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VIA ECF

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

Re: *Chevron Corporation v. Donziger*, Nos. 14-826, 14-832

Dear Judges Wesley, Kearse, and Parker:

I write as counsel for Chevron Corporation ("Chevron") in response to Appellants' supplemental briefing, which was supposed to explain what bearing, if any, the ongoing arbitration between Chevron, Texaco Petroleum Company ("TexPet"), and the Republic of Ecuador ("ROE") under the United States-Ecuador Bilateral Investment Treaty (the "BIT arbitration") has on the resolution of this appeal. Instead, Appellants' briefs range far afield, as they rehash old contentions and raise new issues at this late stage that are unrelated to the arbitration. Their limited arguments about the BIT arbitration show why they have never before, during the four years of this litigation, suggested that the district court should have abstained, stayed, or otherwise deferred to that proceeding: There is no legal or factual basis to do so.

It is perfectly appropriate for a victim of fraud to pursue different claims against different parties in different fora, especially where, as here, no single tribunal has jurisdiction over all of the relevant parties. Perhaps for this reason, rather than asking the district court to defer to the BIT tribunal, up until now Appellants have gone to extraordinary lengths to disparage and impugn the competence and good faith of the tribunal's members and their charge. Any stay or deference owed to the BIT tribunal is thus more than waived—it has been affirmatively and repeatedly disclaimed. But even if Appellants had taken a different tack and instead had asked the court below to stay or dismiss this action out of deference to the arbitration, they would have failed. Appellants' own cited authority makes plain that a pending arbitral proceeding involving different legal claims, different sources of law, different parties, and different requested relief cannot justify the suspension of a federal court's virtually unflagging obligation to exercise its jurisdiction. And no authority supports an appellate court staying a final judgment after a full trial on the merits out of deference to an ongoing arbitration that may be years away from finality.

In fact, Donziger does not claim that the BIT arbitration is a basis to order the district court to abstain or stay its final judgment, as the Lago Agrio Plaintiffs ("LAPs") assert. Instead, facing an injunction grounded in the federal RICO statute and based on unchallenged predicate acts that do not depend on the legitimacy of the Ecuadorian judgment, Donziger seeks complete absolution. He urges this Court to preemptively act as an international arbiter policing a hypothetical "risk of inconsistent findings" (Dkt. 422-1 at 1), so as to preclude the courts of other nations from applying their own normal procedures and substantive rules to sort out whatever potentially preclusive effect any differing future

rulings might have. But this Court has already rejected this misguided approach, explaining in a related case that "there is no reason" to "resolve any entirely hypothetical conflicts between as-yet-nonexistent rulings," because "[a]ny such conflict, should it arise, could be resolved in any resulting proceedings" by future courts, who would apply settled legal principles to the real, rather than hypothetical, facts before them. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 399 (2d Cir. 2011). And Donziger's new claim that the BIT arbitration provides Chevron an "adequate remedy at law" ignores both that the BIT tribunal cannot restrain him or the LAPs, and that the ROE (the only party subject to BIT remedies) has consistently flouted the tribunal's awards and has made plain it intends to continue to do so.

Appellants' arguments unrelated to the BIT arbitration fare no better. The LAPs' counsel calls for an "imaginative appellate power" to condition any affirmance on the results of an "accelerated judicial verification proceeding" to assess whether there was "untainted evidence" supporting the Lago Agrio judgment. Dkt. 421 at 7–9. This unprecedented request contradicts the LAPs' own recent, publicized instructions to that same counsel that "we do not approve, nor will we ever approve, to re-submit the merits of our environmental case before any jurisdiction in the United States or elsewhere." Ex. A at 2. Nor is the argument pressed by Donziger. More important, the LAPs' counsel's proposal lacks any legal justification and ignores the district court's unchallenged factual findings demonstrating that Appellants' fraud and bribery has tainted the entire Lago Agrio record. *See* Dkt. 253 at 113–15. Moreover, Appellants waived any challenge to the district court's exclusion of their so-called environmental evidence, and if they thought they had a basis to show that the district court committed clear error on their "causation" theory, it was *their* duty to prove it in their oversized principal briefs.

The LAPs also reprise their false contention that they are "innocent Ecuadorian victims, 'guilty' of nothing more than believing in their lawyers." Dkt. 421 at 7. This pose is contradicted by the district court's unchallenged findings of the LAPs' complicity in the scheme, and the fact that they continue to seek enforcement of the corrupt judgment in their own names. Indeed, the LAPs recently confirmed that, despite the evidence of fraud, they "stand by" the judgment they are trying to enforce. Ex. A at 2.

Donziger's assertion that Chevron has somehow "refashion[ed]" its claim for equitable relief by referring at oral argument to *Marshall v. Holmes*, 141 U.S. 589 (1891), also cannot be squared with the record. Dkt. 422-1 at 7–10. In fact, the district court expressly relied on *Marshall* in its decision (*Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 562, 564 n.1294 (S.D.N.Y. 2014)), as did the cases Chevron cited in its brief (*see* Dkt. 253 at 95, 151, 163–65). Chevron's position, which is supported by *Marshall* and other authorities, has remained consistent: because the district court had jurisdiction over the Appellants, it could enjoin them from profiting from the fraudulent procurement of the judgment.

