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August 7, 2017

VIA ECF

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

RE: *Chevron v. Donziger*, Case No. 11 Civ. 691 (LAK)

Dear Judge Kaplan:

I write to object on various grounds to your order dated July 17, 2017 laying out a series of deadlines to contest the reasonableness of Chevron's attempt to recover from me $32,334,584 in fees in the above-captioned matter in what is obviously a SLAPP-style attempt to thwart my ongoing role in litigating against the company over its environmental contamination in the Amazon rainforest of Ecuador. This court must dismiss the company's application forthwith on the basis of established precedent in this Circuit. It also must dismiss the application based on the radical change in circumstances since the issuance of the RICO judgment related to the submission by Chevron of fraudulent evidence that Your Honor used as a core basis for the district court's factual findings. In short, both law and equity bar any recovery of fees in this matter.

In the alternative, I request that the legal question of the availability of fees *vel non* in light of Chevron's wholesale waiver of damages claims be certified to the Court of Appeals. Absent certification, the parties and this court will be forced to engage in substantial litigation on the equitable issue (Chevron's fraudulent submission of fabricated evidence) as well as the unreasonableness of Chevron's fees more broadly, all of which would be a waste if the Second Circuit simply adheres to precedent and finds that legal fees in a civil RICO matter are unavailable absent a claim for damages. This is a particularly compelling factor given the extreme resource disparity here between an individual litigant and one of the world's largest fossil fuel companies with annual revenues surpassing $200 billion.[1]

Should this matter not proceed immediately to dismissal or certification, I hereby ask that you recuse yourself for reasons related to a flagrant conflict of interest that has emerged in recent

[1] The arguments contained herein also apply to Chevron's parallel attempt to collect costs in this matter, as explained in a letter to Clerk of the Court dated August 1, 2017. The arguments in that letter also are incorporated herein by reference.

months involving Your Honor's relationships to some or all of the six SDNY judges who wrote a highly inappropriate, misleading, and intemperate referral letter to the Attorney Grievance Committee of the First Judicial Department seeking my disbarment based on the same fraudulent Chevron evidence cited above. This letter was a clear attempt by your colleagues to seek vindication of the controversial RICO findings—findings which still must face the rigors of the most important review for which they were intended, namely those are now taking place in asset seizure actions in other jurisdictions related to enforcement of the Ecuador judgment. The bases for my objections to the July 17 order, and for the request for recusal, follow.

Judicial Precedent Prohibits Chevron's Fee Application

As a threshold legal matter, the law requires immediate dismissal of Chevron's fee application. As set out in my opposition to Chevron's attorney's fees motion (Dkt. 1895), the Second Circuit has squarely held in *Aetna Casualty & Surety Co. v. Liebowitz* that RICO's "plain language" does not "authorize an attorney's fee award for obtaining injunctive relief, as distinguished from damages." 730 F.2d 905, 907 (2d Cir. 1984). As the court is well aware, Chevron dropped all of its claims to money damages just prior to the RICO trial so that it would not have to prove its claims to the satisfaction of an impartial jury.[2] In exchange, Chevron limited itself to injunctive relief only. I argued at the time that the denial of a jury trial violated my constitutional rights, including my right to due process, given that Chevron was making allegations that I had engaged in criminal felony acts that if true surely should have, and I believe would have, been pursued by appropriate prosecutorial authorities.

My concerns in this regard have been further vindicated by the emergence of new facts that show that Chevron used false evidence to shore up its RICO case after the legal process in Ecuador appropriately addressed and rejected the various due process complaints Chevron presented regarding the conduct of the trial in that forum. The subsequent and categorically false testimony submitted by the Chevron-paid witness Alberto Guerra in the RICO matter regarding a "bribe agreement" supposedly arranged by the Ecuadorian legal team with the trial judge in Ecuador eventually became the core of this court's final judgment. As I testified under oath, this testimony is false. My testimony has now been corroborated by independent evidence, including by Guerra himself.

Given that Chevron benefited immeasurably in 2013 from the short-term tactical advantage of denying its primary RICO target a jury of impartial fact-finders, it now must pay the full cost of its decision to "unequivocally [] surrender[] any claim to money damages as well as to any other relief that is not equitable in nature," Dkt. 1500. Under the bedrock principle established by *Aetna*, Chevron also lost any entitlement to fees in this matter. *Aetna* has been followed by a string of

[2] Dkt. 1469 ("(i) Chevron will not seek money damages against Steven R. Donziger . . .; (ii) at trial and in all other phases of this action, Chevron will seek only equitable relief against the Donziger Defendants, and; (iii) Chevron will waive all claims for money damages relief against the Donziger Defendants").

courts in other jurisdictions without a single contrary holding since its issuance more than 30 years ago.

