

11-1150-cv(L)

11-1264-cv(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

——
CHEVRON CORPORATION,

Plaintiff-Appellee,

v.

HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE,
STEVEN R. DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Appellants,

(Additional Caption On the Reverse)

—
*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF FOR PLAINTIFF-APPELLEE CHEVRON CORPORATION

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state that Chevron Corporation is a publicly traded company (NYSE: CVX) that has no parent company. No publicly traded company owns 10% or more of its shares.

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TABLE OF ABBREVIATIONS

The following abbreviations will be used in Chevron Corporation’s Brief:

Donziger.Br.	Opening Brief for Appellants Steven R. Donziger and the Law Offices of Steven R. Donziger
LAPs.Br.	Opening Brief for Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje
A	Appendix (“A”), preceded by volume number in which the cited pages appear (<i>e.g.</i> , 2A100 refers to page 100 in Volume II of the Appendix)
SPA	Special Appendix
SER	Supplemental Excerpts of Record
FLA	Chevron’s concurrently filed Foreign-Law Addendum
RJN.Ex.	Exhibits to Chevron’s concurrently filed Request for Judicial Notice
MTS.Ex.	Exhibits to Chevron’s concurrently filed Motion to Supplement
CRS	CRS refers to the clip number of excerpts from the unreleased footage from the movie <i>Crude</i> . It is preceded by an exhibit number, corresponding to the exhibit number on the three CDs containing video files of the <i>Crude</i> outtake clips that are part of the Appendix, but separately submitted to this Court.
Anton.Br.	Brief of Amici Curiae International Law Professors in Support of Appellants
EDLC.Br.	Brief of Amicus Curiae Environmental Defender Law Center in Support of Appellants
ROE.Br.	Brief of Amicus Curiae the Republic of Ecuador In Support of Appellants

PRELIMINARY STATEMENT

District Judge Lewis A. Kaplan properly imposed a status quo injunction, based on an uncontroverted record of admissions from Appellants and their agents, amassed from evidence produced pursuant to federal court orders and repeatedly upheld on appeal by this Court and others. Appellants' admissions on videotape and in internal emails leave no doubt about Appellants' illicit scheme. For example, their legal team openly worried that revelations from U.S. discovery proceedings would be "potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail)." 5A1387-89. They even admitted "it appears" that the "plaintiffs can be charged with a 'fraud.'" 5A1390. Upon learning of the scheme, several U.S. lawyers engaged to oppose Chevron's 28 U.S.C. §1782 discovery actions, including the Constantine Cannon firm, made "abrupt decision[s] to no longer be involved in the case." 13A3540; 13A3542. Other former co-counsel have characterized Appellants' acts as "not defensible," and "potentially improper and unethical, if not illegal." 19A5212; 9A2481.

Abundant evidence demonstrates that the \$18-billion Ecuadorian Judgment ("Judgment") is fraudulent and that Appellants intend to use it to disrupt Chevron's operations around the world in order to force Chevron to pay them off. 8A2034-35, 2044; 14A3728-30, 3744-45; SPA69. Thus, the District Court's temporary, targeted restraint, preliminarily enjoining the fraudulent Judgment's procurers from

seeking to enforce it elsewhere, pending a November trial on the merits, is completely unremarkable.

What is extraordinary is not the preliminary injunction, but the overwhelming and undisputed evidence of Appellants' wrongdoing, primarily perpetrated, aimed at, or directed from the United States. Appellants and their co-conspirators operated under the credo, expressed by Donziger and his Ecuadorian co-counsel, Pablo Fajardo, that "[i]f you repeat a lie a thousand times it becomes the truth." 12A3217. When, for example, Appellants' co-conspirator Ann Maest of Stratus Consulting told Donziger that there was no evidence of groundwater contamination, Donziger responded that it did not matter because their "evidence" was "smoke and mirrors and bullshit[,] [i]t really is," and "this is Ecuador," where so long as "there's a thousand people around the courthouse, you're going to get what you want." Ex.1, CRS-195-05-CLIP-01; 4A932-33.

Undisputed evidence shows Appellants intentionally plotting to exploit an Ecuadorian "judicial system ... [that] is so utterly weak" (Ex.1, CRS-053-02-CLIP-01; 21A5954) and filled with judges who are "all corrupt" because "it's their birthright to be corrupt" (Ex.1, CRS-053-02-CLIP-03; 3A699). They used self-described "dirty" "pressure tactics" to force judicial compliance with their demands—including bursting into a judge's chambers and haranguing him into stopping a judicially approved inspection of the laboratory the Lago Agrio Plaintiffs

(“LAPs”)¹ were using to “analyze” environmental samples. Ex.1, CRS-052-00-CLIP-05; 3A689; *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 289 (S.D.N.Y. 2010). In their own words, the inspection would have been a “DISASTER” for Appellants (15A4152), since this lab was not properly accredited (SER201), and lacked the equipment to conduct tests it purportedly ran (21A6009).

Appellants went to great lengths to cover up their wrongdoing, using secret code names to disguise their illicit interactions with the judge (the “cook” or “boss”) and the supposedly “neutral” and “independent” court expert Richard Stalin Cabrera Vega (the “waiter” or “Wao”), whose report they ghostwrote.

14A3979; 9A2340; 15A4145; *see* 5A1270-74; 15A4055-60, 4064-65. Appellants falsely represented in Ecuadorian court filings that the notion that Cabrera “works for us” is “simply ridiculous” (11A2946), “a despicable accusation that has NEVER been true” (8A2183). Cabrera, ordered to maintain “strict independence” from the parties (9A2313), likewise insisted that allegations that the LAPs had “provided [him] with technical information and support staff to assist with the ex-

¹ Because only two of the 47 LAPs appeared in the District Court (though all purportedly authorized Patton Boggs to represent them in related litigation), the LAPs’ brief is filed on behalf of two “LAP Representatives.” Chevron uses the term “LAPs” interchangeably to refer to the two LAPs proceeding in this Court and the LAPs as a whole.

pert examination” were “untrue,” declaring “the idea that the plaintiffs would be helping [him] with that” was “unthinkable” (15A4025). In U.S. court filings and congressional testimony, Appellants described Cabrera as an “independent” court expert, akin to a U.S. “Special Master.” 8A2065; 12A3275. And Appellants’ co-defendant Stratus, after ghostwriting the report Cabrera adopted “pretty much verbatim” (5A1243), originally claimed to be “astonish[ed]” to see “similarity” between its work and Cabrera’s, and said it had no “opportunity to review Cabrera’s report in draft form” (13A3432; 13A3403).

The evidence of Appellants’ malfeasance is overwhelming, and the District Court was more than justified in crediting that evidence, much of which reflects Appellants’ own contemporaneous acknowledgment of the wrongfulness of their actions. Appellants concede the point by ignoring most of Judge Kaplan’s detailed, 128-page opinion and instead relying heavily, without acknowledgement, on arguments they either did not make to the District Court or made only belatedly, and on “evidence” that is not part of the preliminary injunction record, trying to blame Chevron for the fraud they perpetrated. This is improper and unavailing.

1. On this record, the injunction is unexceptional and poses no comity concerns. The District Court’s injunction merely maintains the status quo until the upcoming trial on the merits. It enjoins individual actors properly before it, not any foreign court. The unstated assumption of Appellants’ “comity”

argument—that other countries have an affirmative interest in being asked by Appellants to seize the property of Chevron subsidiaries (which are not even judgment-debtors) for Appellants’ benefit—is unsupported and nonsensical.

There is nothing “arrogant” about applying New York’s Recognition Act to evaluate, among other things, the impartiality and due process afforded by Ecuador’s courts, as well as Chevron’s allegations of fraud. The District Court’s preliminary findings on these grounds represent the straightforward application of the statute to the largely uncontroverted record before it, not an international crisis.

The record makes clear that no other country or court has a greater interest in the adjudication of Chevron’s claims. Appellants fought for years to sue Texaco in the Southern District, claiming it was the proper forum. Appellants also sued Chevron in the Southern District seeking to stop the arbitration Chevron commenced pursuant to the U.S.-Ecuador Bilateral Investment Treaty (“Treaty Arbitration”) (8A2052-53), asserting in that action that New York law would “give[] [Chevron] the forum and a venue” to determine the propriety of the Ecuadorian Judgment (14A3756). While Appellants assert there is no “evidence that recognition or enforcement would be sought in the U.S., let alone New York” (LAPs.Br.1), this is false. Indeed, before Chevron uncovered their fraudulent scheme, the LAPs publicly stated for years their plan to immediately seek to enforce any Ecuadorian Judgment in the United States:

- *Donziger, April 14, 2008*: “[I]f we get a judgment out of Ecuador, we will take that judgment, if they don’t pay it, come back to the US court and get the judgment enforced.... We are not waiting for the appeals process, as is our right.” Ex.1, CRS-482-00-CLIP-01; 5A1123.
- *Fajardo, September 4, 2009*: “[W]e will seek an injunction ... in other words, in the United States to have the funds seized and ensure complete enforcement of the judgment in Ecuador.” 8A2077.
- *Amazon Defense Front, June 24, 2009*: “[R]epresentatives from the communities say they will seek to enforce any judgment against the oil giant immediately in U.S. courts” 14A3749.

