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May 22, 2015

Hon. Richard C. Wesley
Hon. Amalya L. Kearse
Hon. Barrington D. Parker, Jr.
United States Court of Appeals
for the Second Circuit
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: Chevron Corp. v. Donziger, 14-826 (L)
Chevron Corp. v. Payaguaje and Naranjo, 14-832 (Con)

Your Honors:

Pursuant to an order entered on May 12, 2015, counsel for the appellants in 14-832 respectfully submits this letter brief discussing two questions raised for the first time during oral argument:

> (1) In light of a plausible risk of conflicting findings, should the District Court be directed to defer consideration of Chevron's application for injunctive relief pending the outcome of parallel arbitral proceedings commenced two years earlier by Chevron; and
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> (2) Given the "unique" circumstances of this appeal, may this Court condition any appellate relief favorable to Chevron on its

agreement to take steps designed to assure the speedy, just and efficient resolution of this protracted dispute?

I.

Pending Completion of the Intertwined BIT Arbitration Proceedings Commenced by Chevron in 2009, a Court of Equity Sitting in New York Should Abstain From Entertaining Chevron's Request for Wholly Meaningless Equitable Relief

In 2009, two years before seeking prospective equitable relief in the Southern District of New York against Steven Donziger, Javier Paiaguaje Payaguaje, and Hugo Naranjo, Chevron commenced an arbitration proceeding against the Republic of Ecuador (the BIT arbitration) attacking the validity of the Lago Agrio trial proceedings and, eventually, the *de novo* Sucumbíos appeals court judgment. See *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (declining to enjoin the BIT arbitration);[1] *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (vacating worldwide injunction issued by District Court); *Chevron Corp. v. Donziger*, 974 F. Supp.2d 362 (S.D.N.Y. 2014) (re-issuing injunction barring enforcement in the United States) (appeal pending).

The BIT arbitration panel has not yet definitively ruled on Chevron's claim that both the Lago Agrio and the Sucumbíos

[1] In *Republic of Ecuador v. Chevron Corp.,* 638 F.3d 384 (2d Cir. 2011), a panel of this Court declined to stay the BIT arbitration as inconsistent with Chevron's promise to this Court in 2002 to submit to Ecuadorian jurisdiction as a *quid pro quo* for a *forum non conveniens* dismissal, noting that the pendency of the BIT arbitration against the Republic of Ecuador would not unduly interfere with the ability of individual Ecuadorian victims to pursue their claims against Chevron in an Ecuadorian court because findings by the arbitral forum could not bind the individual victims, as non-parties to the arbitration.

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judgments are invalid.[2] The District Court has, however, ruled (erroneously) that the Sucumbíos appellate judgment is unenforceable because, according to the District Court, it is tainted by the fraud that allegedly permeated the Lago Agrio trial court judgment. As the *Republic of Ecuador* panel noted, the District Court's findings are not binding on the BIT arbitral panel because the Republic of Ecuador, the sole respondent in the BIT arbitration, is not a party to the equitable proceedings in the Southern District of New York. *Martin v. Wilks,* 490 U.S. 755 (1989) (declining to apply preclusion to non-party); *Taylor v. Sturgell*, 553 U.S. 880 (2008) (same).

As members of the panel recognized during oral argument on April 20, 2015, given the fiercely contested nature of the District Court's findings concerning the Sucumbíos judgment, the BIT arbitration panel may well disagree with the District Court, and uphold the validity of the Sucumbíos judgment. The flimsy and unpersuasive effort by the District Court to avoid confronting the *de novo*, untainted nature of the Sucumbíos appellate judgment (974 F. Supp.2d at 608-08) is unlikely to impress a neutral arbitral tribunal. See Brief of Appellants in 14-832 at 21-22; 25-53; Reply Brief of Appellants in 14-832 at pp. 6-14.

