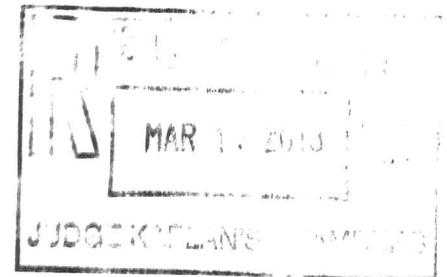


# DOCKET

LAW OFFICES  
**KEKER & VAN NEST**  
LLP  
633 BATTERY STREET  
SAN FRANCISCO, CA 94111-1809  
TELEPHONE (415) 391-5400  
FAX (415) 397-7188

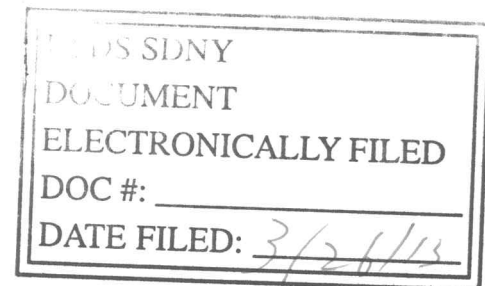
JOHN W. KEKER  
jkeker@kvn.com



March 18, 2013

## VIA HAND DELIVERY

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



Re: *Chevron Corporation v. Steven Donziger, et al.*, Case No. 1:11-cv-00691-LAK  
Objection to appointment of Special Masters

Dear Judge Kaplan:

I write as counsel for Steven Donziger and the Law Offices of Steven Donziger ("Donziger Defendants"), in accordance with this Court's order of March 1, 2013 (Dkt. 865). We object to the appointment of any Special Masters in this case, and in particular we object to the appointment of Max Gitter.

**General Objection.** The Donziger Defendants have objected from the outset to the appointment of any Special Masters in this case, as violating the letter and spirit of F.R.C.P. 53, which contemplates appointment of a Special Master "only" in the face of some "exceptional condition" not present here. F.R.C.P. 53(a)(1)(B)(i); *see also Weissman v. Fruchtmann*, 83 CIV. 8958 (PKL), 1986 WL 15669 (S.D.N.Y. Oct. 31, 1986). Donziger Defendants objected to the appointment of Special Masters in their February 19, 2013 opposition to Chevron's motion (Dkt. 822); and in our Rule 16 Report filed March 12, 2013 (Dkt. 890); and we continue to object. Chevron's limitless resources give it the luxury of trying to win this case through economic pressure designed to make the Defendants "give up" in economic exhaustion. *See* March 1, 2013 letter of Craig Smyser to the Court. Chevron's effort to force Defendants to pay fees and costs for not one but two special masters, in potentially dozens of depositions, in numerous locations in North and South America, violates Rule 53(a)(3)'s requirement that a court "must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense".<sup>1</sup> If Chevron ultimately succeeds in this case through its campaign of

<sup>1</sup> Donziger Defendants and Camacho and Piaguaje requested, first of Chevron and then of the Court, disclosure of the amount of fees and costs billed by Mr. Gitter in the 1782 proceedings. *See* Joint Rule 16 Report filed March 12, 2013. (Dkt. 890) at page 3. We repeat that request here, and reserve the right to supplement this letter once that information has been provided.

The Honorable Lewis A. Kaplan  
 March 18, 2013  
 Page 2

economic bullying, it will not be without Defendants' strenuous and continuing objection to tactics like this one, designed to bleed resources from the Defendants. We recognize that the Court ruled against us on this point, *see* March 1, 2013 Order (Dkt. 865). But we maintain a continuing objection to that ruling, and to the unfair and legally incorrect appointment of Special Masters in this case, and to the requirement that the defendants (other than the Stratus defendants) be required to advance 50 percent of the fees and costs for the masters.<sup>2</sup>

**Specific objection to Max Gitter.** F.R.C.P. 53(a)(2) provides that a master "must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. §455." Rule 53 (b)(3) provides that a court may appoint a special master "only after...the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455," and Rule 53(b)(1) provides that "before appointing a master, the court must give the parties notice and an opportunity to be heard. 28 U.S.C. §455 in turn provides that grounds for disqualification exist in situations where a judicial officer's "impartiality might reasonably be questioned", or where he "has a personal bias or prejudice concerning a party", or where he has "personal knowledge of disputed evidentiary facts concerning the proceeding". Mr. Gitter's disqualification is warranted under all three grounds.