Indeed, in their initial opposition to the preliminary injunction motion here, the LAPs argued that the specified grounds in the New York Recognition Act provided Chevron with an “escape hatch” from “[w]hatever horrors that could occur in the future in an Ecuadorian case.” 16A4317-18. The preliminary injunction in no way “smacks of judicial imperialism” (LAPs.Br.3), but rather holds Appellants accountable for their own prior actions and statements in this forum.²

2. The District Court did not clearly err in concluding that Chevron

² The District Court is one of two tribunals to take preliminary measures against the Ecuadorian Judgment: An international arbitral tribunal convened under the U.S.-Ecuador Bilateral Investment Treaty recently entered an interim measures order requiring the Republic of Ecuador to take all reasonable measures to prevent the Ecuadorian Judgment from becoming enforceable there or abroad. SER176-79. Appellants are not a party to that proceeding, and thus the Tribunal’s award does not apply directly against them.

was threatened with irreparable injury. The injunction was—and is—necessary to maintain the status quo, which direct evidence proves Appellants planned to alter as soon as possible by mounting a worldwide “multiple front[]” assault of enforcement proceedings abroad and prejudgment attachments to “compound the pressure” on Chevron to pay them off. 14A3728, 3730. According to Appellants, they plan to avoid jurisdictions that “permit[] a court to consider whether ‘the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court,’” and target jurisdictions subject to their “political connections.” 14A3729, 3735. That Appellants have not yet executed their plan, following the entry of the injunction, does not undermine the District Court’s reliance on these statements. And if Appellants find even a single jurisdiction that will recognize the Judgment, their resulting seizure of assets will be irreversible; the LAPs, whom Appellants have long portrayed as virtually insolvent, would not be able to repay the wrongfully seized funds. Nor will a belated determination that the Judgment was obtained by fraud undo the harm to Chevron’s reputation and goodwill Appellants seek to inflict.

3. Chevron is likely to succeed on the merits. Appellants’ attempt to evade the very court they repeatedly represented should decide a recognition action confirms the wrongfulness of their conduct, the bankruptcy of their Judgment, and the likelihood that Chevron will succeed on the merits. Appellants’ post-hoc de-

fenses of the Judgment are unavailing. Even if Ecuadorian law permitted Appellants' fraudulent conduct, which it did not, that would only confirm the lack of due process there. And even if the Ecuadorian judge had "disregarded" the fraudulent Cabrera Report, which was the exclusive "evidence" of causation in the case (*see* 10A2590; 11A2839-40), this would not erase the fraud permeating the Judgment. "A malefactor, caught red-handed, cannot simply walk away ... and begin afresh.... 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).

4. The balance of hardships tips decisively in Chevron's favor. The District Court required Chevron to post a \$21-million bond to cover the time value of the Judgment if it were determined that the injunction was wrongfully entered. SPA124. Especially in view of Appellants' claim that they cannot presently seek enforcement, the balance of hardships tilts decisively in Chevron's favor.

5. The District Court has personal jurisdiction. Appellants have a wealth of contacts with New York that make jurisdiction proper. Here, too, Chevron's evidentiary showing was entirely unrefuted: these two LAP Representatives have appeared as parties to litigate related issues in the Southern District on four prior occasions. *E.g.*, 8A2052; 13A3666. And they have frequently availed themselves of the benefits of legal counsel in this District for nearly 20 years through

their New York attorney, Donziger, and other New York law firms. Finally, their agents here, including Donziger, the “epicenter” of their cause, have orchestrated, directed and effectuated this fraudulent scheme largely from New York. 6A1412.

6. Chevron’s suit is ripe. The very purpose of declaratory-judgment actions is to “afford a speedy and inexpensive method” of adjudicating legal rights “without awaiting a violation of the rights or a disturbance of those rights.” *Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 397 (2d Cir. 1975). Donziger has expressly stated that “[w]e are not waiting for the appeals process” before commencing enforcement actions (5A1123), a threat made plausible by a treaty giving Appellants the ability to seek attachments in certain Latin American countries, even before the appeal is complete.

7. Appellants’ remaining complaints are meritless. Appellants’ hodgepodge of additional complaints falls far short of demonstrating any legal error or abuse of discretion. In light of the time limitations imposed on TROs by Federal Rule of Civil Procedure 65, and the LAPs’ refusal to stipulate to extend the TRO (SPA116), the District Court did not abuse its discretion in refusing to accept Appellants’ untimely submissions. Appellants’ surreptitious reliance on this excluded “evidence” on appeal is no more proper. Moreover, Appellants’ false “facts” leave uncontroverted Chevron’s showing of their fraud. Appellants’ challenge to the injunction’s form is both untimely and baseless; the District Court

stated that it did not interpret the injunction to bar them from communicating with counsel or funding the litigation. 32A8892-93. When they eventually admitted that their real objective was permission to profit from violations of the injunction, the Court properly rejected their gambit. 32A8926-27 n.3, 8943; 32A8885-86.

Finally, there is no basis to reassign this case. Indeed, this Court complimented Judge Kaplan in a related case for “the exemplary manner in which the able District Judge has discharged his duties,” adding that “all concerned, not least this Court, are well served” by his stewardship. *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App’x 393, 396 (2d Cir. 2010). Appellants’ castigation of a highly respected federal judge is worthy only of rebuke.

Accordingly, this Court should affirm the preliminary injunction.

COUNTERSTATEMENT OF THE ISSUES

Whether the District Court acted within its broad discretion by issuing this preliminary injunction, which maintains the status quo pending an upcoming trial on the merits, under the law and in the venue Appellants have previously represented to be proper.

STATEMENT OF THE CASE

Chevron brought this action against Donziger, the 47 LAPs, the Amazon Defense Front (“Front”) (the designated beneficiary of the Ecuadorian Judgment), and their agents (“defendants”) on February 1, 2011. Chevron seeks, among other re-

lief, a declaration that the multi-billion-dollar judgment of a provincial court in Lago Agrio, Ecuador, is not entitled to recognition or enforcement. 1A67-221.

On February 3, Chevron moved for a TRO and preliminary injunction restraining defendants from attempting to enforce the Judgment, which was imminent. *See* 2A228-3A577. Chevron promptly served all defendants, and the Court set a hearing for February 8. 1A222-27; SPA103-04. Appellants' suggestion that the TRO was entered without notice is untrue.

On February 8, two of the 47 LAPs, Appellants here, filed a 67-page opposition and 1,215 pages of exhibits. 16A4298-5181. Although the 47 LAPs are pursuing other U.S. litigation through counsel Patton Boggs, *see In re Application of Yaiguaje*, No. 10-mc-80324 (N.D. Cal.), the remaining LAPs did not appear. Nor did their Ecuadorian counsel and co-defendant, Pablo Fajardo. SPA7. At the close of the hearing, Judge Kaplan inquired whether the LAPs would agree not to take any enforcement action for two weeks (19A5216-17); the LAPs never agreed.

Following the hearing, the court granted the TRO and set February 11 as the deadline for filing any additional oppositions, and February 15 for Chevron's reply. 19A5232. No party objected to this schedule. SPA125. The LAPs filed another opposition brief on February 11. 19A5241-60. Although he was present at the February 8 hearing (19A5182), Donziger submitted nothing. No party requested an evidentiary hearing.

The very next week—despite having just proclaimed that he still had 50,000 pages of the 200,000-page record to review (15A4150)—the Lago Agrio judge issued a 188-page Judgment against Chevron for \$8.6 billion, with an additional \$868 million for the Front. The court also ordered that an \$8.6-billion “penalty” be imposed unless Chevron issued a “public apology” in the U.S. and Ecuadorian press within fifteen days, before any appeal. SPA56-58; Dkt. 168 at 184-86.

On February 18, Judge Kaplan held oral argument on the preliminary injunction motion. A21-6035. When Donziger’s counsel sought additional time, the Court offered to oblige if defendants would agree to an extension of the TRO; the LAPs refused. 21A6077-84.

On February 25, two weeks after the deadline, Donziger attempted to file an opposition brief. 27A7534. On February 28, the LAPs filed over 700 pages of additional material without seeking leave. 28A7653-8467. On March 4, the LAPs moved for leave to file a third opposition and 400 more pages of exhibits. 36A9668-10155. The Court rejected these untimely submissions and excluded them from the preliminary injunction record. SPA121-28.

On March 7, the District Court granted the status quo injunction, preliminarily enjoining defendants “from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the

judgment previously rendered ... or any other judgment that hereafter may be rendered in the *Lago Agrio Case* by that court or by any other court in Ecuador in or by reason of the *Lago Agrio Case* ... or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment.” SPA129.

STATEMENT OF FACTS

I. Background

A. **TexPet Participates in Ecuadorian State-Controlled Oil Operations, Remediates, and Is Fully Released From Liability**

In 1964, the Republic of Ecuador (“ROE”) granted oil-exploration and thereafter production rights in the Oriente to a consortium, including the Texaco Petroleum Company (“TexPet”), a fourth-tier subsidiary of Texaco. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001). ROE regulated the consortium’s activities. *Id.* By 1976, the state-owned oil company, now called Petroecuador, had taken a 62.5% majority stake. *Republic of Ecuador v. Chevron-Texaco Corp.*, 376 F. Supp. 2d 334, 340 (S.D.N.Y. 2005). Petroecuador assumed full operational control in 1990 and total ownership in 1992. *Id.* at 340-41.

ROE, Petroecuador, and TexPet entered into agreements pursuant to which TexPet was to remediate roughly 37.5% of the environmentally impacted consortium wellsites, approximating its ownership share in the former consortium.

6A1564-73; 6A1613-39. These arm’s-length agreements were in no way “unconscionably favorable” to TexPet (LAPs.Br.10). *See* 6A1580-84. In negotiating

them, ROE consulted “every possible organization,” including the Front, even though the authority to vindicate any communal environmental rights was held exclusively by the State. 6A1545, 1547-50, 1580-84; *see* 6A1574-78. Contrary to Appellants’ statement, there were not hundreds of “hidden pits” found at the sites (LAPs.Br.10), and indeed, one of Appellants’ experts admitted after review of a higher resolution photograph of one such “pit” that “this appears to be a tree.” 21A6023. TexPet remediated its sites and met the other requirements of its agreements with ROE at a cost of nearly \$40 million. 14A3722.