Finally, Appellants ignore the most basic rules of appellate procedure as they disregard the standard of review, treat this Court as a finder of fact, and ignore the voluminous evidence in the record supporting the district court's factual findings, which they have never challenged for clear error. In the process, they misrepresent the record in this case, in Ecuador, and in the BIT arbitration.

I. APPELLANTS' IRRELEVANT FACTUAL CONTENTIONS MISREPRESENT THE RECORD

Appellants made no effort in their principal briefs to challenge the district court's factual findings regarding their fraudulent procurement of the judgment, much less attempt to satisfy the heavy burden of attacking the "trial court's credibility determination[s]," which are "entitled to considerable deference." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). Yet Appellants now try to re-argue the district court's detailed and well-supported credibility determinations of trial witnesses like Alberto

Guerra and Nicolás Zambrano, not by citing *evidence* in the record, but instead with quotations from the biased arguments of the ROE's lawyers in their briefs before the BIT tribunal. This is a pointless effort that is premised on untruths about the record.

Appellants claim that the district court's findings of judgment fraud "rest almost exclusively on" the testimony of "Alberto Guerra—and little else" (Dkt. 422-1 at 1), but this ignores the mountain of evidence corroborating the improper relationship with both Guerra and Zambrano (coded internal emails, bank and shipping records, and the hundreds of draft orders found on Guerra's computers, including orders from the Lago Agrio case itself).[1] In fact, most of the district court's findings have nothing to do with Guerra, including its finding that Zambrano did not write the judgment. The district court made detailed findings in support of each underlying RICO predicate act without relying on Guerra, and concluded that Donziger violated the Hobbs Act (extorting Chevron by promoting knowingly false and misleading statements) and the Travel Act (bribing Cabrera), obstructed justice (lying to district courts during the § 1782 proceedings), tampered with witness testimony (altering the Quarles affidavit), and committed wire fraud and money laundering (use of wires to promote an illegal extortion scheme and sending money to Ecuador for fraudulent payments). Dkt. 253 at 75–77 (citing SPA379–403).

Appellants further assert that "there was no bribe" to Zambrano (Dkt. 422-1 at 2), but the district court found the contrary by "clear and convincing evidence" (SPA335). Donziger *admitted* that he and Pablo Fajardo met with Guerra (in Guerra's capacity as the representative of the corrupt Zambrano) at the Honey & Honey Restaurant in Quito and discussed the possibility of a $500,000 bribe in return for control of the judgment. SPA233. But his claim that he turned it down in disgust is belied by the fact that he later proposed to have Guerra testify in *Naranjo* as an expert on the *impartiality of Ecuadorian courts*. SPA279. Similarly misleading is Appellants' assertion that "Chevron claims to have offered Judge Zambrano 'millions to come clean'" (Dkt. 422-1 at 4), which quotes an argument from the ROE's brief that is premised on Zambrano's false hearsay testimony, not any "Chevron claim." And again quoting an ROE *argument*, Donziger falsely asserts that "Chevron does not contest" that several of its own motions are not in the official Lago Agrio record. Dkt. 422-1 at 2 n.2. In fact, the referenced motions are in the official record and Chevron submitted them as trial exhibits below. *See* PX 8010–8013.

Nor can Appellants escape the district court's findings by relying on the ROE's hearsay assertions about the contents of one of Zambrano's computers. Appellants have conceded that these assertions cannot be considered by this Court for their truth, but nonetheless continue to quote them to the Court as fact. *Compare* Dkt. 370-1 at 1 ("*not* for the truth of their content"), *with* Dkt 422-1 at 4 ("As the Republic explains . . ."). In any event, it is not Chevron that has kept the forensic analysis of Zambrano's computers from public view—for all of its bluster about that analysis, the ROE has begged the BIT tribunal to keep the forensic reports themselves under seal because they offer only further confirmation of the district court's findings below. *See* Dkt. 366-1 at 3–4. This echoes Appellants' conduct at trial, when they initially offered an earlier forensic analysis of Zambrano's hard drive, but withdrew it when it became apparent their proffered evidence "contradicted Zambrano's testimony." SPA207.

The district court's primary basis for its finding that "the LAPs wrote at least material portions of the judgment" was the presence in that judgment of pages of material found verbatim in the LAPs' unfiled work product. SPA226. The ROE's forensic expert agreed that portions of the judgment are

[1] Chevron has previously responded to the attacks on Guerra's credibility that Appellants have now recycled before this Court. *See* 691 Dkt. 1847 at 92–102; 691 Dkt. 1855 at 12–27; *see also* Dkt. 253 at 25–26, 30–31.

