No. 14-826-cv

No. 14-832-cv(CON)

In the United States Court of Appeals for the Second Circuit

CHEVRON CORPORATION,
Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, STEVEN DONZIGER, THE LAW OFFICES OF SEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC ,
Defendants-Appellants,

(caption continues on inside cover)

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Lewis A. Kaplan)

DEFENDANTS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents

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APPELLANTS' PETITION FOR PANEL REHEARING, AND FOR REHEARING *EN BANC* IN 14-0832

Pursuant to Rules 35 and 40 FRAP, and Rules 35 and 40 LR, the undersigned respectfully submits this petition for panel rehearing, or, in the alternative, for rehearing en banc, on behalf of Hugo Gerardo Camacho Naranjo, and Javier Piaguaje Payaguaje, the appellants in 14-0832, in connection with the opinion and order of the panel in 14-0826 (L), and 14-0832 (Con), issued on August 11, 2016, affirming a final order of the District Court entered on March 4, 2014. A copy of the panel's opinion is annexed hereto. The District Court's extensive opinion is reported at 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (per Kaplan, J.).

INTRODUCTION

Appellants in 14-0832 are residents of the Ecuadorian Amazon Basin whose habitat has been decimated by the oil operations at issue in this proceeding. Appellants made a special appearance in the court below, contesting the *in personam* jurisdiction of the District Court. On appeal, they challenge the legitimacy of the District Court's fact-finding, not because it was unsupported by sufficient evidence; but because the District Court lacked the legal authority to resolve a series of bitterly contested factual disputes about what really happened in the Ecuadorian trial court. Given the extremely troubling nature of many of the District Court's factual findings, especially findings involving possible bribery of the Ecuadorian trial judge, and deceptive and unethical behavior in the Ecuadorian trial court by plaintiffs' American

lead counsel, it is not surprising that the panel, consisting of three respected judges of this Circuit, reacted to this appeal with dismay and skepticism. There is, however, an important distinction between the factual findings of a single district judge, and objective truth. What actually took place in Ecuador is the subject of bitter dispute. While the evidence below was arguably sufficient to support the District Court's troubling factual findings, it was also sufficient to support contrary findings. If Chevron's able lawyers had not adroitly avoided a jury trial below by abandoning Chevron's RICO treble damage claims on the eve of trial; or had not successfully choreographed an unprecedented (and wholly unnecessary) action to enjoin the potential enforcement of a foreign judgment before a single judge in the Southern District of New York, the judicially-found facts about what really happened in the Ecuadorian Amazon might look very different. Based on the bitterly contested evidence in the lower court record, a jury, or another court, might have told a different story in which Chevron, not Steven Donziger, played the villain.

Where, as here, the record supports diametrically opposed findings of fact, special care must be taken to assure that the fact-finder chosen by Chevron was, in fact, legally authorized to resolve the bitter factual disputes over what actually happened in the Ecuadorian trial court. In making such a critical threshold determination concerning the District Court's fact-finding power, it would be understandable, but deeply unfair, for an appellate tribunal to allow the lurid nature of the District Court's bitterly disputed version of the events to influence its

determination as to whether the District Court possessed the power to have acted as the fact-finder in the first place.

The distinguished panel in 14-0832 made no secret of the fact that appellants' failure to have challenged the sufficiency of the evidence supporting the District Court's lurid narrative weighed heavily on its disposition of the appeals in 04-0826, and 04-0832. While appellants in 04-0832 hope that the panel's palpable concern over the troubling nature of the story recited by the District Court did not affect its judgment about whether the District Court possessed legal authority to act as a fact-finder in the first place, the powerful nature of appellants' challenge to the District Court's fact-finding legitimacy, coupled with the panel's obvious concern over the facts-as-found by the District Court, call for a dispassionate review by the *en banc* Court in 14-0832.

It is important to stress that appellants do not seek a resolution of the contested facts in this proceeding. They seek merely to assure that the tribunal eventually given responsibility for finding those facts is legally constituted to carry out that difficult task. Despite the machinations of Chevron's able counsel, and the decision of a respected panel, the District Court was not such a tribunal.

