IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE HUGO GERARDO CAMACHO NARANJO AND
JAVIER PIAGUAJE PAYAGUAJE,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(NO: 11-CV-0691-LAK)

PETITION FOR WRIT OF MANDAMUS DIRECTING COMPLIANCE WITH MANDATE AND OPINION STYLED *CHEVRON CORP. V. NARANJO, ET AL.*, 667 F.3d 232 (2d CIR. 2012)

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This Petition uses the following abbreviations:

Abbreviation	Reference
A[#]	Citation to Appendix submitted in conjunction with the Petition
Chevron	Chevron Corporation
Count Nine	Chevron's now-dismissed Ninth Claim for Relief in the proceedings below whereby it sought, *inter alia*, a declaration that the Judgment is not entitled to international recognition
Judgment	Opinion entered by the Sucumbíos Trial Court on February 14, 2011 in the matter *Maria Aguinda et al. v. Chevron Corporation*, No. 02-2003, as affirmed by the Sucumbíos Appellate Panel on January 3, 2012
LAPs	The "Lago Agrio Plaintiffs," members of indigenous and farming communities in Ecuador who have won a judgment against Chevron in Ecuador, two of whom—Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje—have appeared as defendants in the proceedings below under jurisdictional protest
Mandate	Mandate issued by the U.S. Court of Appeals for the Second Circuit to the U.S. District Court for the Southern District of New York on February 16, 2012, in connection with Nos. 11-1150-cv (L), 11-1264-cv (Con), docketed in the proceedings below on the same date
Opinion	Opinion issued by the U.S. Court of Appeals for the Second Circuit in *Chevron Corp. v. Naranjo, et al.*, No. 11-1150, on January 26, 2012, published as *Chevron Corp. v. Naranjo, et al.*, 667 F.3d 232 (2d Cir. 2012)
Recognition Act	New York's Recognition of Foreign Country Money Judgments Act (N.Y. C.P.L.R. 5301, *et seq.*)
ROE	Republic of Ecuador
RICO	Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961, *et seq.*)

S.D.N.Y.	United States District Court for the Southern District of New York
Sucumbíos Appellate Panel	Three-judge intermediate appellate panel that affirmed in all respects the Sucumbíos Trial Court's judgment in the first instance against Chevron and in favor of the LAPs
Sucumbíos Trial Court	Provincial Court of Sucumbíos located in Lago Agrio, Ecuador, which entered judgment in the first instance against Chevron in favor of the LAPs
Texaco	Texaco, Inc.
Tyrrell Decl.	Declaration of James E. Tyrrell, Jr., dated March 5, 2013

I. INTRODUCTION

"To be sure, Ecuador doubtless would rather not have the judgment or its legal system called into question. . . . But this unavoidable. . . . The only question here is whether that analysis will occur in one forum or in dozens or scores of *fora*, as the LAPs would have it. . . . The advantage Chevron seeks by filing in this Court is to have enforceability adjudicated in a single forum at one time, rather than in a multiplicity of jurisdictions all over the world, and it quite obviously sued in its preferred forum. But, as is clear from the Invictus Memo, the LAPs . . . . intend to seek enforcement in their preferred *fora*. The question to be determined here is whether it is better . . . to have one proceeding or many. In all the circumstances, the Court finds that the factors favor exercise of jurisdiction."

– Hon. Lewis A. Kaplan, U.S.D.J., S.D.N.Y.
March 7, 2011 (768 F. Supp. 2d. 581, 638)

"The LAPs hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets. There is no indication that they will select New York as one of the jurisdictions in which they will undertake enforcement efforts . . . . It is unclear what is to be gained by provoking a decision about the effect in New York of a foreign judgment that may never be presented in New York. If such an advisory opinion were available, any losing party in litigation anywhere in the world with assets in New York could seek to litigate the validity of the foreign judgment in this jurisdiction. . . . Chevron can present its defense to the recognition and enforcement of the Ecuadorian judgment in New York if, as and when the LAPs seek to enforce their judgment in New York."

– United States Court of Appeals for the Second Circuit
January 26, 2012 (667 F.3d 232, 246)

"[A]llowing the [LAPs] to take the issue of recognizability and enforceability [of the Ecuadorian judgment] off the table in this case while preserving it in every other court in this and other nations would be to acquiesce in a blatant exercise in forum shopping. This is particularly so because it is abundantly obvious that the effort has been made for the sole purposes of . . . shifting the issue to other *fora* more to their liking."

– Hon. Lewis A. Kaplan, U.S.D.J., S.D.N.Y
July 31, 2012 (A1457)

In a published decision rendered January 26, 2012, this Court prohibited the district court from undertaking to declare, at judgment debtor Chevron's urging, whether the Judgment handed down by a court in Ecuador in favor of the LAPs—members of farming and indigenous communities in Ecuador—is entitled to recognition in New York or any other jurisdiction.[1] This Court directed the lower court to dismiss Chevron's "non-recognition" claim because the LAPs had not sought to enforce the Judgment in New York. New York courts, this Court found, should not be in the business of declaring valid or invalid foreign judgments "that may never be presented [by a judgment creditor for recognition] in New York" because this would "provoke extensive friction between legal systems" and incentivize judgment debtors to run to New York "to seek a res judicata advantage" to frustrate "potential enforcement efforts in other countries."[2]

The LAPs have still not sought recognition in New York, but, beginning less than one month after issuance of this Court's Mandate, Chevron and the district court have engaged in a concerted effort to frustrate it. Despite this Court's unambiguous ruling, the district court has created for itself at least two separate paths to re-animate Chevron's dismissed claim and render the very declaration of "non-recognition" that this Court forbade. First, the district court seized upon the

[1] *Chevron Corp. v. Naranjo, et al.*, 667 F.3d 232 (2d Cir. 2012) ("*Naranjo*").

[2] *Id.* at 246.

LAPs' boilerplate "collateral estoppel" defense (asserted long before this Court's decision), and, over their repeated protestations, construed that defense as seeking recognition of the Judgment under New York law. And notwithstanding the timeliness of their application and the liberal standard for amendment of pleadings, the district court then refused to permit the LAPs to withdraw this defense. Second, the district court manufactured a claim—one that is nowhere to be found in Chevron's Complaint—to "set aside" the Judgment pursuant to its equitable powers and F.R.C.P. 60(d). Not only does no such remedy exist with respect to *foreign country* judgments, but to declare upon the judgment debtor's application that the Judgment is "set aside" would be the equivalent of a declaration that the Judgment is "unrecognizable," which this Court already found to be improper.

The district court continues to insist that for the LAPs "to avoid litigating the recognizability of the Judgment in this action while saving that issue for use in other *fora* amounts to bad faith forum shopping," despite this Court's clear instruction that the LAPs, as judgment creditors, have complete discretion as to when and where to seek recognition. The district court has left no doubt that its aim is to provide Chevron with ammunition to improperly attempt to resist enforcement in other countries. Indeed, to maximize the impact of its improper declaration on those with an interest in the Judgment—peasants and indigenous groups in Ecuador—the lower court has jumped through hoops to keep the LAPs

themselves in this action.[3] The district court is again attempting to engage in an unlawful race to *res judicata* with courts presiding over the LAPs' judgment recognition actions in Canada, Argentina, and Brazil, thereby attempting to deprive them of, or at least interfere with, their consideration of enforcement based on their own laws. Along the way, the district court has entered a series of orders reflecting contempt for the ROE's judiciary and its government. In short, it has taken just one year for the district court to again anoint itself as a "transnational arbiter . . . dictat[ing] to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs."[4]

Because the district court continues to relentlessly pursue a declaration that this Court already has determined to be improper and an affront to international comity, issuance of the Writ is necessary to compel compliance with both the letter and spirit of this Court's Mandate and Opinion. For these same reasons, this matter should also be reassigned to a different district judge.