"identical" to the LAPs' work product. Ex. B at 1194:9–12. The district court also found that those materials did not appear in the Lago Agrio court record (SPA278–79), and now the ROE's forensic expert's analysis of Zambrano's computers has confirmed that the LAPs' work product does not appear there either (Ex. B at 1194:24–1195:3). What *was* found on the older of the two computers in Zambrano's office was a file called PROVIDENCIAS, which contains text nearly, but not completely, matching the issued form of the judgment. No such file was found to have existed on the newer of Zambrano's computers before February 14, 2011, when he issued the judgment, notwithstanding Zambrano's insistence at trial that he had used only the newer computer to compose the judgment. Dkt. 366-1 at 11–12; SPA207. Indeed, a file containing the judgment's text was not placed on Zambrano's newer computer until months after the judgment issued. Moreover, the forensic evidence confirmed that the PROVIDENCIAS file was open for very limited periods of time before Zambrano issued the judgment, that text was pasted directly into the document in large chunks, not typed in word-for-word (as Zambrano testified at trial in this action), and that text copied from the Plaintiffs' internal documents appeared in every version of the judgment found in the Zambrano computers—including matching legal citations that were later deleted to cover up the copying. Dkt. 366-1 at 13. This is not just *consistent* with the district court's finding that Zambrano relied on the LAPs to write the judgment "in major part," it corroborates it, as Chevron has previously explained. *See id.* at 1–2, 10–15.

Finally, the ROE's brief, and Appellants' improper reliance on it here, ignores the analysis of Spencer Lynch, Chevron's forensic expert, who rebutted Racich's baseless conclusions about the import of his analysis, and identified numerous other ways in which Zambrano's computer hard drives further confirm the district court's findings. For example, Lynch identified at least nine separate USB storage devices that were shared between Zambrano's and Guerra's computers. Dkt. 366-4 ¶ 55. And Lynch found that Zambrano's computers contained copies of more than 80 different orders Zambrano issued in various cases, which were also found on Guerra's hard drive, and in every case the copy on Zambrano's hard drive was created *after* the version on Guerra's hard drive—confirming Guerra's testimony that he was Zambrano's ghostwriter on many cases, including the Chevron case. *Id.* ¶ 54.

II. THE ONGOING BIT ARBITRATION HAS NO BEARING ON THIS APPEAL

A. Appellants Waived Any Argument that the BIT Arbitration Has Any Bearing Here. No party ever sought to stay the litigation below or otherwise argued that the BIT arbitration had any bearing on this case—including any argument that the BIT arbitration is a basis for "abstention" or represents an "adequate remedy at law." Nor did Appellants include such arguments in their over-length appellate briefs. They have therefore waived these arguments on appeal. *See McCarthy v. S.E.C.*, 406 F.3d 179, 186 (2d Cir. 2005). The Court should not consider these new arguments now because they were "available . . . below" and yet Appellants "proffer no reason for their failure to raise the[m]." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (internal quotation marks omitted). Moreover, these new arguments for deference to the BIT tribunal contradict Appellants' position throughout the years of litigation up through and including trial, judgment, and completed briefing on appeal. And they are not pure questions of law but turn on fact-intensive discretionary inquiries concerning, among other things, the nature of the issues and evidence before the arbitral panel.

B. Faced With Corruption by Diverse Wrongdoers That Could Not Be Joined in a Single Forum, Chevron Pursued Distinct Claims and Remedies Where It Could Find Jurisdiction. After litigating the Lago Agrio case for years, and faced with the breakdown of the rule of law in the Ecuadorian proceedings, Chevron has appropriately sought available forms of relief in neutral jurisdictions to pro-

tect itself and its shareholders from the ongoing scheme against the company. The BIT arbitration and the case below are founded in different jurisdictional bases, sources of law, and legal claims; they address different parties; and they seek different relief. In fact, Donziger's principal brief concedes that the BIT "proceeding involved different parties and distinct claims from this litigation and was held in an arbitral forum pursuant to an international treaty." Dkt. 150 at 103 (internal quotation marks omitted). There is nothing improper about proceeding simultaneously in civil tort litigation against one set of defendants and contractual arbitration against a different party, even if there are overlapping facts. *See Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750–51 (2d Cir. 1991) (allowing litigation and arbitration to proceed in parallel because "[t]he difference between the parties and issues in the court action and in the arbitration undermines the rationale that the arbitration will have an effect on the stayed action").

The ROE, as a signatory to the BIT, has consented to the arbitration of disputes with U.S. investors. Because the ROE has refused to waive its sovereign immunity Chevron cannot sue it in U.S. courts. *See*, *e.g.*, *Republic of Ecuador v. ChevronTexaco Corp.*, No. 04 CV 8378 (LBS) (S.D.N.Y.), Dkt. 26 ¶ 8. Nor has the ROE sought to intervene in the present case, as it noted in its amicus brief. Dkt. 112-2 at 9. Accordingly, the BIT proceeding provides Chevron with its only avenue of redress against the ROE for its failure to honor its contractual obligations and its violations of international law.

Donziger and the LAPs, on the other hand, are not parties to the BIT treaty, and they have not consented to the tribunal's jurisdiction. *See* 691 Dkt. 410-10 (Ex. 1274) ¶ 4.61; *see also id.* ¶ 4.65 ("[I]t is clear that this Tribunal does not have jurisdiction over the [LAPs] themselves"). In fact, the LAPs (represented by, *inter alia*, Donziger) filed suit in district court to *enjoin* the BIT arbitration, and when they did so, they represented to Judge Sand that they had "no interest in having their views made known to the arbitration panel either by intervening or appearing as an amicus." *Republic of Ecuador v. Chevron Corp.*, No. 09 CIV. 9958 (LBS), 2010 WL 1028349, at *2 (S.D.N.Y. Mar. 16, 2010); *accord Republic of Ecuador v. Chevron Corp.*, No. 10-1020(L), Dkt. 273 (2d Cir.) (asserting that the arbitration has "no role vis-à-vis the [LAPs]"). Thus, Chevron brought this action to secure relief against Appellants.