As documented with scientific, photographic, and other evidence, TexPet’s remediation met specific standards set by ROE (6A1585; 6A1598), and ROE issued nine decrees certifying the adequacy of the remediation, following its inspection by outside auditors. *See* 6A1598-612. As Douglas Beltman of Stratus admitted internally, he could not find any “clear instances where Texpet did not meet the conditions required in the cleanup,” and sampling conducted by the outside auditor “showed the pits to be in compliance with the contract requirements.” 21A5927-28. In fact, Hugo Camacho, one of the two LAPs appearing here, serving as the President of an Ecuadorian town, wrote a 1997 letter to Texaco’s CEO “to present testimony of real gratefulness to Texaco Petroleum Company for the environmental remediation work performed on the creek which has its origin near Well SA-89,” and to praise the individuals at TexPet “whose good will, effort, and deci-

sion[making] permitted the job to be fully and satisfactorily completed.” SER198. Appellants’ current claim that the remediation was a “sham” or that these remediated pits contain “illegal levels” of “contaminants” is thus false.

In 1998, ROE, Petroecuador, and TexPet executed a Final Release, certifying that TexPet had “fully performed and concluded” its obligations and “releas[ing], absolv[ing], and discharg[ing]” TexPet from any environmental liability arising from the consortium’s activities. 6A1603; *ROE*, 376 F. Supp. 2d at 342. The affected provinces and municipalities entered similar agreements. 6A1669.

Under the agreements, Petroecuador was responsible for remediating the remaining 62.5% of the impacted consortium sites, as well as any post-1990 impacts. *See* 6A1613-39; 6A1553. Yet Petroecuador failed, for years, to conduct any remediation. *See* 8A2120. Since TexPet left Ecuador, Petroecuador’s abysmal environmental record has included 1,415 spill events between 2000 and 2008 alone. 6A1519-21. Even the LAPs’ Ecuadorian counsel, Fajardo, admitted in June 2003 that “Petro[ecuador] has inflicted more damage and many more disasters than Texaco itself,” “[b]ut since it’s a state-owned company, since it’s the same people involved in the laws and all, no one says a thing.” 6A1537; *see* 6A1524.

In 2009, Appellants became aware that ROE proposed to “spend \$96 million to remediate the environmental waste, *including that left by Chevron*.” 8A2120 (emphasis added). As Appellants noted, this “cost is extremely low,” leading

Donziger to order his Ecuadorian co-conspirators to “go to Correa to put an end to this shit once and for all.” 8A2119; *see also* 9A2512 (acknowledging that this inexpensive remediation was “cleaning up scores and scores of sites”). Otherwise, Fajardo commented, Appellants faced the “WORRISOME” prospect that “Chevron will take advantage of this and really screw us.” 8A2120.

B. Donziger and Other U.S. Plaintiffs’ Lawyers File the *Aguinda* Litigation Against Texaco in New York

In 1993, a group of U.S. plaintiffs’ attorneys, including Donziger, filed a putative class action against Texaco in S.D.N.Y. SPA11. Despite conducting extensive discovery, the plaintiffs failed to adduce material competent evidence of meaningful Texaco, as distinct from TexPet, involvement, *Aguinda*, 142 F. Supp. 2d at 538, and in 1996, the court dismissed the action on grounds, *inter alia*, of *forum non conveniens* (“FNC”), 945 F. Supp. 625 (S.D.N.Y. 1996).

The *Aguinda* plaintiffs fought that decision for another six years, appealing twice and filing an unsuccessful mandamus petition seeking Judge Rakoff’s recusal. 142 F. Supp. 2d at 538; *In re Aguinda*, 241 F.3d 194 (2d Cir. 2001). In 2001, the court again dismissed on FNC grounds, as Texaco had agreed to accept service in Ecuador and to waive for a sixty-day period after the FNC dismissal any statute-of-limitations defenses that accrued since the filing of the complaint. 142 F. Supp. 2d at 539; SER173-74. Texaco expressly reserved the right to contest any Ecuadorian judgment under New York’s Recognition Act, a right this Court has

held that “Chevron remains free to enforce ... whenever and wherever it chooses, limited only by the scope of the statute and the availability of a forum prepared to address its claims.” *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 397 (2d Cir. 2011). This Court increased the sixty-day period to one year, and otherwise affirmed the FNC dismissal. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478-79 (2d Cir. 2002).

Initially, ROE supported dismissal of *Aguinda*. 7A1787. But then Appellants struck a deal with ROE not to sue or collect any judgment against it or Petroecuador (7A1918-24), despite ROE’s “uncontested role ... in authorizing, directing, funding, and profiting from” the consortium and Petroecuador’s “primary control of it throughout much of the relevant time period.” *Aguinda*, 142 F. Supp. 2d at 551. In anticipation of “a possible move from U.S. courts,” Appellants assisted Ecuador in drafting the 1999 Environmental Management Act (“EMA”), which created a new cause of action to enforce collective environmental rights, which had previously only been enforceable through the State. 7A1925-33.

C. Appellants Sue Chevron in Lago Agrio

In 2003, Appellants retroactively invoked the EMA, filing suit in Lago Agrio, Ecuador. 7A1946, 1948. Despite the fact that TexPet and Texaco both existed as distinct corporations (and still do today), they sued only Chevron, whose sole connection to the case was the fact that it acquired Texaco’s stock through a

reverse triangular merger in October 2001. SPA110.³

As promised, the complaint did not name ROE or Petroecuador. 7A1934-49. Nor is there any plan to provide any of the monies recovered to the individual LAPs, who are, at most, nominal plaintiffs. 5A1249. In fact, defendants and their litigation-investment funding firm with New York agents (14A3702-05; 15A4114-17; *see* SER18-76, 202-76) have conspired to “keep[] the [judgment] funds outside the immediate reach of Ecuadorian law” to enable “adjudication of fee-splitting to take place in a carefully considered forum” (14A3744; *see* SER18-53, 54-74).

II. Appellants’ Scheme to Defraud and Extort Chevron

A. Appellants Exploit the Ecuadorian Judiciary’s Lack of Independence

Rather than litigate the case on the merits, Appellants exploited the “institutional weakness in the [Ecuadorian] judiciary, generally, and of this [Lago Agrio] court, in particular.” Ex.1, CRS-350-04-CLIP-01; 4A1092. In Donziger’s own words, Ecuadorian judges “don’t have to be intelligent enough to understand the law, just as long as they understand the politics.” Ex.1, CRS-129-00-CLIP-02;

³ As the District Court found, Chevron did *not* merge with Texaco, which remains a separate corporation today. SPA17 n.40; *see* RJN.Exs.12, 13. Rather, as Donziger recognizes, “Texaco became a wholly-owned subsidiary of Chevron.” Donziger.Br.8.

3A744. Appellants thus set out to “mobiliz[e] the country, politically, so that no judge can rule against us and feel like he can get away with it in terms of his career.” Ex.1, CRS-032-00-CLIP-01; 3A684.

Appellants’ recognition of the weaknesses in the Ecuadorian judiciary is consistent with the expert report of Dr. Vladimiro Álvarez Grau, whom Judge Kaplan found highly credible. SPA49n.163; *see* 15A4174-81. As discussed *infra* Section III.B.2, Álvarez testified that, after political interference with the judiciary beginning in 2004 and continuing until today, the Ecuadorian “Judiciary can no longer act impartially and with integrity, and is instead subject to constant pressure and threats that influence its decisions.” 15A4181-85; *accord* 22A6171-79 (Dr. Coronel Jones’ expert opinion). These problems have only worsened since President Correa was elected in 2006, as he regularly interferes in judicial matters of interest to the Ecuadorian government. 15A4196-4200. Ecuador now ranks below North Korea with respect to “rule of law.” 8A2129-32; 21A5933.

Donziger acknowledged the alteration Correa’s inauguration worked on the judiciary, commenting that his election “could be critical to the outcome of the case” (SER193), and boasting “I’ve met [President Correa] and we’re tight with him and, you know, part of the Texaco case is in his—in his campaign platform. So, we are in a significantly improved position, uhm, because of that election result, you know.” Ex.465, CRS-130-00-CLIP-01; 20A5426. Ecuador’s Minister of

the Environment assured Donziger that the government was supporting them and creating a new corporation to handle the proceeds of the Judgment, confirming a “very close ... friend of [the Front] [was] working with me doing all this.” Ex. 1, CRS-421-00-CLIP-03.1; 5A1119.

B. *“This is how the game is played, it’s dirty”*: Appellants Take Advantage of the Ecuadorian Judiciary’s Weakness and Corruption

Appellants also attacked the court with “pressure tactics.” Ex.1, CRS-052-00-CLIP-05; 3A689. These included threats of force, as well as backroom conversations and coercion, capitalizing on the fact that, in the words of the LAPs’ Ecuadorian counsel, “[a]ll the judges [in Ecuador] are corrupt.” Ex.1, CRS-053-02-CLIP-03; 3A699.

For instance, when the court ordered the inspection of HAVOC laboratory used by the LAPs, Donziger saw “DISASTER FOR THE LAGO AGRIO CASE” (15A4152-56) and he stormed into the judge’s chambers to shut down the inspection. Donziger explained before this maneuver, “the only language that I believe, this judge is gonna understand is one of pressure, intimidation and humiliation We’re going to scare the judge, I think today.” Ex.1, CRS-052-00-CLIP-06; 3A691. Donziger admits that these tactics are “something you would never do in the United States But Ecuador, you know ... this is how the game is played, it’s dirty.” Ex.1, CRS-052-00-CLIP-05; 3A689. Donziger later affirmed in his notes that the LAPs had, “via intimidation, put an end to” any inspection of HAVOC.

7A1858.

Appellants also raised a self-proclaimed “private army,” Ex.1, CRS-350-04-CLIP-02; 4A1095-97, whose purpose was, as Donziger explained, “to send a message to the court that, ‘don’t f[*]ck with us anymore—not now, and not—not later, and never.’” Ex.1, CRS-350-04-CLIP-01; 4A1093. Donziger explained, “[t]he judge needs to fear us for this to move how it needs to move, and right now there is no fear, no price to pay for not making these key decisions.” 7A1853. When this was caught on tape, a co-conspirator asked if footage of their discussion could be subpoenaed, advising: “I just want you to know that it’s—it’s illegal to conspire to break the law.” Ex.1, CRS-350-04-CLIP-02; 4A1096. But, with the tone set, Appellants engaged in “backroom conversations” with the judge to procure favorable rulings. 8A2109-10; *see* 15A4064-65.