II. RELIEF SOUGHT BY PETITIONERS

Petitioners respectfully request the issuance of a writ of mandamus under 28 U.S.C. § 1651, ordering the district court to: (1) vacate its July 31, 2012,

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[3] For example, the sole remaining claim (aside from a derivative "conspiracy" claim) asserted against the LAPs—a "third-party" common-law fraud claim—is contrary to binding Second Circuit precedent and, yet, the lower court has refused to dismiss the claim or certify the controlling legal question for appeal.

[4] *Naranjo*, 667 F.3d at 243.

November 27, 2012, and February 20, 2013 Orders, which allow Chevron to seek the same declaration of non-recognition of the Judgment that this Court already directed to be dismissed; (2) vacate its January 7, 2013 Order, which read an unpled—and improper—cause of action to "set aside" the Judgment into Chevron's Complaint; and (3) refrain, *in any context*, from considering whether the Judgment is entitled to recognition, unless Petitioners affirmatively seek relief under the Recognition Act. This Court should also order that this case be reassigned to a different district judge under 28 U.S.C. § 2106.

III. ISSUES PRESENTED BY PETITION

Mandamus should issue where a lower court fails upon remand to obey the letter or spirit of an appellate court's mandate and the opinion animating it. In this case, the district court has seized upon every procedural opportunity to do exactly what this Court's Mandate forbade—force the LAPs to litigate the enforceability of the Judgment in the S.D.N.Y., even though the LAPs have still not sought recognition of the Judgment in New York (or anywhere in the United States). The district court's systematic effort to evade this Court's Mandate includes, *inter alia*, (a) an order adopting Chevron's self-serving interpretation of the LAPs' boilerplate estoppel defense to make it appear as though the LAPs demanded a declaration that the Judgment is enforceable; (b) an order denying the LAPs' timely request to withdraw its misconstrued collateral estoppel defense; and (c) an order rewriting

Chevron's pleadings so as to include a request to "set aside the [J]udgment"—the functional equivalent of the dismissed "non-recognition" action.

The first question presented, therefore, is whether the district court's resurrection of Chevron's claim for a declaration of "non-recognition" violated the "spirit or letter" of this Court's Mandate and Opinion, or otherwise amounted to a clear abuse of discretion warranting mandamus relief.

The second question presented is whether this Court should reassign the matter to a new district judge, due to, *inter alia*, the district court's calculated effort to evade this Court's Mandate and Opinion, inability to remain impartial, and hostility toward the ROE's judiciary and government.

IV. BACKGROUND[5]

A. Judgment is Rendered After Eighteen Years of Litigation

From 1964 until 1990, Chevron's predecessor-in-interest, Texaco, operated a 1,500 square-mile concession in Ecuador with roughly 350 oil well sites (the "Concession"). Texaco knowingly polluted a wide swath of the Amazon rainforest in Ecuador—it is undisputed that the company discharged roughly 16 billion gallons of toxic wastewater directly into the surface waters of the Amazon basin.

[5] The LAPs respectfully refer the Court to their prior merits briefing, as well as a prior Petition for a Writ of Mandamus, for a more detailed recitation of facts regarding Chevron's pollution of the Ecuadorian Amazon rainforest, the legal conflict between Chevron and the communities of that region of Ecuador, and the district court's handling of this matter. (*See* A793, A905, A954.)

(A1363.) In 1993, members of indigenous groups and farming communities within the Concession filed suit against Texaco in the S.D.N.Y. ("*Aguinda*").[6] For roughly nine years, Texaco fought to dismiss *Aguinda* on *forum non conveniens* grounds, arguing that Ecuador was the appropriate forum and praising Ecuador's courts. Texaco's "experts" touted Ecuador's "corruption-free history of litigation against multi-nationals and other oil companies," and downplayed concerns identified in U.S. Department of State reports as "isolated problems [that] are not characteristic of Ecuador's judicial system, as a whole."[7] (A309; Tyrrell Decl., Ex. A.) The S.D.N.Y. granted Texaco's motion in 2001, concluding that the litigation had "everything to do with Ecuador and nothing to do with the United States."[8] This Court affirmed on the condition that the company—then "ChevronTexaco" after a 2001 merger—would adhere to promises it made to secure the dismissal.[9]

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[6] *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

[7] Texaco also enlisted its Ecuadorian political contacts to help its cause. Its executives ghostwrote a letter to the U.S. Department of State signed by Ecuador's Ambassador to the U.S., decrying—ironically, in light of Chevron's present litigation strategy—that it would be "highly offensive" for U.S. courts to declare Ecuador's courts unfit. (A310.) At the same time, Texaco was using its influence in Ecuador to obtain a politically-motivated dismissal if the case were re-filed there. Texaco warned Ecuadorian politicians that holding Texaco accountable would discourage American investment in Ecuador. (*See* A314, A315, A317.)

[8] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538–39 (S.D.N.Y. 2001).

[9] The company promised, *inter alia*, to submit to the jurisdiction of Ecuador's courts and respect any judgment rendered against it, subject only to the limited defenses enumerated in the Recognition Act. (A135-36; Tyrrell Decl., Exs. B, C.)

In 2003, the Amazon communities re-filed their claims in the Sucumbíos Trial Court in Lago Agrio, Ecuador, once the hub of Texaco's Ecuadorian operations. Notwithstanding the assurances it gave this Court, Chevron asserted that the Ecuadorian courts have no jurisdiction over it. (Tyrrell Decl., Ex. D at 1.) Years before any judgment issued, Chevron staked out its intended defiance: "[w]e're not paying and we're going to fight this for years if not decades into the future." (A321.) Chevron also continued its political back-channeling. Chevron sought assurances regarding the litigation from the ROE's Attorney General in a series of private meetings (A311), and also "quietly explore[d] with senior [ROE] officials" ways in which the company might "make the case disappear." (Tyrrell Decl., Ex. E.) The trial proceeded despite Chevron's machinations.

On February 14, 2011, after eight years litigating in Ecuador, the Sucumbíos Trial Court concluded "in a 188-page opinion containing extensive findings of fact and detailed conclusions of law, that Chevron was liable for widespread environmental degradation" in the LAPs' native rainforest region.[10] The Sucumbíos Trial Court examined and rejected Chevron's allegations of fraud and attorney misconduct, but still granted Chevron's request to set aside the opinions and conclusions of expert reports that Chevron claimed were tainted with fraud. (A407-11.) Both parties appealed and submitted several hundred pages of briefing

[10] *Naranjo*, 667 F.3d at 237.

and additional evidence for *de novo* review. The three-judge Sucumbíos Appellate Panel affirmed. The panel rejected Chevron's claims of fraud and also described the company's tactics throughout the litigation as "abusive" and "rarely seen in the annals of administration of justice in Ecuador." (*See* A1334-35; *see also* A1353.)

B. Chevron's Collateral Attacks on the Judgment

Roughly a year before the Sucumbíos Trial Court issued the Judgment, Chevron commenced a cavalcade of 28 U.S.C. § 1782 discovery actions throughout the United States. The district judge in the action below—District Judge Lewis A. Kaplan—presided over two of those § 1782 actions. While many of the courts to consider Chevron's § 1782 petitions granted Chevron discovery while maintaining a sense of comity vis à vis the Ecuadorian courts,[11] Judge Kaplan swiped at both the merits of the Lago Agrio Litigation and the quality of the Ecuadorian judiciary:[12]

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[11] *See*, *e.g.*, Tyrrell Decl., Ex. F at 9 (Colorado court granting Chevron discovery "without intruding into the merits that are committed to the jurisdiction of the Ecuadorian trial court"); Ex. G at 2-3 (Tennessee court observing that "Chevron had an opportunity to litigate this matter in the United States and strongly opposed jurisdiction in favor of litigating in the Ecuadorian courts. While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on this court. . . .").