Aetna As A Bulwark Against Litigation Gamesmanship

This matter illustrates the importance of the *Aetna* holding as a guard against the abuse, gamesmanship, and denial of constitutional rights that Chevron now seeks via its SLAPP-motivated motion for fees and its separate application for costs. There is no more textbook illustration of abuse than Chevron's tactical decision in September 2013 of "surrendering any claim to money damages" on the one hand (to gain the benefit of denying me a jury trail) while claiming in 2017 the right to reimbursement of $32 million in fees. While nothing more than a rounding error to Chevron, the amount potentially represents a backbreaking burden on me and my Ecuadorian clients who live a largely impoverished existence. The outrageousness of the fee figure is also linked to the abusiveness of the proceeding: just for trial, Chevron dedicated more than 100 lawyers to the task of trying to neutralize me and my counsel with hundreds of pretrial motions, excessive discovery burdens, and last-minute waiver and burden tactics as my former counsel John Keker so eloquently described in his motion to withdraw as counsel.[3] *Aetna* sets a clear line against recouping any portion of fees unless it can satisfy the grounding influence of getting its "facts" accepted by a jury of the defendant's peers.

Aetna clearly controls the outcome of Chevron's fee application and forecloses the possibility of any fee award to Chevron quite apart from the issue of Chevron's fraud on the court.[4] As already

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[3] Keker, one of the most acclaimed trial attorneys of his generation, called out this court's "implacable hostility" toward the undersigned and described how in his view Your Honor allowed the RICO proceeding to degenerate into a "Dickensian farce" with little adherence by the court to its legal and ethical duties to neutrally adjudicate the issues. The long-term fallout from the many defects in the RICO proceeding that Mr. Keker noticed in the Spring of 2013 continue to manifest themselves years later and clearly undermine the present-day reliability of Your Honor's decision. Chevron's fraudulent RICO evidence now must give extreme pause to any truly impartial court—such as the Ontario Court of Appeals and the Supreme Court of Canada, courts which were not in the least swayed by the RICO decision when ruling unanimously in favor of the Ecuadorian villagers after Chevron attempted to abort the enforcement action in that country. Your Honor stands alone in endorsing a Chevron narrative that multiple judges around the world have rejected and continue to reject as a legitimate basis for judicial action. The problematic evidence that formed the basis for the RICO decision will now be further scrutinized by judicial officers in enforcement courts around the world, where the many flaws in the proceeding, the clearly problematic factual findings, and the disturbing role that Chevron's own lawyers played in presenting fraudulent evidence, will very likely be on full display. For the district court at this time to grant Chevron fees for legal work creating what can only be described as a miasma of questionable ethical dealings, if not outright illegality, would be nothing short of a disgrace—especially when the factual issues involved are still being intensively litigated on a far larger evidentiary record than was or is before this court.

[4] The only response Chevron was able to provide was to cite cases under parallel language of the antitrust statutes. Dkt. 1897. But as my opposition had already pointed out, the fee portions of those statutes are

noted in my opposition, the able Chevron lawyers who filed the motion for fees declined to cite or even mention *Aetna*, the most directly on-point Second Circuit case on the question.[5] It is not just *Aetna* (and its progeny) that stands squarely in the way of Chevron's motion: numerous cases have favorably cited and applied the rule of *Aetna*. In fact, the *Aetna* case has received no negative treatment in the case law, despite Chevron's self-serving claim that it was "wrongly decided" in its attempt to invite Your Honor to revisit a binding holding of this Circuit.[6] It is time for an end to the special carve-outs – what we call the "Chevron exceptions" -- to established precedent granted to the fossil fuel company in its attacks on adversary counsel that have characterized this proceeding from the beginning. Under the binding law of this Circuit, Chevron forfeited its claim to legal fees when it loosed itself from the burden of proving its damages case to a jury. This court now must hold Chevron to the consequence of its bargain.