C. After Experts Reject the LAPs’ Claims, Appellants Collude With the Court to Appoint a Single “Independent” Global Damage Expert

The Ecuadorian court initially ordered 122 “judicial inspections” of oil-production sites by experts nominated by each side (SER6), with disputes to be resolved by independent “settling experts.” Their first and only report discredited the LAPs’ experts, and exonerated Chevron. 8A2198-2208. So Appellants devised a new scheme—get the court to cancel the inspections that had been ongoing for years and appoint a single expert totally under Appellants’ control.

Appellants seized the opportunity to blackmail the judge who was “on his heels from the charges of trading jobs for sex in the court,” with a complaint they “prepared but [had] not yet filed.” 9A2291. The judge secretly “accept[ed] [Appellants] request to withdraw the rest of the inspections” (*id.*) and agreed “to appoint a guy in Ecuador, um, to be the expert ...” Ex.1, CRS-138-02-CLIP-02; 3A749. As Donziger explained, this expert would “ha[ve] to totally play ball with us and let us take the lead *while projecting the image that he is working for the court.*” 7A1821 (emphasis added).

Appellants focused on making “100% sure the judge would appt Richard [Cabrera]” (7A1803), to whom Appellants likely promised “a job the rest of his life being involved in the remediation” (SPA30; 5A1178). Cabrera would be paid at least \$263,000 for posing as an independent expert, while Appellants ghostwrote his pleadings and reports. 11A2865-2919. As Donziger explained, “all this bullshit about the law and facts ... in the end of the day it is about brute force [The judge] never would have done [Cabrera’s appointment] had we not really pushed him.” Ex.1, CRS-361-11-CLIP-01; 4A1104, 1107.

D. Appellants Secretly Control Cabrera and Ghostwrite His “Independent” “Global Damages” Reports

Weeks before Cabrera’s March 2007 appointment, the LAPs’ legal team, including Donziger, Fajardo, and their U.S. consultants held a planning session with Cabrera. Ex.1, CRS-187-01-02, 188-00-CLIP-02, 188-01-CLIP-01, 189-00-CLIP-

02-03, 189-00-CLIP-05, 191-00-CLIP-02-03, 192-00-CLIP-01, 193-00-CLIP-01; 4A842-908; 4A914-26; 5A1182-83. Fajardo made clear that “the work isn’t going to be the expert’s.” Ex.1, CRS-191-00-CLIP-03; 4A918; *see also* 5A1210; 9A2460-64.

Fajardo underscored that the theory was “that Texaco is responsible for all of the existing damage, even that caused by Petroecuado[r].” Ex.1, CRS-187-01-02; 4A852. Donziger discussed ways to make Chevron pay more, commenting that they could “jack this thing up to thirty billion ... in one day.” Ex.1, CRS-193-00-CLIP-01; 4A925-26. Secrecy was critical to Appellants’ plan; as Fajardo told the group, “Chevron’s main problem right now is that it doesn’t know what the hell is going to happen.” Ex.1, CRS-191-00-CLIP-03; 4A917. The next day, the LAPs’ consultants expressed concerns about the lack of evidence that any contamination had spread in groundwater. Donziger advised that it was all “smoke and mirrors” and did not matter. Ex.1, CRS-195-05-CLIP-01; 4A931-32.

Appellants’ smoke-and-mirrors scheme was elaborate. They secretly selected Cabrera’s inspection sites, directed sampling, and ghostwrote Cabrera’s work plan from the United States (5A1201; 15A4061, 4063; 9A2460-64), all while claiming Cabrera was wholly independent (9A2340-44; *see also* 15A4090-96). They wrote and translated Cabrera’s initial \$16-billion report, delivering its 4,000 pages to him right before he filed it unaltered. 5A1243; *see* 5A1227; 10A2557-88;

14A3770, 3772, 3775; 15A4076-80. To conceal their wrongful conduct, Appellants filed objections to the report they had just written, purporting to criticize it as “unjustly favorable to” Chevron. Dkt. 8-10 at 40. Then they penned “Cabrera’s” supplemental report purporting to respond to their own objections, and adding another \$10 billion in “damages.” 14A3780-82; 5A1279-1384. Stratus also released public comments on Cabrera’s report, which the LAPs’ own lawyers have recognized were “written in a manner to give the impression that Cabrera was entirely independent and conducted his own research and came up with his own findings.” 5A1390.

Appellants now attempt to downplay Cabrera’s significance by characterizing him as just one of 100 experts. LAPs.Br.23. But, as the LAPs themselves have said, he was the “sole expert” appointed to determine both damages and causation (14A3848; *see* 14A3395; 14A3583; 13A2839), making his report “extremely significant” (10A2741). And the time, expense, and effort the LAPs’ lawyers and consultants devoted to the Cabrera report’s clandestine preparation by itself attests to its central importance.

E. Appellants Try to Cover Up Their Fraud

Appellants go to great lengths to suggest that their control of Cabrera and the ghostwriting of Cabrera’s reports was permitted in Ecuador. *See, e.g.*, LAPs.Br.24-25. Yet their contemporaneous denials of any relationship with

Cabrera show that they knew full well that their conduct was unlawful. Indeed, after Appellants ghostwrote the Cabrera Report, they took steps to ensure that the real authors were not discovered. For instance, upon realizing that Stratus subcontractor Richard Clapp might send his work that was included in the Cabrera Report to a Congressman, Beltman urgently emailed Donziger: “We have to talk to Clapp about that 5-pager, and how we have to limit its distribution. It CANNOT go into the Congressional Record as being authored by [Clapp].” 10A2713; *see* 10A2719, 2556, 2751. Incidents like these prompted Beltman to lament, “Oh what a tangled web” 10A2719.

And when Chevron commenced 28 U.S.C. § 1782 discovery proceedings in U.S. courts, Appellants embarked on a campaign of misrepresentation and obstruction to prevent their ongoing conspiracy from being foiled. When Chevron sought discovery from Stratus, the LAPs intervened and told the District of Colorado (falsely) that their only contacts with Cabrera were through court-sanctioned document submissions in 2008. 13A3395-96. They filed a declaration from Fajardo, who falsely attested that Cabrera was “independent” and that the LAPs’ contact with him was pursuant to court orders issued in 2008. 13A3544-50. However, Donziger has admitted—and the evidence leaves no doubt—that Appellants “met with and interacted with Mr. Cabrera both before and after” those orders. 5A1214. And despite recognizing that Fajardo’s declaration was “misleading at best”

(15A4081-84), the LAPs re-filed it all around the country. 13A3544-50, 3824-32, 3833-45, 3863-75, 3909-19, 3920-32, 3933-48.

To stop the production of unreleased footage from the movie *Crude*, the LAPs represented to this Court and to Judge Kaplan that a scene edited out at Donziger's direction—which showed their agents working hand-in-hand with a member of Cabrera's "independent" team, *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 287—was "of no relevance to anything." 13A3669; *see* 15A4107. The LAPs did not mention that when Fajardo learned of this scene, he implored the filmmakers to cut it, saying, "the way it is, the entire case will simply fall apart on us." 15A4110; *see* 12A3202, 3169-97, 3207-12.

F. Appellants Attempt to Whitewash Their Fraud With "New" Reports Repackaging the Sham Cabrera Report

Once their fraud was evident, Appellants began "an effort to 'cleans[e]' any perceived impropriety related to the Cabrera Report." 5A1402-07. Donziger informed the U.S. legal team of the urgency of the task, explaining that "[t]he Ecuador team is getting nervous that there is an increasing risk that our 'cleansing' process is going to be outrun by the judge and we will end up with a decision based entirely on Cabrera." 15A4085.

The "new" experts were not charged with performing an independent investigation or analysis. Instead, according to Donziger, all the "new expert[s]" needed was the "Cabrera report in and of itself" and the data in that report. 11A2995. As

intended, the “new” experts relied heavily on the Cabrera Report, although they did nothing to verify its data or standards, and had no view about whether they were accurate. *See* 10A2757-58, 2760, 2763-66; 11A2977, 2980, 2983, 2986-89, 2999-3004, 3045-56. None of the experts went to Ecuador, “did any kind of new site inspection,” “did any kind of new sampling,” or did “environmental testing of any kind.” 5A1187-88. And, most importantly, none of the new experts would “cleanse” Cabrera, as none ultimately offered any opinions on either the occurrence of any harm or who caused it. *E.g.*, 11A2755 (Allen); 21A6016-19 (Picone); 11A2989 (Barnhouse).

III. Appellants’ Plans to Leverage the Judgment

The *Invictus* “action plan,” prepared by Patton Boggs, outlines Appellants’ plans for enforcement of the Judgment. 14A3714. *Invictus* acknowledges that the United States “clearly is the locus of a high concentration of Chevron assets,” and that “the preferred approach of course is to enforce the judgment directly against Chevron Corporation—the entity named in the Ecuadorian matter,” rather than against Chevron affiliates and subsidiaries in other countries. 14A3728, 3739.

Appellants recognized that because U.S. courts were now well-acquainted with the evidence of their fraud, their chances of prevailing here were slim. *See* 14A3733. So they determined instead to attack quickly “on multiple enforcement fronts—in the United States *and* abroad,” 14A3728 (emphasis added), boasting

that “you could file suits, you could seize assets, seize boats” (8A2044), causing a “significant disruptive impact on the company’s operations” (8A2035). “Consistent with their aggressive approach,” Appellants will seek “to proceed against Chevron on a pre-judgment basis,” preferably *ex parte*, which “would undoubtedly compound the pressure already placed on Chevron vis à vis an international enforcement campaign.” 14A3730. This strategy is plainly vexatious (SPA108), particularly since Chevron could satisfy the Ecuadorian Judgment were it deemed enforceable in the United States (SPA79).