[12] Judge Kaplan has been so scornful toward Ecuador's courts that the Third Circuit, in a parallel § 1782 proceeding, issued what the American Lawyer magazine dubbed a "Not-So-Veiled Rebuke to Judge Kaplan": "Though it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that

- Opining that the Lago Agrio Litigation was "not bona fide litigation." (A200.)
- Concluding that the Amazon communities' battle with Chevron is a "game," and the "the name of the game is . . . to persuade Chevron to come up with some money." (A210.)
- Declaring that he "got it from the beginning"—the LAPs' lawyers are "trying to become the next big thing in fixing the balance of payments deficit." (A264.)
- Refusing to wait for an Ecuadorian court to indicate its desire, or lack thereof, for § 1782 discovery, stating "[b]elieve me, if this were the High Court in London, you can be sure I'd wait." (A584.)

Naturally, then, Chevron elected to file its 149-page Complaint against the LAPs, their environmental consultants, and their lawyers before the lower court. That Complaint avers that those who aided the LAPs in prosecuting the Lago Agrio Litigation are liable under RICO, New York's Judiciary Law, and common-law fraud and conspiracy, for trying to "extort" money from Chevron through "sham litigation," lobbying, and a public relations strategy designed to "pressure" the company to settle.[13] (*See, e.g.*, A627 ¶¶ 2-4.) But the centerpiece of Chevron's

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system." *In re Application of Chevron Corp.*, 650 F.3d 276, 294 (3d Cir. 2011); (*see also* Tyrrell Decl., Ex. H).

[13] Chevron's systematic attacks against virtually every person who dares speak out in favor of the LAPs suggest that it is executing the "retaliation" plan warned of by one of Chevron's Ecuadorian contractors, who was recorded making various admissions regarding Chevron's "corruption" and litigation misconduct: "[T]hese guys, once the trial is over, they'll go after everyone who was saying things about it. . . . [T]he lawsuits will start against everyone who said things, you get it? . . . They have all the tools in the world to go after everyone, you get it? . . . These guys, sometimes it's surprising how far-reaching they are . . . ." (Tyrrell Decl., Ex. I at 4-5.) In recent months, Chevron has sent at least four letters to the Portland

Complaint was its "non-recognition" claim, Count Nine, in which it sought a declaration that the Judgment is unenforceable in New York or any other jurisdiction. (A790-91 ¶¶ 9-10.) Chevron also requested injunctive relief barring the LAPs from taking any steps toward recognition of the Judgment anywhere in the world. (*Id.*)

After allowing the LAPs only a few business days to respond to Chevron's 70-page brief and nearly 7,000 pages of affidavits and exhibits, the district court granted Chevron its preliminary injunction.[14] The district court opined that Chevron would likely prevail on its "non-recognition" claim and establish *exceptions* to foreign judgment recognition under the Recognition Act—despite no evidence that the LAPs intended to enforce the Judgment in New York.[15]

Harbor Trustee Council, which oversees remediation of an EPA Superfund site, imploring the council to terminate an environmental consulting company from the project because that company has done work for the LAPs. (A1661-76.) Chevron also has used its RICO lawsuit as a platform from which to intimidate academics who occasionally "blog" about the case in a manner critical of Chevron (Tyrrell Decl., Ex. J), and even its own institutional shareholders who disagree with the company's scorched-earth approach to the Ecuador matter (*id*. at Ex. K).

[14] *See generally Chevron Corp. v. Donziger, et al.*, 768 F. Supp. 2d. 581 (S.D.N.Y. 2011) ("*Donziger*"), *vacated sub nom*, *Naranjo,* 667 F.3d 232. Until this Court modified the injunction pending its decision on the merits, the injunction barred the LAPs not just from commencing enforcement actions, but even prohibited their lawyers' from conducting preparatory work of any kind and from discussing enforcement with their clients. (*See* Tyrrell Decl., Ex. Q.)

[15] *See Donziger*, 768 F. Supp. 2d at 632-39. The district court itself acknowledged that New York was not the LAPs' preferred forum, but Chevron's. *Id.* at 638.

C. This Court Orders Dismissal of the "Non-Recognition" Claim

On September 19, 2011, this Court vacated the injunction (A1062), and in its January 26, 2012 Opinion, remanded to the district court "with the instruction to DISMISS Chevron's claim for injunctive and declaratory relief under the Recognition Act in its entirety."[16] The Court observed that the "Recognition Act and the common-law principles it encapsulates are motivated by an interest to *provide for* the enforcement of foreign judgments, not to prevent them."[17] "New York undertook to act as a responsible participant in an international system of justice—not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs."[18]

This Court further held that even the "limited . . . claim that Chevron can petition a New York court to declare in advance" the non-enforceability of "the Ecuadorian judgment *in New York*, must fail."[19] The Court opined that "an advisory opinion" as to "the effect in New York of a foreign judgment that may never be presented in New York . . . . would unquestionably provoke extensive friction between legal systems" and encourage parties to use New York "to seek a

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[16] *Naranjo*, 667 F.3d at 247.

[17] *Id*. at 241 (emphasis in original).

[18] *Id*. at 242.

[19] *Id.* at 245 (emphasis in original).

res judicata advantage . . . in connection with potential enforcement efforts in other countries."[20] Thus, this Court concluded that the district court "abused its discretion in undertaking to issue a declaratory judgment" and that "Chevron can present its defense to the recognition and enforcement of the Ecuadorian judgment in New York if, as and when the LAPs seek to enforce their judgment in New York."[21] The Mandate issued on February 16, 2012.[22] (A1244.)

D. The District Court Forces the LAPs to Litigate a Foreign Judgment Recognition Action in New York

Notwithstanding this Court's unambiguous conclusion that the district court has no authority to issue a declaration regarding the Judgment's enforceability, the district court is once again locked in a race with courts in Canada, Argentina, and Brazil—the nations where the LAPs have filed judgment recognition proceedings. As the district court recently declared: "[t]he LAPs are proceeding abroad with efforts to enforce the Ecuadorian judgment in at least three other countries and threaten to commence proceedings in still more. Although the Count 9 action has

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[20] *Id*. at 246.

[21] *Id*.

[22] Chevron filed a petition for a writ of certiorari to the Supreme Court of the United States, charging that this Court "ignored the well-settled understanding of [the Supreme Court] and every other court of appeals" in dismissing Chevron's judgment "non-recognition" claim, and seeking summary reversal "because of the egregiousness of the Second Circuit's legal error." (Tyrrell Decl., Ex. R at 13-15.) The Supreme Court denied Chevron's petition on October 9, 2012.

been dismissed, this action holds the potential for findings and determinations that, if adverse to them, could be prejudicial to those efforts."[23] (A1585-86.)

The district court has created for itself *two* avenues to end-run this Court's Mandate and declare whether the Judgment merits recognition, in an effort to "prejudice" the LAPs' recognition actions.

1. The District Court Uses the LAPs' Affirmative Defenses to Once Again Seize For Itself the Power to Declare Whether the Judgment is Entitled to Recognition

The LAPs' Answer includes this affirmative defense: "The claims asserted in the Complaint and any relief sought thereunder are barred, in whole or in part, under the doctrines of res judicata and/or collateral estoppel." (A1169.) The LAPs asserted this defense at a nascent stage of this litigation (well before this Court's prior decision, when Count Nine was still pending) and do not indicate which judicial opinion—there have been innumerable opinions rendered by dozens of courts in this global litigation—should be accorded preclusive effect.

[23] The district court made this declaration when it blocked the LAPs from enforcing twenty timely-served subpoenas *duces tecum* in part because of the perceived delay those subpoenas could cause. The district court's "protective order"—which is really an anti-suit injunction prohibiting litigation in other districts—is the subject of a separate pending appeal. (*Chevron Corp. v. Naranjo, et al.*, No. 13-332-cv (2d Cir.).) Chevron, like the LAPs, issued many of its subpoenas at or near the deadline for document discovery—12 of them only three days before the deadline. But the district court did not fault Chevron for that, concluding that while Chevron "also obtained some non-party subpoenas at the last moment," "there is an undeniable difference between the situations. Chevron, at least as much as any other plaintiff, appears to have every interest in moving this case expeditiously to final judgment." (A1629.)