The District Court's contested factual findings impugning the integrity of the Lago Agrio trial judgment may also be rejected by the BIT arbitration panel. The District Court found that the Lago Agrio trial judgment is invalid because Mr. Donziger had improperly played a role in preparing an expert's report, had assisted the Lago Agrio trial judge in preparing his opinion, and had arranged for the deferred

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[2] A three week trial type hearing on the issues concluded on May 8, 2015, at which Alberto Guerra was subjected to a grueling cross-examination. The BIT arbitrators' most recent ruling, issued on March 15, 2014, tentatively rejected Chevron's claim that its liability for polluting a portion of the Ecuadorian Amazon basin the size of Rhode Island was extinguished by sweetheart agreements with former Ecuadorian officials in the 1990's. (A copy of the ruling has been filed with the Court pursuant to Rule 28(j) FRAP).

payment of a $500,000 bribe to the trial judge to assure a favorable result. But forensic evidence recently made available to the BIT arbitration tribunal, and presented to this Court pursuant to a pending Rule 28(j) letter, undermines the District Court's finding that Mr. Donziger inappropriately participated in drafting the trial judge's opinion. The expert report in question was, moreover, explicitly disavowed by both the Lago Agrio trial court, and the Sucumbíos appellate tribunal. Finally, the District Court's clearly erroneous finding of bribery improperly excluded crucial emails from counsel on the eve of the verdict demonstrating a state of mind inconsistent with bribery, and appears to have been premised on an erroneous burden of persuasion. In fact, the District Court's factual findings impugning the integrity of the Lago Agrio trial judgment rest almost exclusively on the testimony of Alberto Guerra, a crooked, de-frocked Ecuadorian judge who was removed for corruption, and who has been paid almost $2 million by Chevron for his late-breaking fairy tale. Since it is doubtful that sophisticated arbitrators will credit the purchased and intensively rehearsed testimony of Alberto Guerra, it is clearly plausible to anticipate that the arbitral tribunal will reject the District Court's findings concerning the validity of the Lago Agrio trial judgment, to say nothing of the District Court's wholly inadequate treatment of the untainted, *de novo* Sucumbíos appellate judgment.

Since Chevron initiated the BIT arbitration, adverse findings by the arbitrators concerning the enforceability of the Sucumbíos judgment would bind Chevron in subsequent judicial proceedings under established principles of preclusion and estoppel, rendering future judicial proceedings unnecessary.[3] *Blonder-Tongue*

[3] The Supreme Court has ruled that federal courts may afford *res judicata* or collateral estoppel effect to arbitral findings on a case by case basis, when appropriate. *Dean Witter Reynolds v. Byrd,* 470 U.S. 213 (1985). The Second Circuit has long afforded preclusive effect to arbitral findings reached under fair procedures. Eg. *Joseph L. Saphier Agency, Inc. v. Green*, 190 F. Supp. 713, 719 (S.D.N.Y.) aff'd, 293 F.2d 769 (2d Cir. 1961); *Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964) (per Weinfeld, J.), aff'd on opinion below, 353 F.2d 484 (2d Cir. 1965, cert denied, 383 U.S. 960 (1966); *Ritchie v. Landau*, 475 F.2d 151 (2d

Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (recognizing defensive non-mutual collateral estoppel); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (recognizing affirmative non-mutual collateral estoppel). Confronted with the plausible risk of a collision between the arbitration panel and the District Court, and with the fact that Chevron would be precluded by adverse findings in the arbitral proceedings, this Court should vacate the District Court's premature exercise of equitable authority, and direct it to abstain from considering Chevron's purely strategic attempt to open a second litigation front in the Southern District of New York.

Chevron's strategic decision in 2009 and 2011 to pursue intertwined arbitral and equitable proceedings poses many of the problems associated with parallel judicial proceedings.[4] It is inefficiently duplicative. It involves blatant forum shopping. It unnecessarily confronts this Court with difficult and far reaching issues of law that need not be reached if Chevron is unsuccessful in the arbitral proceeding. Most importantly, it poses a serious risk of inconsistent answers to sensitive common factual and legal questions concerning Ecuadorian courts, with no clear path to reconciling conflicting rulings.[5] Federal courts initially dealt with efforts to pursue

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Cir. 1973); *American Renaissance Lines, Inc. v. Saxis Steamship Co.*, 502 F.2d 674, 678 (2d Cir. 1974).

[4] A federal court's inherent power to abstain in the context of parallel proceedings is discussed in *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 20 n.23 (1983).