IV. Appellants’ New Arguments on Appeal

Appellants fill half their briefs with arguments and evidence never raised below and not relevant to the question before this Court, *i.e.*, whether the District Court abused its discretion in entering a *preliminary* injunction to maintain the status quo pending final resolution of Chevron’s claims.⁴

First, Appellants make numerous arguments about the “merits” of the Ecu-

⁴ Because the LAPs’ brief incorporates, without indication, substantial “evidence” the District Court excluded, Chevron is moving to strike portions of that brief. Should the Court consider these untimely and stricken submissions, Chevron requests the opportunity to supplement the record with evidence it would have filed in rebuttal, had the District Court entertained Appellants’ untimely arguments. A sampling of the evidence Chevron would have submitted is outlined in this section and in Chevron’s motion.

dorian case (LAPs.Br.14-16; Donziger.Br.13-19), despite professing a desire to avoid re-litigating that case (LAPs.Br.2-3). But these allegations—for which Appellants cite no evidence, instead relying exclusively on their own Ecuadorian briefing (reproduced at 30A8271-8389 and 31A8390-8467) and the fraudulently obtained Judgment—are false.

Appellants attempt to recast TexPet’s historical production operations that were fully compliant with contemporaneous industry standards as an “environmental disaster,” baldly asserting that “tens of thousands” of indigenous people and farmers are being exposed to “toxic,” “carcinogenic,” or “[]poisoned” water and soil due to production water “discharge” or “seepage” from earthen pits are unsupported. LAPs.Br.9; Donziger.Br.4, 18. But Appellants’ own consultants repeatedly admit in internal documents that there is no evidence of groundwater contamination: “[A]ll the reports are saying it’s just at the pits and the stations and nothing has spread anywhere at all” (Ex.1, CRS-195-05-CLIP-01; 4A931); “[T]here simply isn’t a migration pathway” from the stations and pits (20A5854-55); “Texaco may be right when they indicate that the remediation is performing as designed” (8A2234); “we are not finding any of the highly carcinogenic compounds.” (8A2237).

Moreover, Appellants know that *every* drinking water source at *every* judicial inspection site was tested and that *none* exceeded established drinking water

guidelines or standards for any chemical compound related to oil operations.

MTS.Ex.7 at 69-70. Stratus's Managing Scientist, Ann Maest, admitted at deposition to being unaware of any scientific data showing that drinking water wells had been impacted by TexPet's operations. 21A6010. Similarly, the actual testing results demonstrate that residents were not being exposed to, much less "poisoned" by, contaminated soil. Many of Appellants' claims of "contamination" depend on mislabeling as "toxic" substances such as "production water" (which the EPA does not consider hazardous waste, 40 C.F.R. § 261.4(b)(5)) and barium (which is used in drilling operations in a non-soluble, non-toxic form that poses no health risks, 40 C.F.R. § 372.65(c); *see also* 58 Fed. Reg. 32622, 32624, Donziger.Br.15-17), and misrepresenting relevant legal limits in the U.S. and Ecuador (LAPs.Br.10-11); *see also* 5A1386; MTS.Ex.7 at 20. And Appellants ignore the reality that, after TexPet was forced out of Ecuador, Petroecuador engaged in a massive expansion of oil operations at former consortium sites, drilling more than 400 new wells (compared to the 335 wells drilled by the consortium) and digging hundreds of new earthen waste pits. MTS.Ex.7 at 20-21, 31.

Given their lack of legitimate scientific evidence, Appellants turned to fraud long before Cabrera. Discovery has uncovered fraud during the judicial inspections ranging from Appellants using hotel rooms as the "Selva Viva laboratory" (9A2268-70) to submitting test "results" from labs lacking the equipment to con-

duct them. The LAPs also falsified expert reports; when shown two reports filed by the LAPs in his name purporting to find extensive environmental contamination, Dr. Charles Calmbacher testified that “I did not reach these conclusions and I did not write this report.” 9A2262-68.

Second, Appellants suggest that the Judgment is unimpeachable because it supposedly “rel[ies] repeatedly on test results by Chevron’s experts.” Donziger.Br.15. But Appellants mischaracterize the evidence, including misstating expert Ernesto Baca’s conclusion that there was no seepage (*compare* Donziger.Br.18, *with* 27A7411), and facts about wells purportedly “operated solely by Chevron” (LAPs.Br.15). And they rely heavily on audits that pre-dated Texaco’s remediation, and, contrary to Appellants’ description, concluded that Tex-Pet’s operations from 1964-1990 met industry standards. 30A8288-89; MTS.Ex.7 at 29.

Nor do Appellants explain how the Judgment could award, for example, nearly \$5.5 billion for soil remediation when Appellants’ own cleansing expert (relying on Cabrera’s conclusions) calculated the cost at under \$1 billion and ROE has estimated the cost of an even broader clean-up as \$96 million. 8A2120. But there is an explanation—the recently uncovered evidence of Appellants’ covert hand in crafting the \$18-billion Judgment itself, as confirmed by forensic experts. *See* MTS.Ex.1; MTS.Ex.2. The Judgment’s extensive discussion of and findings

on successor liability match exactly large portions of an internal LAP memorandum. MTS.Ex.1 ¶¶ 7-8, 18. And almost all of the sampling data in the Judgment “were copied, cut-and-pasted, or otherwise taken directly from the [unfiled] Selva Viva Data Compilation,” complete with multiple errors. MTS.Ex.2 ¶ 17.

In no proceeding where these forensic expert reports have been filed have Appellants offered any explanation for the incorporation of their internal documents, which were never filed with the Ecuadorian court, into the Judgment. In fact, after Chevron filed these reports, Fajardo admitted to the press that the Judgment contains material found only in the LAPs’ internal documents. RJN.Ex.7.

This Judgment is thus the epitome of one procured by fraud.

STANDARD OF REVIEW

A district court’s decision to issue a preliminary injunction is reviewed ““only for abuse of”” its ““wide discretion in”” granting such relief, *Almontaser v. N.Y. City Dep’t of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (citation omitted), even where mixed questions of law and fact are involved, *Belot v. Burge*, 490 F.3d 201, 206-07 (2d Cir. 2007).

The abuse-of-discretion standard is a “formidable hurdle to overcome,” *Brennan’s, Inc. v. Brennan’s Restaurant*, 360 F.3d 125, 129 (2d Cir. 2004), particularly when “the injunction ... merely preserves the status quo pending resolution of the underlying action,” *Brenntag Int’l Chems, Inc. v. Bank of India*, 175 F.3d

245, 249 (2d Cir. 1999). None of the District Court’s factual findings warrants reversal unless Appellants meet their burden to “specifically identify any such findings” thought to be erroneous and demonstrate clear error. *LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997).

Contrary to Appellants’ claim that “[c]ourts often apply a heightened level of appellate review to anti-foreign-suit injunctions”—for which they cite just one case (LAPs.Br.38)—this Court and virtually all others to have addressed the issue apply the abuse-of-discretion standard. *E.g.*, *Karaha Bodas v. Perusahaan Pertambangan*, 500 F.3d 111, 118-19 (2d Cir. 2007); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984).

SUMMARY OF ARGUMENT

The District Court acted squarely within its discretion when it preliminarily enjoined Appellants from executing their scheme to use vexatious actions based on a fraudulently procured foreign-judgment to intentionally damage Chevron’s operations and goodwill. More than a century of U.S. and international-law jurisprudence establishes the court’s ability to enjoin the parties before it from enforcing a fraudulently obtained debt anywhere in the world—even if the fraud is dressed up like a “judgment.”

Without this injunction, Chevron faces irreparable harm that the LAPs have publicly threatened. Under this Court’s precedent, the unquantifiable reputational

and goodwill harm the LAPs seek to inflict on Chevron and their undisputed inability to repay establish irreparable harm. Chevron is also highly likely to succeed in its declaratory-judgment action on the merits both because the Judgment was procured by Appellants' fraud and because Ecuador's judiciary is politicized and cannot (and did not) provide impartial tribunals or procedures compatible with due process. The resulting balance of hardships starkly favors maintaining the status quo between the parties.

Appellants' additional arguments are meritless. The LAPs' long-standing and extensive connections to New York warrant the Southern District's exercise of jurisdiction over them. And Appellants had a fair opportunity to oppose Chevron's application, particularly in light of their own refusal to stipulate to an extension of the TRO to permit a longer briefing schedule. Their new evidence of Chevron's supposed unclean hands was not properly put before the District Court, and there is no basis for Appellants' assertion that the District Court was obligated to review it notwithstanding its untimely submission. Finally, Appellants' last-ditch effort to force Judge Kaplan off the case comes nowhere close to meeting the "rarest of circumstances" justifying reassignment.

ARGUMENT

I. The Preliminary Injunction Was Well Within the District Court’s Discretion and Necessary to Preserve the Status Quo

A. The Status Quo Injunction Does Not Affect the Judgment Within Ecuador

As the District Court rightly observed, “no one is attempting here to interfere with Ecuador’s adjudication of the underlying dispute or the enforceability of the Ecuadorian judgment in the forum in Ecuador.” SPA90n.323. Instead, the case pertains to the enforceability of the Judgment *outside of* Ecuador. When a forum applies its own law to consider the enforceability of a foreign judgment outside the rendering jurisdiction, it does not “divest the first jurisdiction of its territorial sovereignty,” but “merely ... makes applicable its own law to parties or property before it.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964); *see also Shell Oil Co. v. Franco*, 2005 WL 6184247, at *5 (C.D. Cal. Nov.10, 2005) (rejecting same arguments Appellants make here and holding that determining judgment enforceability does not “make foreign policy pronouncements or evaluate foreign policy positions” but falls “squarely within the province of the judiciary”).