Nevertheless, the district court seized upon this affirmative defense as an excuse to issue the declaration of "non-recognition" that eluded it when this Court dismissed Count Nine.

a. The District Court Denies the LAPs an Opportunity to Define Their Own Defense

On March 1, 2012—just *two weeks* after this Court's issuance of the Mandate lifting the stay of Chevron's remaining claims—Chevron ambushed the LAPs by moving for summary judgment on their estoppel defense, *presuming* it to reference the Judgment and arguing that a foreign judgment must be declared enforceable before it is given preclusive effect.[24] (A1306-07.) That Chevron wasted no time in seeking to elicit the precise declaration that this Court had *just* deemed so troubling speaks to the extent of Chevron's gamesmanship.[25] The LAPs replied that they were not asserting "estoppel with respect to the Ecuadorian Judgment. . . . We all know what Chevron was up to here: seeking a preemptive ruling that the Ecuadorian Judgment is not entitled to recognition, even though Defendants have not sought here to have that Judgment recognized. The Second

[24] When Chevron filed its summary judgment motion, the district court had not even held its "status conference to address scheduling, discovery and other issues relating to the case going forward" after lifting the stay of the remaining claims it entered previously when it severed and expedited Count Nine. (*See* A1242.)

[25] The LAPs' estoppel defense existed through the prior appeal, yet Chevron failed to mention this supposed alternative grounds for a non-recognition declaration to this Court. Instead, Chevron withheld this argument to give itself and the district court another bite at the apple when the LAPs may not appeal as of right.

Circuit rejected that remedy." (A1367.) Indeed, to make clear they did not intend to seek recognition of the Judgment in New York, the LAPs previously "agree[d] and stipulate[d] never to seek recognition of the Lago Agrio Judgment in the State of New York *by any means or under any law*." (A1379-80 (emphasis added).)

Even though the LAPs had done nothing since this Court's decision to seek recognition in New York, the district court rewarded Chevron's sharp tactics and resurrected Chevron's non-recognition claim. The district court devoted roughly 25 pages to a litany of tortured justifications for refusing to allow the LAPs to be the masters of their own pleading.[26] (A1435-59.) Most disturbing is the district court's *primary* justification, which directly contravenes this Court's Mandate:

> First and foremost, allowing the [LAPs] to take the issue of recognizability and enforceability off the table in this case while preserving it in every other court in this and other nations would be to acquiesce in a blatant exercise in forum shopping. This is particularly

[26] For example, the district court relied on the LAPs' reference to certain of the Sucumbíos Trial Court's findings in a separate defense "two pages away" from the estoppel defense as evidence that the LAPs intended to argue that the Judgment be given preclusive effect. (A1437.) The district court also rejected the LAPs' clarification that the estoppel defense referred to other opinions, holding that if "their answers sufficiently raised *res judicata* and collateral estoppel defenses based on Second Circuit and/or Section 1782 rulings that they did not even mention, they were good enough also to invoke also [sic] the Ecuadorian Judgment." (*Id.*) On that reasoning, litigants would lose control over their own pleadings; one's adversary could impute to them any self-serving meaning they wish. *See Davis v. City of Chicago*, No. 06 C 4125, 2006 U.S. Dist. LEXIS 79364, at *6 (N.D. Ill. Oct. 18, 2006) (prohibiting defendant from "improperly attempting to interpret . . . ambiguous allegations of the complaint in the [defendant's] favor.").

> so because it is abundantly obvious that the effort has been made for the sole purposes of . . . shifting the issue to other *fora* more to their liking.

(A1457.) Thus, the district court continues to find it repugnant that the LAPs might exercise their right, as judgment creditors, to litigate the validity of the Judgment in fora of *their* choosing. And the lower court apparently also continues to believe that a judgment debtor like Chevron enjoys a superior right to choose *its* preferred forum. But this Court already rejected these very arguments.[27]

The district court's refusal to allow the LAPs to define their own affirmative defense speaks for itself. But the game afoot became even more obvious when months later, as written discovery was about to close, *Chevron* wished to "clarify" the meaning of allegations permeating its Complaint, and the district court readily obliged. Chevron's Complaint is rife with accusations that the Amazon communities' case against it is "objectively baseless, improperly motivated sham litigation." (*See*, *e.g.*, A776, A628.) But when the LAPs sought discovery aimed at these allegations, *i.e.*, discovery demonstrating that the company is well aware of the pollution it caused, Chevron suddenly wished to apply a less intuitive gloss

[27] *See*, *supra*, Section IV.C; *Naranjo*, 667 F.3d at 234 ("Judgment-debtors can challenge a foreign judgment's validity under the Recognition Act only defensively, in response to an attempted enforcement."); *see also* A1504-05 (CIRCUIT JUDGE LYNCH: "Wouldn't any plaintiff who had a big judgment against a company with worldwide operations undertake planning as to where it would be advantageous for them to go and enforce the judgment . . . ?").

to its allegations.[28] (A1567.) With the shoe now on the other foot, the district court invited Chevron to "clarify" its pleadings, rather than allow the LAPs to challenge Chevron's allegations as written (let alone allow the LAPs to interpret Chevron's pleadings as it allowed Chevron to do with the LAPs' pleadings):

> THE COURT: Maybe an editor's blue pencil might solve the problem, Mr. Mastro. . . . It may be that Chevron really means to assert by using the term "sham litigation" that it was a lawsuit that transparently had no merit at the inception . . . . And it may mean, it may be that they're really asserting something else. And if they're really asserting something else, that may change the scope of the discovery that may be appropriate here . . . .
>
> * * *
>
> Look, it is my working hypothesis that this sham litigation argument is going to go away because you are going to resolve it by virtue of *Chevron stating more specifically what their allegation is and what it isn't*.

(Tyrrell Decl., Ex. L at 135:16-17, 137:20-138:1, 189:11-14 (emphases added).) Chevron soon denied that it ever intended to suggest the LAPs' claims against it were baseless, and thus urged the Court to deny the LAPs' requested discovery concerning Chevron's environmental experts.[29] (A1590-91.) Judge Kaplan

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[28] At a hearing on the LAPs' document requests, Chevron's counsel backed away from the company's earlier, sweeping statements about the invalidity of the LAPs' case against it: "A sham occurs on many levels, your Honor. A sham litigation because of collusion with the government, a sham litigation because of fixing the process . . . a sham litigation because they sue Chevron which never even did business in Ecuador instead of Texaco . . . ." (Tyrrell Decl., Ex. L at 136:8-13.)

[29] Document productions by Chevron's environmental experts in ROE-initiated proceedings have shown that Chevron: (1) sent its experts to perform "pre-

accepted *without question* Chevron's "clarification," ruling that "[i]n light of Chevron's representation, the references in the amended complaint to the Lago Agrio litigation being a 'sham' shall . . . not be construed as making any assertions with respect to the environmental conditions existing in [Ecuador]."[30] (A1614.)

If there is some legitimate basis for indulging Chevron's self-serving, eleventh-hour clarification of its pleadings, while castigating the LAPs for attempting to clarify a boilerplate affirmative defense months earlier (almost immediately after resumption of the proceedings upon remand), we fail to see it.

b. The District Court Denies the LAPs an Opportunity to Withdraw Their Defense

Once the district court denied the LAPs the right to interpret their own pleading, the LAPs timely moved to amend their Answer to withdraw their collateral estoppel defense entirely so as "to remove all doubt as to their intentions." (A1494.) Despite the timeliness of the motion and the liberal standard for amendment of pleadings, the district court denied it on two primary grounds,

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inspections" of designated sampling locations prior to the official, court-sanctioned judicial site inspections, so as to locate "clean" spots that they could later return to with an appearance of randomness; and (2) upon being called to the carpet on this practice, created a fake sampling protocol—which it distributed to experts charged with testifying as to the legitimacy of Chevron's methodologies—that replaced the earlier directives to find "clean" spots. (A1176, A1200.) Thus, it is not surprising that Chevron backtracked on its claims to avoid this type of discovery.