[5] If the Court permits the parallel proceedings to unroll simultaneously, Chevron, as a matter of equitable estoppel and preclusion, will be bound by adverse findings in either *fora*, but neither *fora* will be empowered to preclude non-parties, opening the prospect of conflicting rulings on the validity of the Sucumbíos judgment with no method of reconciling the conflict.

intertwined arbitral and judicial proceedings by routinely staying arbitration pending potentially preclusive judicial resolution of non-arbitrable claims.[6] In *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 216-17 (1985), however, the Supreme Court construed the Federal Arbitration Act as barring courts from staying the simultaneous prosecution of intertwined arbitral and non-arbitral proceedings.[7] In the wake of the *Byrd* decision, federal courts in the Second Circuit have routinely abstained from conducting potentially unnecessary parallel judicial hearings on non-arbitrable claims raising issues common to both the arbitral and judicial proceedings. Eg., *Nederlandse Erts-Tankersmaatscappij, NV v. Isbrandtsten Co.*, 339 F.2d 440, 441 (2d Cir. 1964); *Sierra Rutile Ltd. v.* Katz, 937 F.2d 743, 750 (2d Cir. 1991); *Citrus Mktg Board of Isr. V. L. Lauritzen A/S*, 943 F.2d 220, 225 (2d Cir 1991); *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71 (2d Cir. 1997); *Alexander Chesapeake Appalachia LLC*, 839 F. Supp. 2d 544 (N.D.N.Y.. 2012); *The Provident Bank v. Kabas*, 141 F. Supp.2d 310 (E.D.N.Y. 2001); *DaPuzzo v. Globalvest Mgmt. Co LP*, 263 F. Supp.2d 714 (S.D.N.Y. 2003).

Appellants in 14-832 urge this Court to mandate such an abstention-based approach in this case. Having self-selected BIT arbitration as an adequate remedy at law in 2009, Chevron should not be permitted in 2011, and again in 2014, to ask a court of equity sitting in New York to entertain requests to restrain the enforcement of the same Ecuadorian judgment that Chevron is attacking in the arbitral proceeding. Pending resolution of the BIT arbitration, this Court should instruct the District Court to abstain from considering Chevron's request for a wholly unnecessary prospective injunction

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[6] Eg., *Wilko v. Swan,* 346 U.S. 427, 437-38 (1953); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974); *Barrentine v. Arkansas Best Freight Sys*., 450 U.S. 728, 745-46 (1981).

[7] *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 216-17 (1985); *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985); *CompuCredit Corp. v. Greenwood*, 565 U.S. __ (2012).

against innocent parties in 14-832, who have repeatedly disavowed any intention of seeking enforcement of the Sucumbíos judgment in the United States.

II.

Under the "Unique" Circumstances of this Appeal, the Panel is Empowered to Condition Appellate Relief on Chevron's Agreement to Take Steps Designed to Assure Substantial Justice

Members of the panel expressed concern during oral argument that the traditional appellate remedies of unconditional affirmance or unconditional reversal may not fully achieve justice in this "unique" case. Unconditional affirmance in 14-832 would leave innocent Ecuadorian victims, "guilty" of nothing more than believing in their lawyers, with no path to justice after more than 22 years of litigation. On the other hand, at least one member of the panel noted that unconditional reversal on the "unique" record might expose Chevron to injustice, although not until a court had passed on Chevron's defenses in an enforcement proceeding. Counsel believes that the fact that Chevron will remain free to challenge the validity of the Sucumbíos judgment in any enforcement action (as well as in the BIT arbitration tribunal) tips the remedial balance in this appeal strongly towards vacating the injunction in 14-832. Since the injunction in 14-832 rests solely on a common law cause of action for fraud, the absence of actual fraud on the part of the Ecuadorian victims, coupled with the untainted nature of the Sucumbíos judgment, undermines the lower court's common law fraud-based theory, calling for unconditional reversal in 14-832.

If, however, the Court elects to affirm the injunction in 14-832, given the "unique" nature of this appeal, the Court should condition its affirmance on Chevron's willingness to submit to an accelerated judicial verification proceeding before a genuinely neutral magistrate designed to reassure the Court that the voluminous record before the

Sucumbíos court contained sufficient untainted evidence of widespread pollution to validate the decision of the Provincial Court of Sucumbíos to issue a *de novo* judgment requiring Chevron to remediate the ravaged land. If Chevron agrees to submit to such a verification procedure, this unduly protracted litigation can finally be put to rest quickly and justly. Such a conditional appellate remedy, while extraordinary, would be analogous to the Court's traditional power to issue remittiturs affirming a jury's finding of liability on condition that the prevailing party agree to accept a lesser damage award.[8] If the prevailing party declines such a conditional affirmance, the lower court verdict is overturned, and the entire case set for re-trial. In this case, if Chevron declined to abide by the Court's equitable condition, the District Court injunction would be vacated, with Chevron free to assert its fraud claims as a defense in any enforcement proceeding.