Certification to Court of Appeals

If the court is unwilling to apply the black-letter law of *Aetna* and dismiss Chevron's motion for fees, it should recognize the same as a "controlling question of law as to which there is substantial ground for difference of opinion," the determination of which "may materially advance the ultimate termination of the litigation"—indeed it would end it entirely—and thus certify the question for interlocutory appeal under 28 U.S.C. § 1292(b). To require the parties to fully engage the "reasonableness" of a fee motion based on some 15,000 billable hour entries by Chevron's lead counsel alone, and an equal number from various "consulting" firms, would be absurdly wasteful and abusive. Reasonable conservation of judicial and party resources requires that the issue of the availability *vel non* of attorneys' fees given Chevron's waiver of all money damages should be decided (and if necessary, appealed) first, prior to a complex and time-consuming dispute over the reasonableness of fees.

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totally inapplicable to the instant matter. They were *legislatively amended* to allow fee recovery in cases of injunctive relief, whereas the RICO statute was never so amended. Dkt. 1895 at 4-5.

[5] The relevance of *Aetna*, even if Chevron claims it was "wrongly decided," is essentially admitted by Chevron in its reply to my opposition, where it defends itself by noting that it did cite the case in a footnote in its 400-page post-trial brief. But if the case was worth citing in the section of the post-trial brief section on attorneys fees, it was *a fortiori* necessary to cite in an application dedicated exclusively to fees question. The failure of Chevron's massive legal team to cite the most on-point circuit case was obviously not a mistake, but an attempt to mislead the court and bury a case that it knows outright forecloses the relief it asks for.

[6] Rather, the Second Circuit's analysis in *Aetna* has been cited with approval in numerous other circuits. *See Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959 (9th Cir. 2007) (citing the *Aetna* analysis of the Clayton Act); *Abston v. Johnson*, 30 F.3d 1491, n.3 (5th Cir. 1994) (citing the Second Circuit's conclusions "that RICO recovery provision in § 1964 authorizes recovery of attorney's fees only when 'a plaintiff ... obtains a judgment for damages on the merits'"). It has also been cited and applied by district courts in this circuit. *See e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2010 WL 1253741, at *2 (S.D.N.Y. Mar. 5, 2010) (applying the underlying premise in Aetna that attorney's fees are only recoverable if treble damages are awarded by a jury).

Equity Bars Any Award of Legal Fees

Beyond the unavailability of fees under the RICO statute, Chevron's attorney fee request is objectionable for equitable reasons that have come into sharp focus only in the time since the trial record in the case closed. These reasons also compel the court to deny Chevron's motion.

Evidence now exists suggesting that Chevron and its counsel knowingly suborned perjury, obstructed justice, violated numerous federal laws[7], and committed a fraud on this court with respect to the testimony of Alberto Guerra. Guerra was Chevron's "star witness" at the RICO trial and the source of the *only* direct evidence Chevron offered in support of the core erroneous finding of the district court that there was a "bribe" agreement in the Ecuador case. While many critical facts —devastating to Chevron's case—have already emerged, others would need to be more fully developed in discovery before the court could possibly award compensation for attorney conduct that appears to have been fraudulent and illegal.

The most salient emergent facts include that Guerra admitted under cross-examination in the international arbitration action between Chevron and the Republic of Ecuador that he intentionally and repeatedly lied on the stand and in his sworn statement during the RICO trial. These lies were not tangential; they cut to the very core of several issues relied on by this court to credit his testimony. This was critically important to the outcome given that even Your Honor acknowledged Guerra's history of corruption and his crass desire to exploit Chevron for money ("Money talks, but gold screams") and to lie to get it. Your Honor, however, largely on the basis of Guerra's excessively coached appearance on the stand, *see* Dkt. 1874 at 250 ("From the standpoint of demeanor, Guerra was an impressive witness."), relieved Guerra from this matted web of past corruption and concluded that "Guerra told the truth." *Id.* at 266. I argued at the time that Your Honor got it wrong. Now, even Guerra himself says Your Honor got it wrong.

Digital Forensic Examination Proves Chevron's Witness Lied

More devastating for Chevron is that the process of digital forensic examination of the hard drives of the computers of Ecuador trial judge Nicolas Zambrano has been completed under the auspices of the parallel international arbitration proceeding between the company and the Republic of Ecuador. This examination revealed unquestionably (and contrary to Your Honor's findings) that the Ecuador judgment was drafted on those computers and that the drafting was done by Judge Zambrano slowly over the course of many months, with hundreds of interim file saves. Although Chevron has desperately sought to spin these fatally damaging revelations, it cannot deny the fact that they are utterly incompatible with the story told by Guerra and accepted by Your Honor that

[7] *See, e.g.*, 18 U.S.C. § 201(b)(3), (c)(3) (prohibiting payments "for or because of [a witness'] testimony under oath" and "with intent to influence [that] testimony"); 18 U.S.C. § 1503 (prohibiting conduct "corruptly" seeking "to influence, obstruct, or impede, the due administration of justice"); 18 U.S.C. § 1512 (prohibiting conduct of "corruptly persua[sion]" to "influence, delay, or prevent the testimony of any person in an official proceeding"); 18 U.S.C. § 1622 ("Whoever procures another to commit any perjury is guilty of subornation of perjury").

the judgment was drafted by lawyers for the plaintiffs and delivered to Judge Zambrano shortly before its public release.