Indeed, Appellants' current professions of reverence for the BIT tribunal contradict their numerous statements during the previous five years of litigation, repeatedly attacking the legitimacy of the BIT proceedings. *E.g.*, Dkt. 366-11 (referring to BIT tribunal as a "Kangaroo court" that "ha[s] no legal authority to decide major questions of international law"); Dkt. 366-12 ("[T]he arbitration panel did not have the right to make that or any other of its rulings."); Ex. J (Spokesperson for Donziger and the LAPs describing the BIT tribunal as "convened and paid by Chevron, with . . . no proper jurisdiction to consider such claims, and no legitimacy whatsoever"). While Appellants now call the BIT tribunal a "distinguished panel" of "sophisticated arbitrators" (Dkt. 422-1 at 1; Dkt. 421 at 4), Donziger's website to this day refers to them as a "Kangaroo Court" and links to an article from the LAPs' team stating that the tribunal's decisions are "unenforceable as a matter of law and practice." Ex. H (article); *see also* Ex. I (website). Donziger's further praise of the BIT arbitration as proceeding on a "more developed record" is dubious as well, considering that neither Donziger (the briber) nor Zambrano (the bribee) testified before the BIT panel—a strategic decision by the ROE doubtlessly reflecting their performances at trial in this action, where the district court, in findings that go unchallenged on appeal, found that Donziger was an "evasive" witness (SPA277) who gave testimony that "deliberately was false" (SPA275) and that "Zambrano was a remarkably unpersuasive witness" (SPA196).

The BIT arbitration differs significantly from the case below. Chevron initiated the arbitration in September 2009—more than a year before the Lago Agrio judgment issued—based on the ROE's failure

to honor its obligations under the 1995 Settlement and Release Agreement between TexPet, on the one hand, and the ROE and Petroecuador, on the other (the "Release"). Under the terms of the Release—which followed TexPet's three-year, $40 million remediation program—the ROE released TexPet from all environmental liability for "diffuse" or "collective" rights violations arising out of its oil operations in Ecuador. SPA18–19. Although the LAPs were free under the Release to bring individual claims for alleged personal harm—and for this purpose the Court in *Aguinda* granted a full year for the refiling of individual suits in Ecuador (*Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478–79 (2d Cir. 2002))—they did not raise any such claims in Lago Agrio but instead brought the same "diffuse" claims that had already been released. Faced with this already-released "diffuse" claim, Chevron initiated arbitration against the ROE, which had not only failed to honor the Release, but was actively colluding with Ecuadorian and U.S. actors to undermine TexPet's contractual and other rights. SPA132–37. Chevron asked the BIT tribunal for several forms of relief against the ROE, including: (1) a declaration confirming the applicability of the Release to the claims in the Lago Agrio litigation; (2) an order requiring the ROE to take all necessary measures to stop enforcement of the Lago Agrio judgment; (3) an order that the ROE indemnify Chevron against any recoveries made on the Lago Agrio judgment; and (4) monetary damages.

The BIT arbitration has since evolved, and in 2012 Chevron supplemented its claims in response to the ROE's further violations of international law—including the ROE's refusal to abide by the BIT tribunal's awards to prevent enforcement of the Lago Agrio judgment during the pendency of the arbitration. In its new "denial-of-justice" claim, Chevron asserted that in adjudicating the Lago Agrio litigation, the ROE violated its obligation to provide minimum standards of due process required under customary international law and the investment treaty. *See* Dkt. 366-3 at 2–3, 56. Denial-of-justice claims implicate a range of factual questions about the proceedings in Lago Agrio and the judgment itself beyond the corrupt manner by which the judgment was procured, but also other due process questions that were not before the district court in this action—including, for example: (1) the judgment's failure to consider causation issues related to Petroecuador's ongoing oil-and-gas operations in the former Consortium, and (2) the assessment of an objectively unreasonable multi-billion dollar damages award. *See id.* at 73–74. At its core, the BIT arbitration concerns *Ecuador's* conduct.

The RICO and fraud case that produced the final judgment now on appeal grew out of extensive evidence of Appellants' fraud and other misconduct that Chevron amassed by means of, among other things, discovery actions in U.S. courts pursuant to 28 U.S.C. § 1782 that transpired after the BIT arbitration had been initiated. *See, e.g., Chevron Corp. v. Champ*, No. 1:10MC27, 2010 WL3418394, at *6 (W.D.N.C. Aug. 30, 2010) ("[T]he court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court."). More than a year-and-a-half after the BIT filing, and based on this burgeoning evidence, Chevron filed the underlying civil case in the Southern District of New York against Donziger, the LAPs, and others, seeking damages and injunctive relief based on RICO violations and fraud.