ARGUMENT

I. The District Court lacked *in personam* jurisdiction over the defendants-appellants in 14-0832.

Appellants in 14-0832 are residents of the Ecuadorian Amazon Basin whose habitat has been decimated by oil operations allegedly carried out by Chevron's predecessor, Texaco. They have not been charged by Chevron—or anyone else—with any personal wrongdoing. Their only meaningful jurisdictional contact with New York was to have accepted the offer of free legal services by a New York-based class action lawyer who agreed to bring legal proceedings in Ecuador. The wrongful acts allegedly committed by that class action lawyer giving rise to the lower court's injunction took place in an Ecuadorian trial court. Appellants are not alleged to have played any role in those allegedly wrongful acts. Their English comprehension is rudimentary, or non-existent. They possess limited education. Their knowledge of the law—whether Ecuadorian or United States law—is non-existent. Accordingly, their ability to monitor or direct lawyers claiming to act on their behalf is extremely limited.

Despite such a tenuous personal link with New York, and despite the inability of appellants to monitor, direct, or control the behavior of their lawyers, Chevron has treated appellants as maintaining a classic principal/agent relationship with their lawyers, asserting a form of derivative *in personam* jurisdiction over appellants based solely on the New York-based activities of their New York-based lawyer. In light of recent Supreme Court cases requiring out-of-state defendants to volitionally affiliate

themselves with the forum state in order to be subject to its *in personam* jurisdiction, the panel opinion did not attempt to justify the assertion of classic *in personam* jurisdiction over appellants Naranjo or Payaguaje. Op. at 117, 124. Nor could it have done so. It would make a mockery of the Supreme Court's recent precedents for New York to assert *in personam* jurisdiction over residents of the Amazon basin in connection with a cause of action arising out of wrongdoing in Ecuador based solely on the fundraising activities of appellants' New York-based lawyer, over whom appellants exercised no direction and control. See e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

Instead, the panel relied on the punitive imposition by the District Court of *in personam* jurisdiction over appellants Naranjo and Payaguaje as a Rule 37 sanction for their lawyer's tardiness in complying with the District Court's discovery orders. See Op. at 121–23. Appellants do not quarrel with the Rule 37 power of a District Court to impose punitive jurisdiction over an out-of-state defendant who has wrongfully refused to cooperate with discovery needed to determine whether or not minimum jurisdictional contacts exist. *Ins. Co. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Such an extraordinary power to expand the territorial reach of a court's *in personam* jurisdiction beyond ordinary constitutional limits must, however, in order for its exercise to be constitutional, rest on a plausible allegation of personal wrongdoing by the defendant. No case in the Supreme Court, in this Circuit, or, to counsel's knowledge, in any other Circuit, has ever countenanced the use of Rule 37 as a legal

mousetrap that increases the territorial reach of a District Court's *in personam* jurisdiction beyond its Due Process limitations in the absence of an allegation of wrongdoing on the part of the defendant. See *Satcorp Intern. Group v. China Nat'l Imp. & Exp. Corp.*, 917 F. Supp. 271 (S.D.N.Y. 1996); *Volkart Bros. v. M/V Palm Trader*, 130 F.R.D. 285 (S.D.N.Y. 1990).

Even if the drafters of Rule 37 contemplated such an extraordinary "no-fault" application of the sanctioning rule to expand the territorial reach of federal courts beyond constitutional limits—they did not—the Due Process Clause requires that a putative defendant lacking minimum contacts with a forum must, at a minimum, be alleged to be guilty of something before being punished by being subjected to otherwise unauthorized *in personam* jurisdiction. An innocent client cannot constitutionally be punished criminally for the actions of a lawyer over whom he has no control. Nor can an innocent defendant be brought within the otherwise unconstitutional territorial reach of a federal court as a punishment for the allegedly improper actions of a lawyer, especially where, as here, the client is utterly without power to monitor or control the lawyers' behavior.