The new evidence eviscerates the factual basis for core elements of the court's judgment in this matter. Given that both the Second Circuit panel and the Supreme Court, without comment, have declined to consider these glaringly critical facts that undermine the legitimacy of the RICO judgment, the continued viability of the court's ruling will be a very open question for the various judicial bodies now considering the Ecuadorian judgment within the usual international enforcement process (of which this RICO proceeding has never been a legitimate part). Nonetheless, the facts must now reappear in this matter given that Chevron seeks reimbursement for precisely the work which produced this false evidence. As the U.S. district court judge who oversaw the Chevron RICO proceeding, these critical developments bear heavily on the responsibilities of Your Honor and every judicial officer associated with this court, including the Clerk of the Court and each SDNY judge who has asserted his or her personal or institutional interest in this matter.

Equity Bars Fees When Fraud Used to Obtain the Judgment

The key question is whether equity allows a party to recover either fees or costs for a judgment obtained by fraud. Obviously, there are strong arguments that this should not and cannot be allowed. The emerging evidence suggests knowledge of the above-referenced facts on the part of Chevron and its counsel at Gibson Dunn & Crutcher ("GDC"), including members of the litigation team headed by Randy Mastro. Mastro, the lawyer who signed both the fee motion and the application for costs, had marketed his team to Chevron as a "rescue squad" for companies in legal trouble. It is highly unlikely this is a case where a witness "duped" the party and the lawyers he was assisting with his testimony. Guerra was infamously prepped and coached by Gibson Dunn attorneys for 53 days prior to his RICO testimony.

Chevron's elite investigators and digital forensic analysts at Kroll, Stroz Friedberg, and other consultancies had unfettered access to all of Guerra's files and digital media. Guerra's corrupt history and willingness to lie to advance his interests were documented for years prior to the RICO trial. Chevron's extraordinary payments and provision of benefits to Guerra are vastly in excess of the small measure of compensation allowed under federal law and the ethical rules regarding fact witnesses. All of these factors and more suggest that Chevron and its attorneys at Gibson Dunn knew full well that Guerra's story was invented for high-priced sale. Again, a court has no right under time-honored principles of equity to award either costs or fees in connection with billing practices related to such patently corrupt conduct.[8]

[8] To be clear, every relevant aspect of the district court's findings and conclusions of law—not just the core "bribery" and "ghostwriting" findings—are being challenged by me and the Ecuadorian plaintiffs in enforcement actions against Chevron in other jurisdictions on a far fuller evidentiary record than was before Your Honor or the Second Circuit. In Canada, as mentioned, both the Ontario Court of Appeal and the country's Supreme Court already unanimously rejected a Chevron request to block the

Conflict of Interest – Request for Change of Venue

Another critical issue is the conflict of interest that arose when certain SDNY judges tried to engineer disciplinary action against me by way of an advocacy-oriented and in my view powerfully misleading referral letter to the Attorney Grievance Committee of the First Judicial Department. The letter entreats the First Department to impose a penalty against me based on a controversial theory of collateral estoppel in a protean matter that continues to engage the courts of various countries. The letter entirely fails to mention the raft of open and problematic issues surrounding the district court's RICO decision—such as the use of paid "fact" testimony and the new evidence cited above that suggests Chevron committed fraud—that obviously would give disciplinary counsel pause prior to initiating action and that will be taken up by enforcement courts to the extent they need to examine Your Honor's decision.[9] Signed by Judge Castel (and endorsed by the five other judges on the SDNY Grievance Committee), this referral letter puts me in a patently unfair situation: the same court to which I must now seek a hearing on the numerous outstanding issues related to the motion for fees already has numerous judges who *sua sponte* made a determination that I should be disbarred without even understanding, much less reviewing, the full evidence. In my view, this creates a flagrant conflict of interest. More to the point with regard to Chevron's application for costs, all of the judges on the SDNY Grievance committee who voted to seek disciplinary action against me are connected to the supervision of the office of the Clerk of the Court.