***Mr. Gitter's impartiality can reasonably be questioned.*** Mr. Gitter's impartiality in this case has been and continues reasonably to be questioned. Defendants have previously described Mr. Gitter's conduct in the 1782 litigation as highly biased in Chevron's favor. *See, e.g.,* Camacho and Piaguaje's Memorandum of Law In Support to Application by Order to Show Cause why the Presiding District Judge Should Not Be Recused Pursuant to 28 U.S.C. § 455(a), filed April 26, 2011 (Dkt. 285) pages 10-15, and *In Re Camacho and Piaguaje*, 11-2259 (2d Cir.) Petition for Writ of Mandamus filed June 6, 2011, pages 23-24.

Donziger Defendants specifically pointed out Mr. Gitter's bias to the Court in their opposition to the appointment of any Special Master, *see* Defendants' Joint Opposition to Chevron Corporation's Motion to Appoint Special Master (Dkt. 822) at 3 n.1. In response, the Court chose to appoint not just any Special Master, but indeed *the very person* whose impartiality the Court the Defendants have already contested, not once, not twice, but at least three times in filed pleadings, supported by ample record references. And, in response to Defendants' objections, Mr. Gitter has himself filed an affidavit which, going far beyond a standard Rule 53 affidavit, presents an advocacy brief in favor of his own appointment, citing as precedent this Court's "finding" which in turn advocates in favor of Mr. Gitter and against Defendants' claims of bias. *See* (Dkt. 897) at page 3.

***Mr. Gitter has a personal bias or prejudice concerning a party.*** The pleadings previously filed in this action and in the Court of Appeals and attached hereto amply document the personal bias and prejudice Mr. Gitter demonstrated against Mr. Donziger during his sixteen

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<sup>2</sup> Due to lack of resources, the Donziger Defendants expect that they will not attend many of the depositions. It especially makes no sense to require the Donziger Defendants to advance payment for special master fees and expenses for any deposition that the Donziger Defendants do not even attend, and we maintain a continuing objection to any such requirement.



The Honorable Lewis A. Kaplan  
March 18, 2013  
Page 3

days of deposition. We incorporate those pleadings by reference, but for the sake of emphasis we quote here one passage from one of those pleadings:

The Court's hand-picked Special Master and former law partner did not merely resolve discovery disputes, but rapidly became a full-fledged Chevron advocate, actively participating in the examination of Donziger on Chevron's behalf<sup>3</sup> .....At times, Donziger found himself fielding questions from a veritable tagteam consisting of Chevron's counsel and the supposedly neutral Special Master.

THE SPECIAL MASTER: Let's go back. Let me do it. Do you want to do it or shall I do it? Let's just finish this whole thing up Go back a little bit.

MR. VINEGRAD: I would like to do it.

THE SPECIAL MASTER: Go ahead, do it yourself.....<sup>4</sup>;

THE SPECIAL MASTER: Excuse me, I want to ask some questions now. Are you finished with this clip?

MR. VINEGRAD: Go ahead, Mr. Gitter.

THE SPECIAL MASTER: Are you finished with this clip?

MR. VINEGRAD: Not quite.

THE SPECIAL MASTER: You finish first.

MR. VINEGRAD: Please, you are the Special Master. You ask the questions.

THE SPECIAL MASTER: That is okay. I want you to finish first."").<sup>5</sup>):

Camacho and Piaguaje's Memorandum of Law In Support to Application by Order to Show Cause why the Presiding District Judge Should Not Be Recused Pursuant to 28 U.S.C. § 455(a), filed April 26, 2011 (Dkt. 285) at page 11.