[30] The LAPs filed an Amended Answer in response to this *de facto* amendment of the Complaint. On February 20, 2013, the district court again rejected the LAPs' effort to control their pleading and struck the Amended Answer. (*See* A1714).

one more convoluted than the other. First, the district court again stated that "to avoid litigating the recognizability of the Judgment in this action while saving that issue for use in other *fora* . . . amounts to bad faith forum shopping . . . ." (A1548 (internal quotations omitted).) Second, the district court found that Chevron would be unduly prejudiced by a withdrawal of the defense, because it had "expended enormous resources and conducted extensive discovery on the issue of the Judgment's enforceability . . . ." (*Id*.) But, at that point, Chevron had conducted *no* discovery in connection with its remaining RICO and fraud claims; any expenses were incurred in litigating Count Nine prior to this Court's instruction to dismiss that count. Nor had Chevron expended any discernible resources litigating enforceability in connection with the remaining claims—save for its decision to ambush the LAPs with a premature motion for summary judgment on a boilerplate defense.[31] Thus, per Judge Kaplan's reasoning, Chevron must be permitted to litigate enforceability in connection with its remaining claims because it already has poured vast sums into pursuing an unlawful injunction and a groundless declaratory judgment action.

[31] And if Chevron expended any resources litigating the Judgment's enforceability in the underlying action *after* this Court's Mandate and Opinion, then it was in defiance of this Court's clear instruction and at Chevron's own peril.

On January 28, 2013, Chevron filed another motion for summary judgment on the estoppel defense, seeking a declaration that the Judgment is unenforceable.[32] (A1630.) That motion remains pending in the district court.

2. *The District Court Confers Upon Chevron a Cause of Action Nowhere to be Found in Its Complaint—a Claim to "Set Aside" the Judgment*

To keep the LAPs—who are hanging by a thread in this case—in the game so that it may attempt to bind them with a non-recognition declaration, the district court further defied this Court's Mandate when it created for Chevron a cause of action not pled in its Complaint—a claim that is itself the functional equivalent of the dismissed Count Nine. Chevron's Complaint pleads only two claims against the LAPs (as distinct from their lawyers and consultants) that remain "live"—a common-law fraud claim (Count Three), and a civil conspiracy claim (Count Seven).[33] Chevron's "fraud" claim is that the LAPs' representatives made

[32] The district court denied without prejudice Chevron's earlier motion for summary judgment on the estoppel defense (*see supra* at 15) on the basis that Chevron must answer limited factual questions before it can receive its declaration of "non-recognition." (A1460-62.)

[33] The second claim is dependent entirely on the first—absent an underlying tort, civil conspiracy will not lie. *See*, *e.g.*, *WestRM-West Risk Mkts., Ltd. v. XL Reinsurance Am., Inc.*, No. 02 Civ. 7344 (MGC), 2006 U.S. Dist. LEXIS 48769, at *34 (S.D.N.Y. July 19, 2006) ("A claim for civil conspiracy to commit fraud is not an independent cause of action under New York law . . . ."); *Official Comm. of Unsecured Creditors v. SmarTalk Teleservices, Inc.*, No. 00 Civ. 8688 (WHP), 2002 U.S. Dist. LEXIS 3747, at *43 (S.D.N.Y. Mar. 6, 2002) ("[T]ort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort . . . .") (internal quotations omitted).

allegedly false statements about the case to journalists, stock analysts, and government officials, thus putting "pressure" on Chevron to settle the case.[34] (*See*, *e.g.*, A708-09, A714-17.)

The LAPs moved to dismiss these claims on the pleadings because, *inter alia*, New York does not permit fraud claims premised on "third-party reliance" to the detriment of the plaintiff. (A1521-29.) The LAPs pointed to several of this Court's decisions, one as recent as November 2010, holding that New York law is "clear that fraud claims may not be premised on false statements on which a third party relied."[35] The LAPs also observed that, whatever the district court may think of this Court's perception of New York law, it is bound to adopt that perception—even if New York state courts have at times ruled to the contrary.[36] Undeterred by

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[34] The district court has acknowledged that Chevron's "amended complaint does not sufficiently allege any claim of fraud based on detrimental reliance *by Chevron*." (A1601(emphasis added).)

[35] A1528 n.7 (quoting *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Intern. N.V.*, 400 Fed. Appx. 611, 613 (2d Cir. 2010)); *see also* A1522 (citing *City of New York v. Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 545 (2d Cir. 2008), *overruled on other grounds sub nom, Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (holding that "allegations of third-party reliance . . . are insufficient to make out a common law fraud claim under New York law"); *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) (New York law) ("[A] plaintiff does not establish the reliance element of fraud . . . by showing only that a third party relied on defendant's false statements . . . .").))

[36] A1522 (citing, *inter alia*, *Adelphia Recovery Trust v. Bank of America, N.A.*, 624 F. Supp. 2d 292, 309-10 (S.D.N.Y. 2009) ("In the Second Circuit, a federal district court will conclusively defer to a federal court of appeals interpretation of the law of a state that is within its circuit.") (internal quotations omitted); *Luna v. U.S.*, 454

controlling Circuit precedent,[37] the district court ignored all of this and denied the LAPs' motion based on two contrary intermediate appellate state court opinions which *preceded* this Court's latest ruling on the subject.[38] (A1547.) The LAPs asked the district court to certify its order for interlocutory appeal because (1) at a minimum, "substantial ground for difference of opinion" existed as to the viability

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F.3d 631, 636 (7th Cir. 2006) ("If a district court concludes that the intermediate state appellate courts have correctly answered a question [that a circuit] court botched, it should report its conclusions while applying the existing law of the circuit.").)

[37] This is not the first time the district court has ignored or side-stepped Circuit precedent in this case. For example, this Court held previously that because Chevron had "appeared in [the Second Circuit] and reaffirmed the concessions that Texaco had made in order to secure dismissal of" the *Aguinda* litigation, "Texaco's promise to satisfy any judgment by the Ecuadorian courts . . . is enforceable against Chevron *in this action and any future proceedings between the parties* . . . ." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389-90 n.3, n.4 (2d. Cir. 2011) (emphasis added). Not only did Chevron "reaffirm" Texaco's promises, it used the Chevron-Texaco merger against the *Aguinda* plaintiffs. (A25 ("[P]laintiffs argue that these lawsuits should proceed in New York because it is 'the home of Texaco Inc. . . . That is no longer true. . . . The resulting corporation, ChevronTexaco, Inc., is headquartered in San Francisco.").) Nevertheless, the district court rejected this Court's unequivocal ruling as the "product of inaccurate statements" mistakenly made by Chevron's lawyers in 2001, and excused those "inaccurate" statements even though they were made to bolster the company's *forum non conveniens* position. (A1026.)

[38] Both state court cases preceded this Court's *Sojuzplodoimport* opinion. Only one of the two state court opinions referenced by the district court post-dated this Court's *Smokes-Spirits* and *Cement & Concrete Workers* decisions. *See Litvinov v. Hodson*, 74 A.D.3d 1884 (N.Y. App. Div. 2010). But *Litvinov* is not even a "third-party reliance" case; it is instead an "indirect reliance" case—the Appellate Division permitted a fraud claim based on statements made to a third party because the *plaintiff* ultimately relied on those statements to its detriment. (*See id*. at 1885-86.)

of Chevron's fraud claim against the LAPs; and (2) immediate appeal "may materially advance the ultimate termination of the litigation," insofar as the LAPs would cease to be in the case if the fraud claim were dismissed.[39] In addition to asking for certification of the "third-party reliance" issue, the LAPs also requested certification of a second, perhaps even more fundamental question, which implicates the comity issues so vital to this Court's disposition of Count Nine: "Whether a foreign judgment debtor may bring an affirmative common-law fraud claim in New York against a judgment creditor based on alleged fraud in obtaining the foreign judgment." (A1555.)