B. Far From Being Unprecedented or Improper, the Preliminary Injunction Is Grounded in the Court’s Longstanding Equitable Power

Appellants and *amici* try to create the impression that the preliminary injunction is unprecedented, and suggest that no U.S. court—or any foreign court—has

ever “entered such sweeping relief.” LAPs.Br.39-40. These arguments distort the District Court’s order and sidestep controlling authority.

Contrary to Appellants’ suggestion, the injunction does not direct foreign courts in any way. It directs the *parties* before it to refrain from perpetrating a fraud aimed at extorting billions of dollars from a publicly traded U.S. company. “The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well-established.” *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). Indeed, this power is a matter of hornbook law. *See, e.g.*, 43A C.J.S. *Injunctions* § 113 (2011); C.B. De S., *Injunction Against Enforcement of Judgment Rendered in Foreign Country or Other State*, 64 A.L.R. 1136 (2011) (“[T]he power which the court possesses, by virtue of its jurisdiction of the person or the party affected, to enjoin the enforcement of a judgment rendered in another state or country, is not limited to enjoining its enforcement in the state or country in which the court is sitting; and it may under proper conditions grant an injunction operating generally.”); *Cole v. Cunningham*, 133 U.S. 107, 121 (1890).

Numerous courts have entered injunctions against parties restraining their actions on a global (as opposed to merely local) scale. Indeed, in an early case now held out as a typical example of a court’s ability to enjoin a party from enforcing a foreign judgment, a state court enjoined a party “from taking any action on [a

state court] judgment in any court.” *Weed v. Hunt*, 56 A. 980, 980-81 (Vt. 1904); *see also* 64 A.L.R. 1136, *supra* (“[I]t is not uncommon for courts, by a decree operating in personam upon parties personally subject to the jurisdiction, to enjoin the enforcement of a judgment rendered in a foreign country or a sister state....”).

Many more recent decisions have similarly granted worldwide injunctions against foreign enforcement actions:

- *Younis Bros. & Co. v. Cigna Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 747 (E.D. Pa. 2001) (worldwide injunction prohibiting judgment-creditor “from taking any action to enforce [the Liberian judgment] in any jurisdiction ”);
- *A.P. Moller-Maersk v. Ocean Express Miami*, 590 F. Supp. 2d 526, 534 (S.D.N.Y. 2008) (worldwide injunction against purchaser of cargo who had brought several suits against carrier in Panama and Guatemala, enjoining purchaser and its agents from “proceeding with litigation ... in any forum other than the United States District Court for the Southern District of New York”);
- *Karaha*, 500 F.3d at 117-18 (affirming worldwide anti-suit injunction “prohibiting [defendant] from (1) maintaining the Cayman Islands action, or any similar action anywhere, and (2) restraining [plaintiff] from disposing of funds obtained from [defendant]”); and

- *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 131 (S.D.N.Y. 1997) (worldwide injunction prohibiting defendants “from maintaining suit against plaintiff relating to damage to the Cargo in any other jurisdiction”), *aff’d*, 161 F.3d 115 (2d Cir. 1998).

And the list goes on. *See, e.g., Int’l Equity Invs., Inc. v. Opportunity Equity Partners*, 441 F. Supp. 2d 552, 566-67 (S.D.N.Y. 2006), *aff’d*, 246 F. App’x 73 (2d Cir. 2007); *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 956 (D. Minn. 1981), *aff’d*, 664 F.2d 660 (8th Cir. 1981); *Omnium Lyonnais D’Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 441 F. Supp. 1385, 1390-91 (C.D. Cal. 1977); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988).

Nor is this power perceived as an appropriate judicial function only in the United States. Quite the contrary. *See, e.g., Ellerman Lines v. Read*, [1928] 2 K.B. 144, 147, 151-53 (English court issuing worldwide injunction restraining judgment-creditor from enforcing fraudulently obtained Turkish judgment); *Beckett Pte Ltd v. Deutsche Bank AG*, [2011] 1 SLR 524 (Singapore) (entering worldwide anti-suit injunction against commencing or continuing any further proceedings against Deutsche Bank or its agents in relation to disputed sale). Indeed, an arbitral tribunal in a proceeding related to this very case barred ROE from aiding in enforcement abroad. SER178.

Such an injunction, entered preliminarily to maintain the status quo, is par-

ticularly appropriate here, where Appellants procured a sham judgment built from intentionally fabricated evidence, collusion, and fraud. The Supreme Court and New York's courts have long recognized that this is precisely when courts should exercise their power to “control[] the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it.” *Cole*, 133 U.S. at 121; *Vail v. Knapp*, 49 Barb. 299, 305 (N.Y. Sup. 1867) (same); *accord E.&J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (enjoining parties from pursuing litigation in Ecuador, explaining “the American court enjoins the claimant, not the foreign court.”).

C. The Status Quo Injunction Does Not Offend Comity and Is Proper Under *China Trade*

Appellants' argument that *China Trade* makes the injunction improper fails.

First, there are no parallel proceedings, thus “[t]o the extent [defendants] are enjoined ... from filing additional actions,” the “anti-suit injunction doctrine of *China Trade* is not even implicated, because additional actions are not parallel proceedings.” *Software AG, Inc. v. Consist Software Solutions, Inc.*, 2008 WL 563449, at *25 (S.D.N.Y. Feb. 21, 2008), *aff'd*, 323 F. App'x 11 (2d Cir. 2009); *accord Title Ins. & Trust Co. v. Cal. Dev. Co.*, 171 Cal. 173, 209 (1915) (rejecting the same comity arguments Appellants make here because there were no ongoing parallel proceedings, only the action in the U.S. to enjoin judgment enforcement).

And in any event, the District Court acted in an abundance of caution in ap-

plying *China Trade* and did not abuse its discretion concluding that the *China Trade* factors clearly support injunctive relief. SPA109.

1. The Judgment Creditors Are Parties to This Action

As to the first, mandatory *China Trade* factor, all of the named plaintiffs in the Ecuadorian action are defendants here, as is the Front. *Compare* 7A1934-35 with 1A77,83. Thus, there is a substantial similarity between the parties here and the parties who would necessarily be involved in any enforcement action. *Paramedics Electromedicina Comercial, Ltda v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004).⁵

2. A Final Decision Here Will Be Dispositive

A final decision on the merits permanently enjoining Appellants from seeking to recover this fraudulent and fundamentally flawed “debt” will be dispositive for multiple reasons, none of which involves the District Court setting legal standards for courts worldwide. *First*, the court will decide the factual issue between the parties of whether the “judgment” is a fraud, and if so, will permanently enjoin

⁵ Without proof, Appellants argue some unnamed trustee may become the judgment-creditor (LAPs.Br.46), but the Judgment expressly names the Front as the beneficiary of the trust designed to carry out the “remediation.” 27A7479.

the defendants from continuing that fraud—thus resolving the matter between the parties and thereby precluding Appellants from continuing their extortionate-campaign. SPA107-08; *supra* Section I.B.

Second—and independently—the grounds on which Chevron argues the Judgment is unenforceable are nearly universal and resolution of the issues here will be dispositive for this reason as well. SPA107-08; *supra* Section I.B.

Contrary to Appellants’ suggestion, the decision need not be legally binding on foreign courts to be dispositive. “[I]f *China Trade*’s requirement that the action in the enjoining court be dispositive of the action to be enjoined meant what [Appellants] suggest[] it does, the requirement could never be satisfied when one party seeks to enjoin a proceeding in a foreign country.” *In re Vivendi Universal, S.A. Sec. Litig.*, 2009 WL 3859066, at *6 (S.D.N.Y. Nov. 19, 2009); *see Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 915 (9th Cir. 2009).

Rather, a decision is “dispositive” under *China Trade* where there is similarity in the “substance of the claims and arguments raised in the two actions,” *Vivendi*, 2009 WL 3859066, at *6, which requires only that the foreign claim “touch matters” that could be resolved in the enjoining forum. *Paramedics Electromedicina v. GE Med. Sys.*, 369 F.3d 645, 654 (2d Cir. 2004). This is certainly the case here.

For example, in order to rule on Chevron’s claims, the court will make fac-

tual findings regarding whether the Judgment was procured through fraud. *Clarkson Co. v. Shaheen*, 544 F.2d 624, 631 (2d Cir. 1976). If it concludes that it was, it will clearly have the authority to enjoin Appellants from further harming Chevron by vexatiously pursuing fraudulent debt-collection proceedings against them worldwide (which by itself will be dispositive). It will also establish as true a set of facts that make the Judgment unenforceable in any system of justice. *See, e.g., Yukos Capital v. OJSC Rosneft*, [2011] UKQB 1461, at ¶¶ 91, 105(1), 107 (Dutch judgment finding Russian judgment was procured by fraud gives rise to issue estoppel in the U.K.); *supra* Section I.B.; FLA (universal applicability of “obtained by fraud” defense).⁶

Appellants failed to offer evidence below that *any* foreign country would recognize a fraudulent judgment. SPA76. Their failure to do so precludes such an unpalatable suggestion now. *Id.* & n.278 (“When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum.”). *Amicus*’ suggestion that “civil law jurisdictions typically do not deny recognition of a foreign judgment based on a finding

⁶ Jurisdictions that do not prohibit enforcement of a fraudulent judgment as an independent ground do so under the public-policy ground. *Id.*; Dicey, Morris & Collins, *The Conflict of Laws* § 14-135 (14th ed. 2006).

that ... the judgment was procured by fraud” and that “Japan, Germany, Switzerland and Italy” will enforce fraudulently-begotten judgments, EDLC.Br.13-14, is demonstrably false. *See* FLA; Dicey, § 14-135; Toshiyuki Kono et al., *Recognition and Enforcement of Foreign Judgments* 8 & n.42 (2009) (Japan), http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/paper/009_09May09_Kono-Tada-Shin.pdf.⁷

Further, as the court found, numerous other grounds on which Chevron seeks to prove this Judgment unenforceable are effectively universal. SPA107-08.