It was, therefore, without question appropriate to pursue both the international arbitration and U.S. litigation because there was no way for Chevron to consolidate its claims against the ROE, which arise out of contract and breaches of international law, and which it can bring only in the BIT, with its U.S. law claims against Donziger and the LAPs, over whom the BIT tribunal does not have jurisdiction. *See, e.g.*, *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 49–50 (1974) ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated

merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

C. No Authority Supports Abstention or a Stay of the District Court's Judgment Due to the Pendency of the BIT Proceeding. Ignoring the procedural posture of this appeal from a final judgment following a lengthy trial on the merits, the LAPs proceed as though the district court is now on the cusp of doing something that needs to be prevented, asking this Court to direct the district court to "*defer consideration* of Chevron's *application* for injunctive relief pending the outcome" of the BIT arbitration. Dkt. 421 at 1 (emphasis added); *see also id.* at 6. The LAPs appear to suggest that this Court should temporarily stay the district court's judgment and then, after the BIT arbitration has concluded, the district court would presumably have the opportunity to revisit its 485-page decision and judgment to ensure there are no inconsistencies. There is no authority supporting such peculiar relief—which, presumably, is why the LAPs frame their request as one of "abstention."

Abstention has no application to a final judgment, and in any event the district court had a "virtually unflagging" obligation to exercise its jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Had Appellants ever sought to stay the district court proceedings pending the outcome of the BIT arbitration, there would have been no abuse of discretion in denying that request because none of the recognized, narrow exceptions to this obligation would have applied. *See id*. at 814–17 (describing circumstances where abstention would be permissible).[2] In fact, in several of Appellants' cited cases, the courts *refused* to order abstention in favor of parallel arbitration proceedings. *See, e.g.*, *Nederlandse Erts-Tankersmaatscappij, NV v. Isbrandtsten Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (reversing order granting defendants' motion for a stay pending arbitration between the plaintiff and a third party, where the defendants were not parties to the arbitration agreement). Other cited cases are inapposite because, among other things, they are premised on judicial economy and avoiding the burden of litigating the same issues in two different fora—which do not apply where one of the proceedings has reached a final judgment. *See*, *e.g.*, *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71 (2d Cir. 1997). Indeed, it is not unusual for judicial and arbitral actions to proceed in parallel, particularly when there are different parties and legal claims involved. *See Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S,* 943 F.2d 220, 225 (2d Cir. 1991) (holding that "a nonparty to the agreement herein that provided for arbitration, was not entitled to a . . . stay [under 9 U.S.C. § 3]").

In any event, Appellants have identified no cases in which a court of appeals has stayed a *final judgment* pending resolution of related arbitral proceedings. Indeed, in the international antisuit injunction context, in which parties are seeking an injunction against a foreign proceeding, the general principle is that "parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984). And Chevron has not argued that the district court's judgment is preclusive in the BIT proceedings.

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[2] The LAPs also contend that abstention would be appropriate because they have "repeatedly disavowed any intention of seeking enforcement of the [Lago Agrio] judgment in the United States." Dkt. 421 at 7. But not only does this ignore the district court's unchallenged findings about the potential for U.S. enforcement (SPA178–83, 305 & n.1192), it also cannot be squared with the LAPs' team's recent press releases stating that U.S. enforcement is only "*temporarily* off limits . . . because of Judge Kaplan's RICO decision." Ex. C at 2 (emphasis added); *see also* Ex. D at 2 ("[W]e expect the ruling to be reversed on appeal thus opening up the United States to potential enforcement actions against Chevron."); Ex. E at 6 ("As we have explained, the U.S. judgment is likely to be reversed on appeal in the coming months. That would open up the U.S. to enforcement actions.").

Lastly, abstention or stay of the district court's judgment would make no sense for the additional reason that the judgment encompasses Chevron's RICO claim against Donziger. Regardless of what the BIT tribunal decides, there is not even the possibility of a conflict with the district court's extensive findings as to Donziger's extortion, obstruction of justice, witness tampering, or wire and mail fraud. Nor is there a basis in law or justice for Donziger to receive a free pass for his violations of federal and state law based upon Ecuador's compliance or noncompliance with international law.

D. Any Hypothetical Conflict Between the District Court's Judgment and the Eventual Outcome of the BIT Proceedings Would Properly Be Resolved by a Future Court, as This Court Recognized in Its* Republic of Ecuador *Decision. Depending on how the BIT tribunal analyzes Chevron's claims, it may reach factual questions that overlap with some issues adjudicated by the district court—namely, the fraudulent procurement of the Lago Agrio judgment and the Ecuadorian judiciary's lack of impartiality in highly politicized cases. But there is no reason to presume there will be any conflict with the district court's analysis, particularly given the strength of Chevron's case—as recounted in detail in the opinion below and elsewhere. Moreover, the BIT tribunal is evaluating the questions before it under different legal standards than those applied below, and need not even reach the impartiality of Ecuador's judiciary to find that the ROE violated the terms of the BIT and/or that Chevron was denied justice.

In *Republic of Ecuador* this Court acknowledged that "[a] conflict may arise if the Ecuadorian courts do issue a final judgment, and the arbitrators subsequently enter an award that is inconsistent with that judgment." 638 F.3d at 399. Yet it declined to speculate how such a conflict might present itself, let alone how a future court should resolve it: "Any such conflict, should it arise, could be resolved in any resulting proceedings to enforce the judgment." *Id*. Because "[a]ny conflict . . . remains purely hypothetical," the Court concluded "there is no reason for us to forestall or resolve any entirely hypothetical conflicts between as-yet-nonexistent rulings." *Id*.