The district court denied the motion, resorting to judicial gymnastics to justify keeping these issues and the case out of this Court's hands. (A1596.) The district court posited that even if this Court were to find that Chevron's third-party fraud claim is not cognizable under New York law, that ruling would not "materially advance" the disposition of the case. (A1602-03.) Why? According to Judge Kaplan, the LAPs "would remain defendants on the state law conspiracy claim (Count 7), an effect of which is to leave them exposed to possible liability with respect to the [New York] Judiciary Law [§ 487] claim asserted in Count 8 against [Steven] Donziger," their lawyer. (*Id*.) The district court's justification

[39] A1156 (quoting *Telectronics Proprietary, Ltd. v. Medtronic, Inc*., 690 F. Supp. 170, 172 (S.D.N.Y. 1987).)

lacks any legal authority: "Judiciary Law § 487 . . . is *only applicable to attorneys and cannot extend derivative liability to a client*."[40]

But even the district court had to acknowledge that it "perhaps is doubtful that Chevron would be able to prove their conspiracy claim against the LAP Representatives, whatever its prospects with respect to other defendants." (A1603 n.20.) Thus, the district court offered an additional, and even more tortured, justification for closing the door to interlocutory appeal: it suggested that dismissal of Chevron's fraud claim might not necessarily dispose of all claims against the LAPs *because perhaps their lawyer, Mr. Donziger, might in the future wish to sue his clients—peasants living in the Ecuadorian jungle*. (*Id*. ("[I]t should not be overlooked that as Donziger allegedly committed the wrongs alleged against him as the LAPs' agent . . . the possibility of a third party claim by Donziger against the LAP Representatives for indemnity or contribution would remain a possibility.").) No more need be said about the validity of this hypothetical.

Neither of the district court's aforesaid justifications for refusing to grant certification, however, was as specious—or as key to the instant Petition—as its final one. The district court asserted that, regardless of the outcome of any

[40] *Yalkowsky v. Century Apartments Assoc.*, 215 A.D.2d 214, 215 (N.Y. App. Div. 1995) (emphasis added). In fact, Chevron did not even suggest in its briefing (or Amended Complaint) that the LAPs could be held liable for conspiracy to violate the Judiciary Law.

certified questions, it may still grant Chevron "[r]elief from a final judgment" and "*set aside [the] judgment for 'fraud upon the court*.'" (A1609-10 (emphasis added).) The district court concluded that Chevron's Complaint includes an *unstated* "set-aside" component to its fraud claim—"an independent action attacking the finality of a judgment under Rule 60(d)" of the Federal Rules and principles of equity. (*Id*.) Thus, the district court has held that, notwithstanding this Court's clear instructions, it may declare the Judgment "set aside" based upon the alleged conduct of the LAPs' representatives. (A1610-11.)

Chevron's Complaint includes no such action to "set aside" the Judgment—the district court conjured it from thin air. Perhaps more importantly, a declaration that the Judgment is "set aside" would be equally, if not more, offensive to international comity than the "non-recognition" declaration this Court already deemed impermissible. And it is just as groundless as a matter of law.[41] In enacting the Recognition Act, New York's legislature instituted the mechanism by which the bona fides of foreign country money judgments are to be evaluated if a judgment creditor chooses to seek recognition in New York.[42] Judgment debtors may not end-run this mechanism entirely by filing an equitable action to "set

[41] Just as no precedent supported the district court's authority to issue a "non-recognition" declaration, the district court cited no precedent for a domestic court entertaining a foreign judgment debtor's complaint to "set aside" a foreign judgment against it. (A1610-11.)

[42] *See Naranjo*, 667 F.3d at 242.

aside" a foreign judgment.[43] If they could, this Court's Opinion would be a nullity and judgment debtors would be permitted to race to United States courts to select their forum.[44] And that brings us full-circle. The LAPs will not voluntarily, and this Court has already held that they cannot be compelled to, litigate the enforceability of the Judgment in the court of their debtor's choosing.

V. WHY THE WRIT SHOULD ISSUE

"One of the *less controversial* functions of mandamus is to assure that a lower court complies with the *spirit as well as the letter* of the mandate issued to that court by a higher court."[45] A district court is "without power to do anything which is contrary to either the letter or *spirit of the mandate construed in the light*

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[43] *See Veltze v. Bucyrus-Erie Co.*, 154 F.R.D. 214, 216 (E.D. Wis. 1994) ("Rules 60(b)(5) and (6) . . . do not provide grounds . . . to obtain relief from the judgment entered in the Peruvian action which is the relief [defendant] is really seeking by virtue of its satisfaction motion."); *Thomas & Agnes Carvel Found. v. Carvel*, 736 F. Supp. 2d 730, 755 (S.D.N.Y. 2010) (observing that F.R.C.P. 60 is an "irrelevant legal source[]" upon which to challenge foreign judgments in U.S. district court).

[44] Such an action might arguably be permissible *after* the creditor converts his foreign judgment into a domestic one. In that case the district court would in fact be "setting aside" the decision to recognize the foreign judgment, not the foreign judgment itself. *Cf. Osorio v. Dole Food Co.*, NO.: 07-22693-CIV, 2010 U.S. Dist. LEXIS 12576 (S.D. Fla. Feb. 12, 2010) (implicitly recognizing availability of Rule 60, in theory, as potential basis for reconsideration of district court's refusal to recognize foreign money judgment).

[45] *In re Cont'l Ill. Sec. Litig.*, 985 F.2d 867, 869 (7th Cir. 1993) (emphases added); *see also In re FCC*, 217 F.3d 125, 133 (2d Cir. 2000) (explaining that mandamus is properly granted "to assure that the terms of the mandate are scrupulously and fully carried out and that the inferior court's actions on remand are not inconsistent with either the express terms or the spirit of the mandate.") (internal citations and quotation marks omitted) (alterations omitted).

of the opinion of the court deciding the case, and it is *well settled* that mandamus lies to rectify a deviation."[46] The Court's Mandate of February 16, 2012 must be deemed to "encompass[] everything decided, either expressly or by necessary implication" on appeal.[47]

This Court unambiguously ruled that the district court may not "declare in advance" whether the Judgment is entitled to recognition in New York when the Judgment "may never be presented" for recognition there, because "an advisory opinion" such as this "would unquestionably provoke extensive friction between legal systems" and encourage litigants to run to New York "to seek a res judicata advantage . . . in connection with potential enforcement efforts in other countries." (*See supra* at 12-13.) But, as described at Section IV.D, *supra*, the district court has engaged in a systematic, pervasive, biased, and disrespectful effort to evade and defy this Court's instructions since the case was remanded.

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[46] *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1972) (further noting that this "approach [to mandamus] may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision, or to prevent relitigation of issues already decided by the appellate court.") (internal quotation marks omitted) (emphases added).

[47] *In re MidAmerican Energy Co.*, 286 F.3d 483, 487 (8th Cir. 2002); *see also Delgrosso v. Spang & Co.*, 903 F.2d 234, 240 (3d Cir. 1990) ("When an appellate court directs the district court to act in accordance with the appellate opinion . . . the opinion becomes part of the mandate and must be considered together with it.").

Near the outset of this case, the district court observed that "[t]he core of this case is the issue of the enforceability of the Judgment outside of Ecuador. Once that issue is decided, one way or the other, it is likely that the rest of the case will vanish or at least pale in significance. Such a decision probably would . . . eviscerate the RICO and fraud claims, and leave little incentive to pursue what remains." (A611.) That path to a tidy resolution was closed off when this Court ordered the dismissal of Count Nine. Undeterred, the district court has engaged in a pattern of conduct and identified two innovative ways to do what this Court said that it could not—provide an improper declaration of "non-recognition" that Chevron can attempt to use as ammunition against the LAPs in foreign recognition actions. The LAPs have still not sought to enforce the Judgment in New York, but the district court is once again racing to declare that the Judgment is not entitled to recognition, and/or to "set it aside," on the alleged basis that it was procured by fraud, with the clear intent to give Chevron a perceived "res judicata advantage" vis à vis recognition proceedings in Canada, Argentina, and Brazil.