In upholding Rule 37 jurisdiction, the panel made no effort to ascribe wrongdoing to the defendants-appellants in 14-0832, or to suggest the plausible likelihood that a trove of hidden documentary material existed linking residents of the Amazonian rainforest to New York. Instead, the panel zeroed in on the alleged misbehavior of a lawyer provided to the Ecuadorian defendants free-of-charge in the

District Court by their New York class action lawyer, ruling that the lawyer's tardiness in complying with the District Court's discovery orders constituted a sufficient basis for asserting punitive Rule 37 jurisdiction over residents of the Ecuadorian Amazon Basin. It is possible, of course, to imagine settings where unscrupulous defendants seek to use lawyers as a shield against the assertion of *in personam* jurisdiction by withholding documents, or transferring them to a lawyer, and then claiming innocence when the lawyer fails to cooperate with discovery orders. But no such allegations exist in this case. Instead, unsophisticated residents of the Amazon rainforest are being swept into the vortex of a New York proceeding that palpably lacks constitutionally justified *in personam* jurisdiction over them based solely on the failure of a lawyer, over whom they had no control, to comply in a timely fashion with discovery requests for material that was not in defendants' possession or control, and that was highly unlikely to yield relevant information.

In such a setting, the lawyers may well be subject to significant sanctions. It would, however, constitute a deprivation of liberty without due process of law to use Rule 37 to assert dramatically expanded territorial power over an innocent defendant who is otherwise beyond the constitutionally defined scope of the court's power. If this Circuit is to blaze a new, constitutionally doubtful, trail drastically enlarging the territorial reach of the federal courts over wholly innocent persons outside the United States solely on the basis of alleged misbehavior by American lawyers, it should do so

only after full consideration by an *en banc* court, and without being influenced by the deeply contested version of the facts asserted by the District Court.

II. No cause of action exists against appellants Naranjo and Payguage.

Recognizing that they are free from any personal wrongdoing, Chevron does not assert a statutory RICO claim against the appellants in 14-0832. Instead, Chevron relies solely on an alleged common law cause of action against the enforcement of a fraudulent judgment. Since the only assertion of subject matter jurisdiction over Naranjo and Payaguaje is alienage jurisdiction, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), New York law governs the nature of any cause of action against appellants in 14-0832. There is, however, no New York common law cause of action to enjoin the enforcement of a foreign judgment. Whatever common law cause of action may once have existed, New York has statutorily codified its rules governing enforcement of foreign judgments by enacting the New York Recognition Act (NYCPLR Secs. 5301-5309). In *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), this Court held that the New York Recognition Act did not create an affirmative cause of action authorizing a judgment debtor to launch a preemptive injunctive proceeding aimed at determining the validity of a foreign judgment. Instead, the judgment debtor was obliged to assert any claimed defense to a foreign judgment as a defense to an enforcement proceeding. In short, after *Naranjo*, a New York judgment debtor may raise fraud as a defense to an effort to enforce the final judgment of a foreign court,

but may not invoke New York law to launch an anticipatory attack on a foreign judgment in a New York court.

The panel sought to distinguish *Naranjo* by pointing out that while the injunction before the *Naranjo* court was world-wide in scope, the injunction in this proceeding applies only to efforts to enforce the Ecuadorian judgment in any United States state or federal court. Op. at 94. But the *Naranjo* holding did not turn solely on the scope of the injunction. It turned on the inappropriateness of allowing New York courts to act as an extraterritorial arbiter of the legitimacy of a foreign judgment in the absence of an attempt to enforce the foreign judgment in New York. While the world-wide scope of the *Naranjo* injunction rendered it particularly offensive, the core holding of *Naranjo* is violated, as well, by an injunction that places judges throughout the United States under the *de facto* tutelage of a New York judge who is asserting preemptive nationwide authority to pass on the validity of a foreign judgment that is not the subject of a New York enforcement proceeding. Since the panel's opinion conflicts with the core of the *Naranjo* holding, *en banc* review is particularly appropriate.