The Court's reasoning applies equally to other proceedings where some common facts are being litigated: "Given the extent and fluidity of this dispute, we do not suggest that the possibilities discussed above are the only moves that the parties can or will make, nor do we express any views on how a court should respond to these potential arguments." *Id.* at 399 n.11. The Court specifically referenced Chevron's underlying civil suit against Donziger and the LAPs, in order "to show that *the possible avenues for the parties to seek relief are many* and that allowing the BIT arbitration to proceed does not . . . preclude the possibility that the final chapter in this dispute will be played out in American courts that will be better able to evaluate the factual record than we are today." *Id*. (emphasis added). This restrained approach makes sense, because district courts have "broad discretion to determine when [collateral estoppel] should be applied." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *see also Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 333–34 (1971) (estoppel "will necessarily rest on the trial courts' sense of justice and equity"). It would be inefficient and improper for this Court to speculate how some future court might address a hypothetical estoppel question in whatever context it might present itself, because invocation of collateral estoppel "is influenced by considerations of fairness in the individual case" (*PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004)), and has been recognized as "a fact intensive inquiry that is best determined on a case-by-case basis." *Purdy v. Zeldes*, 337 F.3d 253, 260 n.7 (2d Cir. 2003).[3] Thus, a hypothetical future court confronted

[3] Moreover, even if there were some eventual inconsistency in the rulings between the BIT tribunal and the district court below, "the issue as to which preclusion is sought must be identical to the issue decided in the prior proceeding." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992) ("[i]ssues of fact may bear the same

with conflicting rulings about Ecuador's tribunals could have discretion not to apply estoppel effect to either decision. *See, e.g.*, *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 92 (2d Cir. 2005).

The Court thus should reject the Appellants' belated arguments about hypothetically inconsistent rulings. This is especially the case here because Appellants are in no position to complain about potential inconsistent judgments, given the numerous enforcement actions they have been able to initiate as a result of their successful arguments in *Naranjo*. *See* Dkt. 253 at 93–94.

E. Neither the BIT Arbitration Nor Any of the Other Supposed "Remedies" Identified by Donziger Is an "Adequate Remedy at Law" Warranting Vacatur of the District Court's Injunction. Donziger points to four proceedings that, he claims, constitute adequate remedies at law, notwithstanding his failure to raise this issue as a ground for his appeal. Dkt. 422-1 at 4–7. None of these other "remedies" undermines the district court's discretionary decision to grant Chevron equitable relief.

The BIT arbitration is not an adequate remedy at law for the various injuries flowing from Donziger's misconduct because, among other reasons, Donziger is not a party to the BIT arbitration or bound by the tribunal's orders. Indeed, at the same time that he argues the arbitration provides a "superior" remedy for Chevron, Donziger leaves himself room to continue attacking the BIT proceeding and disregarding its rulings because of supposed "concerns over the power of investor-state arbitral tribunals." Dkt. 422-1 at 5. And the ROE has consistently refused to follow the BIT tribunal's orders. For instance, in 2012, the panel ordered the ROE to "take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador" of the Lago Agrio judgment. SA5581.51. The ROE has flouted these orders and the BIT panel expressly "declare[d] that the [ROE] has violated the First and Second Interim Awards under the [BIT] and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina." SA5581.56. All levels of Ecuador's government have joined in this disregard of international law, with its courts rejecting the tribunal's decisions (SA6245) and President Correa publicly referring to tribunal members as "pimps." Ex. F at 1.

In addition, final relief from the BIT arbitration is likely years away. The ROE would be able to challenge any relief in the civil court system in the Hague, which could include three separate levels of challenges—and in fact, the ROE has already moved to set aside the First Partial Award and the Interim Measures Award, and a hearing will be set for later this year. Meanwhile, Appellants are already pursuing enforcement actions in Ecuador and three other countries, with more threatened, and they have already seized assets held by Chevron subsidiaries in Ecuador.

Furthermore, defending against multiple enforcement proceedings is not a remedy at all, but a cost Appellants seek to impose on Chevron for its refusal to give in to their extortionate demands. The district court was correct when it found that requiring Chevron to litigate multi-year enforcement actions in country after country with no discernable end date is "'incomplete and inadequate to accomplish substantial justice.'" SPA484 (quoting *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972)). Appellants did not challenge that common-sense finding in their appellate briefing.

Appellants also waived reliance on the Collusion Prosecution Act when they failed to present it to the district court, notwithstanding their belated—and cursory—reference to it in their opening brief on appeal. *See* Dkt. 253 at 176–77. Donziger suggests he preserved this issue in the district court because

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label without being identical" where "the legal standards governing their resolution are significantly different").

the Collusion Prosecution Act was referenced in an Ecuadorian decision that he "put before the district court" for a completely different purpose. Dkt. 422-1 at 6. This is nonsense. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Regardless, the Collusion Prosecution Act is inadequate because it depends on the proper administration of justice by Ecuador's corrupt courts, it would not prevent the judgment's enforcement and could not make Chevron whole for the harms it has already suffered, and for the additional reasons Chevron identified in its principal brief. Dkt. 253 at 177–78.