The fact that the manner in which the district court has cleverly re-inserted declaratory relief into the proceedings was not previously contemplated by this Court does not place the district court's conduct outside the scope of mandamus.[48]

[48] As noted, the *only* reason this Court has not already dealt expressly with one of the district court's excuses for re-injecting judgment recognition into the proceedings below—namely, the "collateral estoppel" ambush—is that Chevron

This Court has granted mandamus relief, for instance, where a district court "under-read" a mandate requiring it to "refrain from impeding the regulatory actions of the FCC, in particular, the FCC's enforcement of the payment schedule established by its regulations."[49] Although the mandate in that case arose in connection with a challenge to the FCC's "full payment" regulation as to licensees, this Court found that the district court's subsequent interference with the FCC's "timely payment" regulation contravened the "terms and spirit" of its mandate.[50]

What has transpired here is far more than "under-reading." By forcing the LAPs to litigate the enforceability of the Judgment in New York, the district court has thumbed its nose at the Mandate.

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withheld from this Court its intent to seize on the LAPs' collateral estoppel defense to resurrect its declaratory judgment claim in the event that this Court rejected it. (*See supra* at 15 n.25.)

[49] *See In re FCC*, 217 F.3d at 138-39.

[50] *Id*. Similarly, in *In re Chambers Dev. Co.*, the Third Circuit considered a petition for a writ of mandamus challenging, *inter alia*, the district court's application of judicial estoppel. 148 F.3d 214 (3d Cir. 1998). The Third Circuit earlier remanded with instructions to allow plaintiff "to amend its complaint to enable it to present its case in its current status." *Id*. at 231. Hence, although the judicial estoppel issue arose *after* remand and was thus not part of the Third Circuit's prior analysis, the Third Circuit held that applying estoppel was contrary to its mandate, granted the writ, and vacated the lower court's decision. *Id*. at 231-32.

VI. THE CASE BELOW SHOULD BE REASSIGNED

The Court should exercise its discretion under 28 U.S.C. § 2106 to order that the case be reassigned upon issuance of the Writ.[51] Among the principal grounds for reassignment is "whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous."[52] The lower court's dogged defiance of this Court's prior Opinion *alone* is cause for reassignment.

Notwithstanding this Court's instruction to the contrary, the lower court has continued to require the LAPs to litigate the "recognizability" of the Judgment in New York, holding that permitting the LAPs to seek recognition in the *fora* of their choosing is to condone "bad faith forum shopping." (A1548.) Consequently, the

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[51] Space does not permit identification of each and every reason for reassignment. Petitioners thus respectfully refer the Court to the LAPs' earlier briefing in support of recusal insofar it recounts fully, at least up to the date of its submission, the unfair treatment that the LAPs have received from the district court since these matters first arrived at its doorstep by way of Chevron's 28 U.S.C. § 1782 proceedings. (A905, A1030.) As described in these earlier submissions, Judge Kaplan's ill will for the LAPs' most public American lawyer, Steven Donziger, has prevented the LAPs themselves from receiving fair treatment in the district court. *See*, *e.g.*, *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966) ("[E]ven when a judge's initial adverse reaction to a lawyer may have stemmed from reasons that were legitimate or at least understandable, it is undeniable that if such an antipathy has crystallized to a point where the attorney can do no right, the judge will have acquired 'a bent of mind that may prevent or impede impartiality of judgment.'"). Although this Court previously was unwilling to require *recusal* based upon this evidence, the district court's prior conduct and partiality provide further context for and, indeed, amplify Petitioners' present request for *reassignment*.

[52] *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977).

district court has manufactured bases to subvert this Court's holding and issue a declaration on the validity of the Judgment before the Argentine, Brazilian, or Canadian courts get the chance to—presumably because those countries' courts cannot be trusted to rule on the validity of the Judgment. The district court has in fact admitted that it believes the proceedings in New York must outpace the pending enforcement actions. (*See supra* at 13-14.) Hence, "[t]his is a case where the district judge, in stark, plain and unambiguous language, told the parties that his goal . . . was something other than what it should have been and, indeed, was improper."[53]

This Court already has informed the district court that it may not act as a "transnational arbiter" of the Judgment, yet he continues to conduct himself that way. To say that the lower court has had "substantial difficulty" in surrendering its discredited viewpoint would be an understatement.[54] This is the "rare case where a judge has repeatedly adhered to an erroneous view after the error is called to his attention," such that reassignment is necessary to avoid "an exercise in futility [in which] the Court is merely marching up the hill only to march right down again . . .

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[53] *United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) (ordering reassignment to a different district judge on remand).

[54] *See Robin*, 553 F.2d at 10 (observing that the need for reassignment depends in part on the "firmness of the judge's earlier-expressed views"); *United States v. Campo*, 140 F.3d 415, 420 (2d Cir. 1998) (granting reassignment based on district judge's "firmly expressed position").

."[55] Lest there be any doubt that proceedings in the district court have fully reverted to the bottom of that hill, days ago, on March 1, 2013, Chevron proffered a series of expert reports opining on "evidence of the lack of impartiality and independence of a foreign judiciary *necessary to deny recognition and enforcement of a judgment or award*." (Tyrrell Decl., Ex. S at 1-2 (emphasis added).) These reports are authored by the experts who offered reports on the same, "systemic judicial weakness" issue in connection with Count Nine, including Dr. Vladimiro Álvarez Grau, who, as this Court previously noted, is an "avowed political opponent of [Ecuador's] current President, Rafael Correa,"[56] and who predictably concludes that "under President Correa's Administration, the country is experiencing a severe institutional crisis" whereby "the Judiciary can no longer act impartially and with integrity . . . ." (Tyrrell Decl., Ex. T at 9; *see also* Ex. U.)

The ever-present international comity issues in this litigation render the consequences of the district court's defiance uncommonly serious. As this Court previously observed, the not-so-subtle implication of the lower court's race against the Argentine, Brazilian, and Canadian courts is that these tribunals are "assumed insufficiently trustworthy" to fairly decide Chevron's claims.[57] More acutely, the

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[55] *Robin*, 553 F.2d at 11 (quoting *United States v. Tucker*, 404 U.S. 443, 452 (1972) (Blackmun, J., dissenting)).

[56] *Naranjo*, 667 F.3d at 238.

[57] *Naranjo*, 667 F.3d at 232.

ROE's courts were condemned from the start by the lower court. (*See supra* at 10.) It is not often the case that an American court so antagonizes another nation's courts that they feel compelled to fire back. That is the undesirable turn this case has taken. For example, the Sucumbíos Appellate Panel took special note of Chevron's attacks "against Ecuadorian jurisdiction in international forums," which "lead [sic] to public declarations of some North American judge of the surname Kaplan who tried to offend, without motive or jurisdiction, the Ecuadorian Administration of Justice." (A1322-23.) Taking exception to Chevron's charge that Ecuadorian courts had claimed "universal jurisdiction" for themselves, the appellate panel contrasted itself to Judge "Kaplan[, who made] some comments against the Ecuadorian jurisdiction . . . which are . . . inappropriate in the light of the conditions and requirements of mutual respect due between States." (A1334.)

The district court's contempt for the ROE, its courts, and its laws has only grown more prominent over time. For example, the district court ordered the LAPs to produce their Ecuadorian counsel's documents or face sanctions notwithstanding an *Ecuadorian* Court Order finding that it would be a violation of *Ecuadorian* law for the LAPs' *Ecuadorian* lawyers to disgorge to Chevron their clients' documents located in *Ecuador*. The LAPs timely presented to the district court the relevant Ecuadorian Order, as well as binding authority from this Court requiring the lower court to defer to Ecuadorian law regarding the availability of documents in

Ecuador.[58] The district court made no mention of either in its order compelling the LAPs to produce these documents. (A1677.)