3. The Additional *China Trade* Factors Support the Injunction

a. Important Policies of the Forum

Appellants’ plans for extortionate foreign attachment and enforcement actions directly threaten “strong public policies of [New York]” and support the preliminary injunction. *Karaha*, 500 F.3d at 126. Most notably, New York has a strong interest in remedying a New York-based fraudulent scheme aimed at a company doing business in New York. *Globe Commc’ns Corp. v. R.C.S. Rizzoli*

⁷ *Amicus*’s reference to certain foreign laws that purportedly only allow non-recognition on the basis of fraud where the evidence is new on its face does not apply where, as here, the fraud was not meaningfully “the subject of prior adjudication.” EDLC.Br.12&n.6 (quoting Singapore laws and cases).

Periodici, 729 F. Supp. 973, 976 (S.D.N.Y. 1990); *L.K. Station Group, LLC v. Quantek Media, LLC*, 879 N.Y.S.2d 112, 117 (N.Y. App. Div. 2009). Appellants' scheme constitutes "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).

Appellants' plan to vexatiously enforce an unmistakably fraudulent-judgment is an affront to New York's core public policy in favor of ensuring due-process protections and protecting against deprivation of property without due process. *DiScala v. Facilities Dev. Corp.*, 691 N.Y.S.2d 229, 243 (N.Y. Civ. Ct. 1998); N.Y. CONST. art. I § 6; *In Andrus' Will*, 281 N.Y.S 831, 858 (N.Y. Surr.Ct. 1935).

b. Threat to Jurisdiction

The District Court is the first court outside Ecuador to consider the overwhelming evidence of fraud. The claims of fraud presented in Ecuador were never meaningfully addressed, in no small part because the court appears to have been (willfully or fearfully) complicit in the fraud. *See* SPA87-88. Now, racing against mounting evidence of fraud, Appellants and their agents seek to "gain leverage in the hope of forcing a quick settlement." SPA73.

Using meritless attachment actions against Chevron's foreign subsidiaries to

extort a settlement—in an effort to avoid having the District Court decide whether the Ecuadorian Judgment was obtained by fraud or without fairness or due process, despite the fact that Appellants themselves previously fought to have those very issues decided under New York law—is clearly a threat to the court’s valid exercise of jurisdiction and is sufficient to support an injunction restraining Appellants from executing their plan in foreign courts. *See* 8A2071; *Laker Airways*, 731 F.2d at 922-23; *accord Karaha*, 500 F.3d at 126 (anti-suit injunction appropriate where foreign-litigation threatened federal jurisdiction to determine whether “judgments should be invalidated on the basis of the fraud”).⁸

c. Vexatiousness

The third factor—vexatiousness—also supports the injunction. Courts in this Circuit have “unquestioned authority to terminate and prevent the renewal of a protracted series of vexatious lawsuits.” *Covanta Onondaga Ltd. v. O.C.R.R.A.*, 318 F.3d 392, 398 (2d Cir. 2003); *Karaha*, 500 F.3d at 127.

⁸ Moreover, the threat to jurisdiction is doubly great here, as it invokes the court’s in rem/quasi in rem jurisdiction; it will resolve whether the foreign-judgment-creditor has an interest in the judgment-debtor’s New York (and U.S.) assets—the proper target of any enforcement proceedings, since Chevron’s foreign subsidiaries are not judgment-debtors. *China Trade*, 837 F.2d at 36 (recognizing the “long-standing exception to the usual rule tolerating concurrent proceedings ... for proceedings in rem or quasi in rem”).

The Supreme Court defines a vexatious foreign-lawsuit as one that “inflict[s] upon [defendant] expense or trouble not necessary to [plaintiff’s] own right to pursue his remedy.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Chevron has sufficient assets in the United States to satisfy the Ecuadorian Judgment (SPA73); actions against foreign non-judgment-debtor subsidiaries are “not necessary,” and serve no purpose other than the infliction of “expense [and] trouble.” *Id.*

Foreign lawsuits are also vexatious where a party has “acted in bad faith throughout and in a manner calculated to cause vexation,” *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, 2010 WL 1050988, at *6 (S.D.N.Y. Mar. 23, 2010); especially where a party’s “stated goal [of the foreign-suit] is to cause [their opponent] to withdraw from [the domestic] proceeding,” *Vivendi*, 2009 WL 3859066, at *7. Appellants’ plan to institute worldwide attachment actions against Chevron subsidiaries not named as judgment-debtors is clearly vexatious under this definition, as it is designed to force Chevron into a settlement of litigation in the U.S. and elsewhere. *Id.*; 14A3730 (*Invictus*); SPA61-63.

d. Extreme Delay, Inconvenience and Expense, and Inconsistency, Race to Judgment and Prejudice to Other Equitable Considerations

Comity is not only a limiting factor, but an enabling one as well. A truly “functioning system for solving [transnational] disputes [must incorporate] many

values, among them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations.” *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 555, 567 (1987) (Blackmun J., concurring). These values may be substantially undermined if multiple courts race to judgment over the same dispute; some more susceptible than others to Appellants’ fraud, pressure, and bribery. *E.g.*, *Karaha*, 500 F.3d at 125 (citing “concerns of international comity” as factor justifying anti-suit injunction).

Additionally, the plan to inflict myriad enforcement and ex parte attachment actions against Chevron’s foreign subsidiaries based on the fraudulent Judgment will result in “a race to judgment” and will “prejudice other equitable considerations.” *China Trade*, 837 F.2d at 35. Allowing Appellants to litigate identical issues, such as fraud, on multiple fronts—and allowing them to attempt to litigate them first in countries that are “susceptible to the political winds” (14A3735)—will cause extreme “inconvenience, expense, [and] inconsistency.” *Storm LLC v. Telenor Mobile Commc’ns AS*, 2006 WL 3735657, at *9 (S.D.N.Y. Dec. 15, 2006). The “unseemly race to judgment” would certainly occur here, as Appellants race to

collect on their illicit award before Judge Kaplan is able to weigh in on the merits of the fraud. *Id.*; *Amaprop*, 2010 WL 1050988, at *8.⁹

II. Chevron Will Suffer Irreparable Injury Absent an Injunction

Arguing that Chevron is not at risk of irreparable harm because it “would remain a viable entity” even if the Judgment were enforced (Donziger.Br.56-58) completely misses the mark. Irreparable injury turns not on whether a harm would bankrupt a company, but on whether that harm “cannot be remedied ‘if a court waits until the end of trial to resolve [it].’” *Faiveley Trans. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55 (2d Cir. 2004) (“irreparable harm [is] ‘harm shown to be non-compensable in terms of money damages’”) (citation omit-

⁹ *Amicus Anton* interjects the so-called “principle of non-intervention.” Anton.Br.7. But this “principle” is one of public (as opposed to private) international law; it has no bearing on the propriety of the injunction here. *See* Eugene F. Scoles et al., *Conflict of Laws* 2-3 (4th ed. 2004); Joel Paul, *The Transformation of International Comity*, 24 *Law & Pol’y Int’l Bus.* 1 (2008). Additionally, contrary to the suggestion in the Anton brief (as the Anton brief’s own sources confirm, *see* Anton.Br.7), absent a treaty, no court (in the U.S. or elsewhere) has an obligation to recognize a foreign-judgment. Julian Ku, *International Delegations and the New World Court Order*, 81 *Wash. L. Rev.* 1 (2006); Story, *Commentaries on the Conflict of Laws* § 34 (1834). And, particularly because the District Court did not “interfere with Ecuador’s adjudication of the underlying dispute,” whether customary international law permits such intervention is irrelevant. *See supra* I.A; SPA90n.323.

ted). Judge Sand, in dismissing the LAPs attempt to forestall the Treaty Arbitration, dismissed this very same argument as “ludicrous.” 14A3757. Then and now, Appellants fail to dispute Chevron’s harms, much less show “clear error” in Judge Kaplan’s factual findings on irreparable injury. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004).

A. Appellants and the Defaulting Defendants Will Imminently Attempt to Enforce the Ecuadorian Judgment Around the World

Appellants fixate on the pendency of the Ecuadorian appeal as a supposed barrier to Chevron suffering any irreparable harm. But Appellants have threatened to inflict harm on Chevron even *before* the Ecuadorian appellate process concludes. 14A3730; 22A6228, 6258, 6268; 12A3303-04; 14A3746-52; 15A4136-38; 21A6031-33. Donziger himself has stated, “[W]e’re coming back immediately, as soon as we can, to get that judgment enforced. We are *not waiting for the appeals process*, as is our right.” 5A1123 (emphasis added). Appellants’ plan is plausible because “Ecuador is a party to [the Inter-American Convention on Execution of Preventative Measures] pursuant to which the LAPs are able to seek, and perhaps to obtain, preventive measures orders in other Latin American countries, including Colombia, that would freeze or attach Chevron assets,” even before the appeal in Ecuador concludes. SPA74 (citing 22A6167-69). The result is that a bevy of worldwide enforcement actions could ensue any day. That they have not does not mitigate the threat. Indeed, the defaulting defendants—including the LAPs’ Ecu-

dorian counsel, Fajardo—have publicly declared that they will “accomplish enforcement of the judgment [wherever] Chevron has assets” regardless of the injunction. 22A6258.

Appellants’ own conduct confirms that the Ecuadorian appeal’s pendency presents no significant barrier to relief. If Appellants were correct that nothing could happen before the Ecuadorian appeal concluded, it would have been costless for them to agree to hold off on enforcement efforts pending resolution of this suit or, at a minimum, completion of Donziger’s requested longer briefing schedule. 32A8895. But they refused to do so. 19A5216-17, 21A6084. This refusal led the District Court to find that the likelihood of harm, absent an injunction, is “substantial.” SPA76. Nothing Appellants have said shows that these findings are clearly erroneous, making it entirely irrelevant when the Ecuadorian appeal will finish.