Finally, Chevron's pending application in the Constitutional Court of Ecuador is subject to the political control of the ROE, which remains Appellants' staunch ally. Moreover, it is merely a limited challenge to constitutional issues, not an appeal of the judgment.

III. THE LAPS' "ACCELERATED JUDICIAL VERIFICATION" PROPOSAL IS CONTRARY TO LAW

A year and a half after the trial concluded, the LAPs have proposed for the very first time an "imaginative technique" in which this Court would "condition its affirmance on Chevron's willingness to submit to an accelerated judicial verification proceeding before a genuinely neutral magistrate." Dkt. 421 at 7–8. The "accelerated judicial verification" proposal is fundamentally at odds with the LAPs' stated wishes just weeks ago. Following the oral argument, during which the panel asked about the propriety of a "retrial,"[4] the LAPs immediately wrote to their counsel (and "leaked" the letter to the media) and instructed him that "we do not approve, nor will we ever approve, to re-submit the merits of our environmental case before any jurisdiction in the United States or elsewhere." Ex. A at 2. Donziger's counsel has likewise rejected a retrial of the Lago Agrio case as "fanciful." Ex. G at 3.

Furthermore, the LAPs do not appear to be proposing a full retrial of the district court case or the Lago Agrio case, but rather yet another attempt to "cleanse" the fraudulent Lago Agrio judgment.[5] Yet just as the Ecuadorian appellate courts could not possibly have cleansed the Lago Agrio record, as Chevron has explained, a U.S. court could not do so either. Dkt. 253 at 102–19. Among other problems, the court would need to identify any supposedly "untainted evidence" in the "voluminous" record (Dkt. 421 at 7–8), which would require a painstaking analysis of the impact of Appellants' fraud. *See* Dkt. 253 at 105–15 (explaining how Appellants' misconduct necessarily tainted the entire evidentiary record); SPA545–57 (explaining how the fraudulent Cabrera report was material to the judgment); *cf. Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 608 (1993) ("appeal

[4] Judge Wesley queried at oral argument that the authority to order a retrial of the Lago Agrio case on the merits in an enforcement action might be found in English law. No such authority exists. What English courts will sometimes do, under a line of cases stemming from *Abouloff v Oppenheimer* (1882) 10 QBD 295, is hold a trial on a judgment-debtor's assertion that a foreign judgment was procured by fraud. *See AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (holding that an English court need not defer to a foreign court's finding that its proceedings were not infected with fraud); *Owens Bank plc v Bracco* [1992] 2 AC 443; *Jet Holdings Inc. v Patel* [1990] 1 QB 335. To the extent the foreign court examined some of the same factual questions, such as where the fraudulent conduct was brought to the attention of the foreign court and disregarded, this subsequent proceeding can arguably be seen as a partial "retrial"—but it is not a retrial on the merits of the underlying claim.

[5] The LAPs claim they should receive special treatment from this Court because this Court "bear[s] significant responsibility for the underlying litigation's unduly protracted and complex nature." Dkt. 421 at 9. But contrary to this mischaracterization of the prior *Aguinda* proceedings, it was the *Aguinda* plaintiffs who prolonged that litigation, engaging in lengthy discovery, moving for reconsideration, filing multiple appeals, and even seeking a writ to recuse the presiding judge. *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001).

and trial *de novo* will not cure a failure to provide a neutral and detached adjudicator").

Absent any actual support for the LAPs' proposed "imaginative" procedure, the LAPs analogize to appellate remittitur of excessive damages awards. Dkt. 421 at 8–9. But remittitur it is not a means to engage in additional fact-finding unrelated to the trial itself. *See Hansen v. Boyd*, 161 U.S. 397, 411 (1896). And if Chevron does not accept the "remittitur" here, the LAPs are not proposing a retrial of the RICO and fraud claims against Appellants; instead, they are suggesting that this Court should vacate the district court's injunction as if the lengthy trial in the district court never happened. Dkt. 421 at 8. Nor is the LAPs' verification proposal akin to a "conditional injunction," which some New York courts have issued in cases involving publicly beneficial nuisances. The LAPs are not proposing that if Chevron refuses their judicial verification idea, this Court would convert the injunction against the LAPs into one that would dissolve in the event the LAPs paid Chevron's damages. Rather, the LAPs are proposing that in the absence of any demonstrated error on appeal, this Court should nonetheless create a new remedy in the first instance, and require Chevron to return to the district court to litigate an entirely different set of issues even though it has already proven that the Ecuadorian judgment was fraudulently procured.

Not only is there no authority for the LAPs' "imaginative technique," it is foreclosed by settled U.S. law, which does not permit adjudicated wrongdoers a second bite at the apple. "Once a litigant chooses to practice fraud, that misconduct infects his cause of action, in whatever guises it may subsequently appear." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1121 (1st Cir. 1989). "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).[6]

IV. CHEVRON'S REFERENCE TO *MARSHALL V. HOLMES* HAS NOT CHANGED THE LEGAL BASIS FOR ITS CLAIM FOR EQUITABLE RELIEF FROM THE FRAUDULENTLY PROCURED JUDGMENT

Donziger claims that by referring at oral argument to the decision in *Marshall v. Holmes*, 141 U.S. 589 (1891), "Chevron's counsel pivoted 180 degrees" and introduced a "new argument" that its claim for equitable relief was directed to "the *persons* who hold some interest in" the Lago Agrio judgment. Dkt. 422-1 at 7–8. Donziger is wrong. Chevron's statement was not a "change" of its position. The district court itself specifically cited *Marshall* in its analysis of Chevron's claim for equitable relief. SPA347 n.1294. *Marshall* was also cited in *United States v. Beggerly*, 524 U.S. 38 (1998), *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and *Griffith v. Bank of New York*, 147 F.2d 899 (2d Cir. 1945), cases that Chevron discussed in its brief. *See* Dkt. 253 at 95, 151, 163–65.