Moreover, even if a New York common law cause of action to enjoin the enforcement of an allegedly fraudulent foreign judgment survives *Naranjo*, no court has ever recognized such an equitable claim in the absence of an allegation of wrongdoing by the enjoined party. In every reported case of the grant of such a common law injunction against a client, the client was alleged to have personally

participated in the fraud. Where, however, the client is innocent, the injunction has been denied. Compare *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (injunction granted; client participated in fraud) with *United States v. Beggerly*, 524 U.S. 38 (1998) (denying injunction in absence of showing of fraud by party). See also *Morrel v. Nationwide Mut. Fire Ins. Co.,* 188 F.3d 218 (4th Cir. 1999) (denying fraud on ground that client did not engage in fraud).

Thus, when lawyer and client both engage in fraudulent behavior, a common law injunction may bind both. But when a client is free from wrongdoing, no basis exists for a pre-emptive common law injunction. While the judgment debtor remains free to assert the lawyer's alleged fraud as a defense to an enforcement proceeding, no basis exists at common law to secure an injunction sounding in equity preventing an innocent plaintiff from even seeking to enforce a foreign judgment. It is possible, of course, that such an enforcement would fail because of the wrongful actions of counsel, but, at common law, an innocent client has a right to attempt to enforce the judgment in a forum of its choice.

A common flaw runs through the panel's disposition of appellants' challenge to both *in personam* jurisdiction and the lack of a cause of action. In both settings, the panel treated lawyer and client as a single jural entity, reflexively rendering the client fully responsible for the actions of lawyers, without even an allegation of personal fault. In the jurisdictional context, the panel rendered the hapless appellants fully responsible under Rule 37 for the alleged failure of a lawyer operating beyond their

control to comply in a timely fashion with a discovery order. In the cause of action setting, the panel treated appellants as moral wrongdoers for the purposes of injunctive relief without even an allegation of personal wrongdoing.

In many, perhaps, most settings clients are legally bound by their lawyer's behavior under classic principal/agent rules. See Deborah DeMott, *The Lawyer as Agent,* 67 Fordham L. Rev. 301 (1998). But, where, as here, lawyers are alleged to have gone rogue, their innocent clients may not be treated as immoral clones without even an allegation of personal wrongdoing. *Holland v. Florida*, 130 S. Ct. 2549, 2565, 2568 (2010) (Alito, J., concurring) (discussing "attorney misconduct that is not constructively attributable to the [client]"; *Maples v. Thomas*, 132 S. Ct. 912 (2012) (declining to attribute fraudulent, extraordinary, or unethical behavior to a client). See also *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) (Jacobs, J., concurring) (same).

III. The District Court lacked power to substitute its factual judgment for the ruling of the National Court of Ecuador as to whether the *sala unica* of the Provincial Court of Sucumbios had carried out a *de novo* review of the trial court record.

The panel appeared to accept the fact that the *Sala Unica* of the Provincial Court of Sucumbios (hereafter the "intermediate appeals tribunal") was vested under Ecuadorian law with both the power and duty to conduct a *de novo* review of the trial court record, and to issue a substitute judgment free from any taint of improper behavior in the trial court. See *Naranjo,* 667 F.3d at 237 (recognizing *de novo* review

power of Ecuadorian intermediate courts). On November 12, 2013, the National Court of Ecuador ruled that the untainted intermediate appeals court judgment had superseded the potentially tainted trial court judgment. Indeed, the National Court of Ecuador criticized Chevron for insisting that the operative judgment was the tainted judgment of the trial court. The decision of the National Court of Ecuador is set forth in the Appendix at A 3449-3670. The recognition by Ecuador's highest court that the intermediate court's untainted judgment had superseded the trial court's potentially tainted judgment is set forth at A 3548 ("... the court decision sought to be annulled [appealed] here is the one rendered by the court of appeal and not the one issued by a trial court; something [Chevron] has confused…"].

The District Court declined to give the intermediate appeals court judgment operative effect, finding as a matter of fact that the five judges of the intermediate tribunal had failed to engage in a *de novo* review of the trial record. The panel upheld the District Court's finding that no *de novo* review took place, relying on a reading of the same intermediate court opinion that was reviewed by the Ecuadorian National Court. Both American courts simply ignored the crucial statement in the Ecuadorian intermediate appeals court opinion that it had conducted:

> "… a prior and exhaustive review of the proceedings, along with the judgment of the trial court, seeking what legal doctrine calls relation of consistency of ruling with the supporting documents in the proceeding." A 454.