The district court's antipathy for the ROE and its courts is further evidenced by its facilitation of Chevron's second, and still pending, motion for summary judgment on the LAPs' estoppel defense. That motion relies principally on the affidavit of a "surprise" witness—a judge who presided over the Lago Agrio Litigation for a short time in 2003, and who was removed from the bench for misconduct in 2008. (A1633.) Apparently willing to conduct a full-blown witness protection program in service of its civil RICO case, in exchange for his cooperation, and before his affidavit went public, Chevron relocated the former judge, his immediate family, *and* his son's family to the United States, and agreed to pay him roughly $326,000 over the next two years.[59] (Tyrrell Decl., Ex. M.)

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[58] *Id*. (citing *Shcherbakovskiy v. Da Capo Al Fine, Ltd*., 490 F.3d 130, 139 (2d Cir. 2007) (reassigning district judge who sanctioned party that failed to produce Russian documents in violation of Russian law, observing that "[i]f Russian law prohibits appellant from obtaining and producing the documents . . . then the matter is at an end.").)

[59] This is the *second* time Chevron has plucked from Ecuador, on the company dollar, a witness who admits to criminal conduct aimed at the Ecuadorian judiciary. In May of 2009, one of Chevron's Ecuadorian self-described "logistics" contractors, Diego Borja, posed as an environmental remediation consultant to offer then-Presiding Judge Juan Nuñez a bribe and to provoke the judge to reveal his intended disposition of the case—all while secretly recording this entrapment scheme with a pen camera and watch camera. (A287-92, A337-39.) Borja provided Chevron with his first three such recordings at a meeting in San Francisco, after which Borja returned to Ecuador to make a fourth. (A1232-34.)

Chevron's counsel also filed under seal two supposedly corroborating affidavits by Ecuadorian "John Doe" witnesses. Continuing to act as if this civil case were a criminal matter, and as if it had the powers of a United States Attorney, Chevron demanded a protective order prohibiting the LAPs' New York counsel of record from sharing these Doe affidavits with anyone in Ecuador *other than their two individual clients* on the grounds that these witnesses "fear reprisals." (A1653-56.) At argument, the district court prodded Chevron's counsel to advocate a more restrictive view, *to wit*, that the Doe affidavits may not be revealed to *anyone* except counsel of record in the S.D.N.Y. because the LAPs might share the affidavits with their "Ecuadorian lawyers[, who] have absolutely refused to do anything" demanded of them, and have taken the "position . . . that the U.S. courts have nothing to say to them that they are obliged to comply with." (Tyrrell Decl., Ex. N at 38:4-8, 41:10-46:13.) Buying readily into Chevron's backwards narrative that Ecuador is a dangerous place for those who dare side with the world's tenth largest and most powerful company and cross the indigenous

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Less than 48 hours after the fourth and last recording was completed, Chevron sent one of its private investigators to relocate Borja from Ecuador to the U.S., whereupon Chevron housed Borja near its headquarters in San Ramon, provided him with extraordinary benefits, including payment of virtually all of his living expenses for the past four years, and wrapped him in a cocoon of best-in-class criminal defense, immigration, and tax attorneys. (A1213-14.) Chevron characterizes its payments to Borja as "humanitarian" and the move necessary for his "security"—characterizations belied by Chevron's apparent belief that it was safe enough for Borja to return to Ecuador and make a fourth recording. (*Id*.)

communities and their team of roughly three Ecuadorian lawyers working from a repurposed house in the Quito suburbs,[60] the district court has allowed the identity of Chevron's witnesses to remain hidden from anyone capable of realistically investigating their veracity. In ruling on Chevron's four-page motion, the district court rendered a 35-page diatribe against the ROE and the LAPs' Ecuadorian counsel to justify its extraordinary actions. (*See* A1703-07.) The district court acknowledged that Chevron proffered no specific threat of harm to these secret witnesses; instead, the court appears to have based its decision substantially on its unfounded belief that Ecuador is a lawless cesspool: "Although the record does not establish that others in similar positions have been victims of violence in the past, the climate in Ecuador, the stakes of this litigation, the attitude of those representing the LAPs in Ecuador, and the characteristics of Ecuadorian law

[60] Chevron has employed on this matter some of the country's largest private intelligence agencies, including Kroll, to track and intimidate the LAPs' U.S. and Ecuadorian legal teams. Death threats, home invasions, and office break-ins directed toward members of the LAPs' Ecuadorian legal team have provoked the Inter-American Commission on Human Rights to order the Ecuadorian government to immediately implement "precautionary measures" to safeguard these persons, including the provision of security. (Tyrrell Decl., Ex. O; A319.) Chevron, at one point during the Lago Agrio Litigation, even managed to co-opt the Ecuadorian military. (Tyrrell Decl., Ex. P; A345.) That Chevron's lawyers have managed to convince a United States district judge that *Chevron's* witnesses face an unacceptable risk of bodily or other harm is indicative of just how far down the rabbit hole these proceedings have fallen. This case "deserves a fresh look by a different pair of eyes." *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006) (ordering reassignment to different district judge).

enforcement noted by our State Department combine to justify the finding that the risk of physical violence cannot be disregarded entirely . . . ." (A1709.) The court explained, "Ecuador's record with respect to crime, violence, law enforcement, and the legal process gives little comfort that these witnesses . . . would be safe from retribution."[61] (A1703-04.)

It is not surprising that notions of comity and international respect are being trampled in this perverse "litigation about litigation" entertained by the district court. One need only look at the way the district court, at Chevron's urging, framed the main issue in the case, to see why: "the discrete inquiry here will be whether the judgment's findings have any support untainted by fraud in the record that existed before the Ecuadorian court at the time the judgment was issued." (A1614; *see also* A1481 (noting that inquiry will be whether the Sucumbíos Trial Court relied materially on allegedly tainted report despite stating in its opinion that it did not).) That sounds like appellate review. If this Court's Opinion did not

[61] If the district court's bleak conception of Ecuador were remotely accurate, it is nothing short of a miracle that none of the many lawyers to have represented Chevron since the Lago Agrio Litigation began in 2003 have ever been harmed. One gets the sense that Judge Kaplan would be surprised, upon deplaning at Quito International Airport, not to find himself in the middle of a frontier outpost ruled by outlaws. Instead, he would find himself in a country that International Living has rated the "world's top retirement haven" for five years running, noting, among other things, that the nation is especially hospitable to expat-owned businesses. (*See* International Living, *The World's Top Retirement Havens in 2013*, *available at* http://internationalliving.com/2012/12/the-worlds-top-retirement-havens-in-2013/# (last visited Feb. 24, 2013).)

sufficiently clarify for the district court that it has no right to act as an international super-appellate court, nothing will.

The LAPs asked the district court to certify to this Court the question of whether a foreign judgment debtor may sue his creditor in New York for fraud in the procurement of the judgment. (*See supra* at 23-24.) If the answer to this question were "yes," everything this Court has said about the Recognition Act—*i.e.*, that it is the creditor who chooses where to litigate the viability of his judgment—would be for naught. A judgment debtor like Chevron could entirely frustrate that framework with a simple common-law fraud claim. The district court denied certification and is holding the Lago Agrio Plaintiffs in the case on a bogus claim so that it may bind them with a declaration that it has no business making. Reassignment should occur where it is "advisable to preserve the appearance of justice." *Robin*, 553 F.2d at 10. That is the case here.

VII. CONCLUSION

Petitioners respectfully request that this Court issue a Writ of Mandamus directing the district court to take the measures specified at Section II, *supra*, and otherwise compel compliance with this Court's Mandate and Opinion. Petitioners also respectfully request that this Court reassign the matter (*Chevron Corp. v. Donziger, et al*., No. 1:11-cv-00691) to a different district judge on remand.

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Respectfully submitted,

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