For these reasons and others, I request that this matter be assigned (along with all other post-trial issues, if any) to a different and non-conflicted venue outside the SDNY for resolution. In my view, it would be patently unfair if any judge or judicial authority in the same court where at least six judges have taken the extraordinary step of seeking my disbarment would now make *any determination* regarding the numerous remaining legal and factual issues involved, including those related to costs and fees. This is particularly true when those determinations could result in

enforcement action based on the RICO decision and other issues. Further, most of the district court's predicate RICO findings against me (*i.e.,* money laundering, wire fraud) are derivative of the fraudulent testimony presented by Guerra in reference to the supposed bribery and ghostwriting, which render them legally irrelevant for purposes of judgment enforcement other than as evidence of the lengths to which Chevron will go to avoid paying compensation for the extensive harm it caused in Ecuador. The other findings of the district court not related to fraud or ghostwriting (such as "extortion") are also being contested by me on legal and factual grounds in other courts that will review *all of the evidence* both as it exists and as it continues to emerge—not just the limited and distorted evidence Chevron wishes to be considered, as was the case before the district court.

[9] As indicated, the new evidence never was heard by the district court, the Second Circuit panel, or the U.S. Supreme Court. However, the new evidence will be presented to courts in other jurisdictions that are moving to enforce the Ecuador judgment against Chevron's assets. In addition to new evidence, courts in other jurisdictions are likely to want to consider critical contextual evidence that this court outright excluded, such as the 105 technical evidentiary reports and 64,000 chemical sampling results presented during the Ecuador trial documenting Chevron's responsibility for creating illegal and life-threatening amounts of pollution.

extraordinary burdens being imposed on a solo practitioner who continues to fight for vulnerable clients who suffer cancers and other life-threatening health impacts from extensive oil contamination that not even the moving party in this matter disputes it caused.

Barring Dismissal, the Court Must Grant Discovery and a Hearing

If this Court refuses both to deny Chevron's motion based on the black letter law and other reasons, and refuses to certify the same for interlocutory review, I obviously will need substantial additional time to conduct discovery. Discovery is needed to probe not just the reasonableness of Gibson Dunn's 15,000-plus entries of billable hours (and similar number of entries from various "consultants") but to more fully develop the claims of fraudulent and illegal conduct regarding Guerra that, as argued above, equitably foreclose Chevron's application. This includes probing the role of Chevron counsel at GDC and its investigative firms (including Kroll, Stroz Friedberg, and Investigative Research, Inc.) in effectively fabricating Guerra's testimony. Given the apparent fraud regarding Guerra, much of Chevron's other evidence must be re-scrutinized to see if it bears out similar concerns.

Even though Chevron's latest gambit is essentially in the realm of make-believe—Chevron knows I don't have even 1% of the outlandish amount it is demanding in the motion and is clearly pursuing the claim for a punitive purpose—I nonetheless intend to devote the resources necessary to establish the evidentiary record that Chevron's claim for fees is abusive, deeply unreasonable on multiple levels, and involves legal work that produced (and perhaps was designed to produce) false evidence on which this court based its now-tainted RICO judgment. For this, I will require a reasonable period of discovery and an evidentiary hearing, both standard protocol for complex and controversial fee motions such as this.

The necessary discovery will include document requests and depositions of those lawyers and investigators most closely involved in inducing and presenting the Guerra testimony. This includes, but is not limited to, Randy Mastro, Andrea Neumann, Avi Weitzman, and Reed Brodsky as well as Guerra himself who remains on Chevron's payroll in a location known only to Chevron. I would request a minimum initial period of 120 days to engage Chevron on this discovery, plus any extensions that may be necessary if Chevron and Gibson Dunn start to repeat the obstructive discovery practices seen in the RICO case. As a basis for the recusal motion, I will also need to probe the circumstances surrounding the referral letter signed by Judge Castel, including any contacts between the members of the SDNY Grievance Committee and Your Honor.

Conclusion

In sum, I respectfully request that the court first decide the controlling question of law as to the availability of fees *vel non* before requiring any further litigation on reasonableness. If the court disagrees with the ruling from *Aetna* and sees no other basis to deny the fee motion, I ask that it certify that question to the Court of Appeals. If litigation regarding reasonableness is at some point required, I request a substantial period of discovery to inquire into the nature of Chevron's and

Gibson Dunn's conduct regarding Guerra's false testimony, as well as the nature of Gibson Dunn's billing practices, the services provided by the consultants, and other more routine inquiries.

Sincerely,

/ s /

Steven R. Donziger

cc Counsel of Record
Clerk of the Court