Such a conditional appellate remedy would resemble, as well, the conditional injunction, an imaginative technique pioneered in the equity courts of New York during the last two decades of the 19th century pursuant to which a judge conditioned permission to engage in future behavior on both parties' agreement to act fairly. *Henderson v. N.Y. Cent. RR Co.*, 78 N.Y. 423, 429-30 (1879); *Pappenheim v. Metropolitan El. Ry. Co.*, 128 N.Y. 436 (1891); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1976). In the early conditional injunction cases, businesses alleged to pose a relatively minor common law nuisance were conditionally permitted to continue to

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[8] The Supreme Court has long recognized the power of an appellate court to condition affirmance of a damage award on a remittitur. Eg., *Bank of Commonwealth of Kentucky v. Ashley*, 27 U.S. 327 (1829); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Hansen v. Boyd*, 161 U.S. 397 (1896); *Dimick v. Scheidt*, 293 U.S. 474 (1935); *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). See *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir. 1967). See generally Comment, Appellate Control of Excess Jury Verdicts, 66 U. Cinn. L. Rev. 1323 (1998).

operate, but only if they agreed to pay judicially determined compensation to affected persons. Refusal to pay triggered a flat ban on future activity. Refusal to accept fair compensation triggered unlimited permission to continue the activity. See Note, The Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York, 61 NYU Ann. Surv. Am. Law (2006). While the evolution of modern tort and takings law has lessened the volume of conditional injunctions, the technique continues to be utilized as an imaginative remedial option, especially in settings where courts wish to substitute a liability rule for a property rule. See Jeff L. Lewin, *Boomer* and the American Law of Nuisance: Past, Present and Future, 54 Alb. L. Rev. 189 (1990); Lewis Kaplow and Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996).

With respect, the exercise of imaginative appellate power is particularly appropriate in this case since both Chevron, and to a lesser extent, the Second Circuit bear significant responsibility for the underlying litigation's unduly protracted and complex nature. In 2002, after almost ten years of procedural wrangling, Chevron persuaded the Second Circuit to affirm what, in retrospect, was a deeply unfortunate *forum non conveniens* dismissal in favor of Ecuador. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 626 (S.D.N.Y. 1996) (granting *forum non conveniens* dismissal), vacated and remanded *sub nom. Jota v. Texaco, Inc*, 157 F.3d 153 (2d Cir. 1998), on remand *Aguinda v. Texaco*, 142 F. Supp. 534 (S.D.N.Y. 2001) (re-granting *forum non conveniens* dismissal), aff'd, *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002). Now, after Ecuadorian courts have struggled with this complex, massive litigation for 10 years, Chevron cries foul, denying that substantial untainted evidence of pollution existed in the painstakingly assembled Ecuadorian trial record relied on by the Provincial Court of Sucumbíos. Short of outright reversal of the District Court's unlawful injunction in 14-832, the fairest and most efficient response to Chevron's assault on the Sucumbíos judgment would be to call Chevron's bluff by conditioning appellate relief in

14-832 on Chevron's agreement to submit to a summary verification of the Ecuadorian trial record by a genuinely neutral magistrate.[9] If review of the Ecuadorian trial record verifies the existence of substantial untainted evidence of pollution, the Sucumbíos judgment would be deemed enforceable. If substantial evidence is found lacking, enforcement would be barred by the District Court's injunction. If Chevron refused to participate, the District Court's injunction would be vacated, leaving the Ecuadorian victims free to seek to enforce the Sucumbíos judgment, with Chevron free to raise its defenses in such an enforcement proceeding.

With respect, the one wholly unacceptable appellate ruling in 14-832 would be for the Second Circuit to turn away the innocent Ecuadorian villagers for a second time without providing them a path to justice after 22 years of effort.

Respectfully submitted,

s/ burt neuborne

Burt Neuborne
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[9] The District Court erroneously declined to accept evidence demonstrating that the Ecuadorian trial record contained massive amounts of untainted evidence of pollution attributable to Texaco's leadership of the Amazon basin consortium, deeming it irrelevant to the request for injunctive relief. Respect for, at a minimum, the appearance of neutrality would call for the appointment of a magistrate with no prior connection with this litigation to carry out a summary verification.