Mr. Gitter displayed personal animosity toward Mr. Donziger on numerous other occasions in addition to those cited in prior pleadings. For example, on Day 4 of the 16 day deposition, when a cyst in Mr. Donziger's jaw was causing him severe pain and he was under the influence of the opioid painkiller Percocet, Mr. Gitter challenged Mr. Donziger's claim of mental impairment from taking Percocet, called his own family doctor, and reported back his personal physician's telephonic diagnosis that "there is no reason why a single Percocet for pain or two Percocets for pain should impair judgment or affect the witness' ability to testify." Mr. Gitter went on to

<sup>3</sup> Gomez Decl. (Dkt. 286), Ex. 7, Donziger Dep. II (12/01/2010) 564:16-23; Gomez Decl. (Dkt. 286), Ex. 11, Donziger Dep. VII (12/23/2010) 1970:13-1972:8; Gomez Decl. (Dkt. 286), Ex. 8, Donziger Dep. III (12/08/2010) 790:3-25 (rephrasing questions of Chevron's counsel).

<sup>4</sup> Gomez Decl. (Dkt. 286), Ex. 7, Donziger Dep. II (12/01/2010) 564:16-23.

<sup>5</sup> Gomez Decl. (Dkt. 286), Ex. 11, Donziger Dep. VII (12/23/2010) 1970:13-1971:3.

The Honorable Lewis A. Kaplan  
March 18, 2013  
Page 4

## DOCKET

accuse Mr. Donziger of making up his condition in order to secure an adjournment for tactical reasons. "If I were a cynic, I would say that your side hopes that by the time we return on the 20<sup>th</sup> or the 21<sup>st</sup> you would be the beneficiary of [intervening rulings by the Second Circuit.]" Donziger Depo. Day 4, December 10, 2010, 1026:24-1028:13. This is but one example of Mr. Gitter's ridicule and distrust of Mr. Donziger which display a bias which should disqualify him.

***Mr. Gitter has personal knowledge of disputed facts.*** Mr. Gitter was present at the 16 days of Mr. Donziger's 1782 deposition as well Mr. Berlinger's 1782 deposition. Mr. Gitter undoubtedly heard testimony and/or reviewed exhibits which will not be offered and are not relevant in this case. He also heard testimony and/or reviewed exhibits as to which attorney-client and work product objections have been asserted in this case, and was involved in procedural skirmishing in the 1782 cases that is irrelevant to this case. It will be impossible for Mr. Gitter to "un-remember" whatever he may have learned in his prior appointments, and it will be impossible for the Donziger defendants to evaluate whether any rulings he might make in this case are based on the evidence in this case, or on some memory of prior proceedings.

***In summary, Mr. Gitter should not be appointed in this case.*** No objective observer could reasonably fail to question his impartiality with respect to this case. As subjective observers, the Donziger Defendants, absolutely question his impartiality with respect to this case.<sup>6</sup>

Respectfully Submitted,

KEKER & VANNEST LLP



JOHN W. KEKER

JWK:srg

cc: All counsel of record (via e-mail)

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<sup>6</sup> Not lost on Donziger Defendants is the irony of Mr. Gitter's attaching to his affidavit a pleading filed by his firm, Cleary Gottlieb, almost 20 years ago in *Aguinda v. Texaco*, 93. Civ 7527 (S.D.N.Y.) when, on behalf of the Republic of Ecuador, and consistent with Chevron's then efforts to transfer the *Aguinda* litigation to Ecuador, Mr. Gitter's firm argued against litigation in New York of issues relating to Chevron's pollution of Ecuador. Mr. Gitter's firm then wrote that "[a]djudication by a New York court of a dispute involving the development and regulation of Ecuador's petroleum resources may strain the friendly relations that exist between the government of Ecuador and the United States....Additionally...[u]nder Section 402 of the Restatement [3<sup>rd</sup> of Foreign Relations Law], an exercise of jurisdiction over conduct abroad is proper only when the economic effect of such conduct in the United States is 'substantial' or the conduct 'is directed against the security of the state or against a limited class of other state interest.'" Attachment A to Gitter Affidavit filed 3/13/13 (Dkt. 897). Of course, Mr. Gitter disclaims any influence on him of his firm's earlier advocacy commending respect for Ecuadorian sovereignty in the examination of Chevron's conduct in Lago Agrio.