The opinion and supplemental order of the intermediate appeals court are set forth in the Appendix at A453-468; 489-493.

The panel's hostile reading of the intermediate appeals court opinion ignores the court's assertion that it had conducted "a prior and exhaustive review of the proceedings," and holds the intermediate court to a standard of judicial sophistication beyond anything that can be reasonably be expected in a Provincial court serving the Ecuadorian Amazon Basin. Most importantly, as between a Second Circuit panel and the National Court of Ecuador, the highest court of Ecuador's reading of the intermediate appeals court opinion is entitled to preeminence. Under settled notions of international comity, neither the District Court, nor the panel, was empowered to second-guess the National Court of Ecuador on the crucial legal question of the import of the intermediate appeals court's assertion that it had "conducted … a prior and exhaustive review of the proceedings." A 454.

The panel sought to avoid the binding nature of the ruling by the National Court of Ecuador by characterizing it as an improper finding of fact by an appellate tribunal empowered to review legal issues, but not authorized to make factual findings. See Op. at 67–68, 101–02. With respect, however, the National Court of Ecuador's characterization of the *de novo* nature of the judgment of the Ecuadorian intermediate appeals court was not a pure finding of fact. It was a classic resolution of a mixed issue of law and fact clearly within the power of Ecuador's highest appellate court. See *Ornelas v. United States*, 517 U.S. 690 (1996) (issue of whether probable cause

or reasonable suspicion existed is a mixed question of law and fact reviewable *de novo* on appeal). Deciding which of two Ecuadorian judgments—the trial court's, or the intermediate appeals tribunal's—is the operative judgment in a case before the National Court of Ecuador was a similar mixed question of law and fact, requiring the National Court of Ecuador to satisfy itself that adequate *de novo* review had taken place to render the appellate judgment, not merely an affirmance, but a *de novo* substitute for the trial judgment.

Viewing the relevant documents, reasonable people might well disagree over that issue, but, under principles of international comity, neither the District Court nor the panel was vested with authority to reject the ruling of the National Court of Ecuador.

CONCLUSION

An unfortunate irony infects the panel's decision. The panel was deeply moved by lurid factual findings made by a District Judge who lacked authority to make the findings; but refused to be bound by a crucial legal ruling of the National Court of Ecuador which possessed the clear authority to issue the ruling. Appellants fear that the only explanation for the irony is the panel's reluctance to provide any assistance to what they believe to be inexcusable behavior by a lawyer. Understandable as that reluctance may be, it rests on the panel's face-value acceptance of unauthorized fact-finding in a forum carefully chosen by Chevron by a Southern District trial judge who rejected the exculpatory testimony of the Ecuadorian trial judge, and accepted the

inculpatory testimony of a of an ex-judge removed from the Ecuadorian judiciary for corruption, and then paid more than a million dollars, plus relocation of his entire family to the United States, in return for his inculpatory testimony.

The evidence of wrongdoing by plaintiffs' counsel is troubling. But that evidence is bitterly contested. Appellants, over whom the District Court lacked power, are entitled to an opportunity to seek to enforce the Ecuadorian judgment in a forum not hand-picked by Chevron free from the lethal embrace of the District Court's unauthorized and bitterly contested version of the facts. An *en banc* rehearing is needed to provide appellants in 14-0832 with that opportunity.

Respectfully submitted

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Dated: September 14, 2016
New York, New York

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the page limitation established by FRAP 35(b)(2) because it contains 15 pages, excluding the parts exempted by FRAP 32(a)(7)(B)(iii). This petition also complies with the typeface requirements of FRAP 32(a)(5) & (a)(6), as it has been prepared in Word 2007 using a proportionally spaced typeface.

s/ Burt Neuborne
Burt Neuborne

September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

s/ Burt Neuborne
Burt Neuborne

September 16, 2016