The relief recognized in *Marshall* is precisely what Chevron sought and the district court issued in this case, as Chevron noted at argument. *See* Tr. at 43–45. *Marshall* held that while a federal court "cannot require [a] state court itself to set aside or vacate" a judgment, "it may, as between the parties before it, if the facts justify such relief, adjudge that [a judgment creditor] shall not enjoy the inequitable advantage obtain by his judgments" in "an original, independent suit." 141 U.S. at 599. Because a "decree to that effect would operate directly upon" the judgment creditor over which the court had jurisdic-

[6] The LAPs contend that the "summary verification" procedure would also remedy the district court's exclusion of purported evidence of "pollution attributable to Texaco[]." Dkt. 421 at 10 n.9. But the district court explained repeatedly that such evidence was irrelevant to any issue in the trial. SPA16. Appellants have not challenged those evidentiary rulings, let alone showed that they were an abuse of discretion.

tion and "would simply take from him the benefit of judgments obtained by fraud." *Id.* at 599–600.

Donziger is wrong that the "*in rem/in personam* distinction" was a "new argument" first raised at oral argument. Dkt. 422-1 at 8. As the district court explained, Chevron "does not seek to set aside the Judgment in the Ecuadorian court"; rather, "it seeks equitable relief that will strip Defendants of any profits they are able to procure as a result of their corrupt judgment" and "to enjoin enforcement of the Judgment in the United States." SPA330 (internal quotation marks omitted). This relief was available because "equity acts *in personam*" and thus "affords ample scope for equitable relief short of voiding or setting aside a fraudulent judgment." SPA332–33. Chevron likewise argued in its brief that the issuance of equitable relief was proper "[b]ecause it had jurisdiction over Appellants." Dkt. 253 at 151. Indeed, Donziger's counsel claimed at oral argument—*before* undersigned counsel had said a word—that Chevron was trying "to re-characterize this as an *in personam* proceeding." Tr. at 7.

Donziger's remaining contentions are also unpersuasive. He argues that *Marshall* is distinguishable because Louisiana state law authorized an "'action to annul a judgment obtain through fraud, bribery, forgery of documents.'" Dkt. 422-1 at 8 (quoting *Marshall*, 141 U.S. at 598). But as Chevron has explained, New York has long recognized "that a court of equity may render a decree in regard to property, even when in another state or *country*, and in effect stay the execution of a foreign judgment, or a judgment recovered in a Federal court, when the parties are within the jurisdiction of the court." *Davis v. Cornue*, 151 N.Y. 172, 178 (1896) (emphasis added); *see also* Dkt. 253 at 164–67; *Venizelos v. Venizelos*, 30 A.D.2d 856 (2d Dep't 1968) (enjoining enforcement of Greek judgment).

Donziger's reliance on *Harrison v. Triplex Gold Mines*, 33 F.2d 667 (1st Cir. 1929), is also misplaced. Dkt. 422-1 at 9. *Harrison* turned on the fact that the allegations of fraud had "been presented to" the Canadian courts, the judgment debtor had "a full and fair opportunity" to "present every defense to the action," and those defenses were "contested and denied" by the Canadian courts. 33 F.2d at 671–72. By contrast, the intermediate Ecuadorian appellate panel stated that it was "stay[ing] out of these [fraud] accusations, preserving the parties' rights . . . to continue the course of the actions that have been filed in the United States of America." A462. And even if it had passed on Chevron's fraud claims, that court's ruling would not be preclusive here because, as the district court found, "Ecuador does not provide impartial tribunals or procedures compatible with due process in cases of this nature." SPA482.[7]

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Appellants' new arguments are meritless. The Court should affirm the judgment in its entirety.

Respectfully,

/s/ Theodore B. Olson
Theodore B. Olson

cc: All counsel of record (via ECF)

[7] Donziger rehashes several erroneous claims that Chevron has already addressed. First, the district court did not "add an equitable claim" to Chevron's complaint after trial. Dkt. 422-1 at 7. That claim was always asserted in Chevron's complaint, and the parties were on clear notice of it long before trial. Dkt. 253 at 173–75. Second, Donziger claims Chevron has not "identified the contours of its common-law claim," Dkt. 422-1 at 10, but both the district court and Chevron have done just that, *see* SPA330–34; Dkt. 253 at 175. Third, Donziger again claims that his acts of fraud and bribery—acts which directly led to the issuance of the Lago Agrio judgment—were somehow insufficient to establish causation. Dkt. 422-1 at 10. Not so. *See* Dkt. 253 at 78–80, 102–19, 147–50.