Appellants’ assertion that the Ecuadorian appellate court might theoretically never issue a judgment misses the mark—and standard of review. The District Court made factual findings, unaddressed by Appellants here, that “there is good reason to believe that [the Ecuadorian appellate court] will [rule] quickly in this case,” chiefly because of “*how much pressure is placed on the appellate court by the parties or other [political] forces to render its decision.*” SPA60 (citing 22A6171). Not only is the *Invictus* memo in agreement (14A3724), but there is ample evidence of the Ecuadorian judiciary’s corruption and susceptibility to polit-

ical pressure, manifested by the judge’s issuance of the 188-page Judgment just days after the District Court’s TRO, even though shortly before he had told the press he still had 50,000 pages of the record to read (15A4150). Appellants challenge none of this, and thus cannot show clear error.

B. Chevron Will Suffer Irreparable Harm From Disruption of Its Business Operations and Injury to Its Reputation

The “loss of reputation, good will, and business opportunities” constitutes irreparable injury, especially where, as here, “it would be very difficult to calculate monetary damages that would successfully redress” the loss. *Register.com, Inc.*, 356 F.3d at 404; *see also Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007) (collecting cases). Not even the lone circuit-level case Appellants quote for their requirement that to be “irreparable” a harm must threaten “the very viability of [Chevron]” (Donziger.Br.55) supports such a departure from the traditional standard. *See Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995) (“Where the loss ... will cause the destruction of the business itself *or indeterminate losses in other business*, the availability of money damages may be a hollow premise”) (emphasis added).

Judged against the correct standard, the District Court did not clearly err in finding irreparable harm. First, Appellants’ *explicit* threats to cause such harm suffice, on their own, to show irreparable injury. *See, e.g., Commc’ns Workers of Am. v. NYNEX Corp.*, 898 F.2d 887, 891 (2d Cir. 1990); *Osmose, Inc. v. Viance, LLC*,

612 F.3d 1298, 1320 (11th Cir. 2010). By their own admission, Appellants planned to attack on “multiple enforcement fronts” and pursue prejudgment asset seizures as a means of “undoubtedly compound[ing] the pressure” on Chevron. 14A3728-30.

It defies common sense to think that an asset seizure of historic proportions would escape notice, especially when the stated goal of Appellants’ plan is to cause as much damage to Chevron’s business reputation as possible, so that Chevron capitulates. 14A3745. And the natural result—“[m]issing product deliveries as a result of Defendants’ planned asset seizures” of Chevron’s “oil tankers, wells, or pipelines”—would plainly “damage Chevron’s business reputation as a reliable supplier and harm the valuable customer goodwill Chevron has developed over the past 130 years,” as Chevron Deputy Comptroller Rex Mitchell confirmed. 19A5343-44.

Although Appellants criticize Mitchell’s declaration as vague and submitted on reply,¹⁰ they never dispute its *truth*. Nothing more is required when the harm in

¹⁰ Appellants never moved to exclude the Mitchell Declaration nor do they argue that the District Court *abused its discretion* in allowing it. *E.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005). In any event, Chevron properly submitted the Mitchell Declaration *in response* to the LAPs’ arguments

[Footnote continued on next page]

question is “self-evident,” *Reuters Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 909 (2d Cir. 1990), or when it is “supported by affidavit, and undisputed,” accompanied by “generally believed” facts that accord with “[c]ommon sense,” *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987).

Given the essentially undisputed harm to Chevron’s reputation, Chevron need only demonstrate that these harms are not redressable by money damages—and they are not. *Register.com*, 356 F.3d at 404 (injunctive relief proper in cases of loss of reputation, goodwill, and business opportunities where “damages are difficult to establish and measure”). Accordingly, Appellants’ threat of “one of the biggest forced asset seizures in history” justifies injunctive relief. 8A2034-35.

C. A Multiplicity of Suits Threatens Irreparable Injury

It has long been said that equity “abhors a multiplicity of suits.” *E.g., Ashe v. Swenson*, 397 U.S. 436, 457 (1970). Indeed, “[i]njunctive restraints to restrain a multiplicity of suits in such cases are not only permitted, but favored, by the courts.” 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence*, § 261j (Spencer W. Symons ed., 5th ed. 1941).

[Footnote continued from previous page]

(16A4357). *See, e.g., Bayway Refining Co. v. Oxygenated Mtkg. & Trading A.G.*, 215 F.3d 219, 226-27 (2d Cir. 2000).

Time honored as this principle is, Appellants give it short-shrift here, and ignore the irreparable harms posed by a multiplicity of suits.¹¹ Where the same issue is addressed in a multiplicity of suits, the defendant faces the risk of inconsistent judgments and the “settlement extortion” that a plaintiff can wield by obtaining even just one judgment in its favor. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 853 (7th Cir. 2010); *United States v. Union Pac. Ry. Co.*, 160 U.S. 1, 50 (1895) (similar). If a dozen countries refuse to enforce the Ecuadorian Judgment, but a single one does as a result of pressure or fraud, then Chevron is still forced to pay up. From there, the effects snowball. As the LAPs explain in *Invictus*, if “the Aguinda Plaintiffs are able to obtain conversion of the judgment in” certain “‘keystone’ nations—that is, nations that enjoy[] reciprocity—or better yet, are part of a judgment recognition treaty—with nations that serve as the locus for greater Chevron assets,” then they can effectively use one favorable decision to pry open a gateway to even larger recoveries. 14A3734.

¹¹ In fact, because Appellants’ use of widespread litigation is so plainly vexatious, Chevron need not demonstrate lack of adequate remedies at law; “there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists.” *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 592 (1995); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984).

For these harms resulting from multiplicative litigation, the remedy at law is “nonexistent,” making any one of them by definition irreparable. *Thorogood*, 624 F.3d at 851. It was thus no abuse of discretion for the District Court to find the threat of a multiplicity of suits as one of several sources of irreparable harm.

D. Any Attempt to Recoup Money From Appellants Will Fail

Lastly, Chevron faces irreparable harm because there is no meaningful prospect that Chevron could ever recoup from Appellants monetary compensation for the harms suffered here, including the burden of defending its vexatious litigation. Harm is irreparable where “there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.” *Brenntag*, 175 F.3d at 249; *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). “[C]ourts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents,” *Brenntag*, 175 F.3d at 250 (collecting cases), a rule applicable here as the LAPs have routinely portrayed themselves as having “limited resources.” *E.g.*, No. 11-1150-cv(L) (2d Cir.), Dkt. 48 at 18.

III. Chevron Is Likely To Succeed on the Merits of Its Claim

A. The DJA Claim Is Ripe and the Court Properly Entertained It

In arguing that Chevron's claim is not ripe,¹² Appellants compare this case to circumstances where a party sought to preempt enforcement of a not-yet-entered judgment.¹³ But this analogy is inapt, as the Judgment was entered three weeks *before* the court entered the preliminary injunction. Appellants themselves previously conceded that "once a judgment is entered in Ecuador, Chevron 'will then accrue a justifiably ripe occasion to challenge in a United States jurisdiction any effort to enforce the judgment on the substantive grounds it prematurely interposes here.'" 16A4349 (citation omitted). Taken together with Appellants' concessions that they would pursue attachment, before any further appeals occur, and their potential legal avenue to succeed in that pursuit, *see supra* Section II.A, "there is a

¹² The "actual controversy" requirement of the Declaratory Judgment Act ("DJA") is virtually indistinguishable from general Article III "ripeness," and the terms are used interchangeably here. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985).

¹³ For example, Appellants rely on *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 402, 408 (S.D.N.Y. 2002), where plaintiff sought a declaration that a future judgment in a foreign action that had not even been filed would be unenforceable. To bring this case within the scope of *Dow Jones*, Chevron would have had to seek declaratory judgment in 2003, before the Ecuadorian action was commenced.

substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Duane Reade, Inc. v. St. Paul Fire & Marine Co.*, 411 F.3d 384, 388 (2d Cir. 2005).

Even if the parties’ dispute were viewed as contingent on the result of the Ecuadorian appeal, this would “not necessarily defeat jurisdiction of a declaratory-judgment action. Rather, courts should focus on ‘the practical likelihood that the contingencies will occur’” *Associated Indem. Corp. v. Fairchild Indus.*, 961 F.2d 32, 35 (2d Cir. 1992) (citation omitted). Indeed, the very purpose of declaratory-judgment actions is to “afford a speedy and inexpensive method” of adjudicating legal rights “without awaiting a violation of the rights or a disturbance of those rights.” *Beacon Constr.*, 521 F.2d at 397. In light of the corruption that has permeated the Ecuadorian proceeding, *see supra* Facts Section II.B, it cannot reasonably be disputed that there is a “practical likelihood” that the appeals court will ultimately approve a multi-billion-dollar judgment against Chevron.¹⁴

¹⁴ Courts do not require, as Appellants suggest (LAPs.Br.55), the forum of suit to be evident before a dispute can be ripe. *See, e.g., Tropp v. Corp. of Lloyd’s*, 385 Fed. App’x 36, 37-38 (2d Cir. 2010). In any event, the close connections between the Appellants’ team and New York, combined with Chevron’s U.S. citizenship, render New York an obvious forum. *See infra* Section V.

Appellants ignore the second consideration that is relevant to whether an “actual controversy” exists: “the hardship to the parties of withholding court consideration.” *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003). Because there is a likelihood that Chevron will suffer irreparable injury if the court abstains from deciding the controversy (*supra* Section II), this aspect of ripeness plainly counsels in favor of immediate review.

The District Court also did not abuse its “broad grant of discretion” in determining that the factors identified in *Dow Jones*, 346 F.3d at 359, support its consideration of Chevron’s claim. Where, as here, Appellants’ position “amount[s] to little more than the argument that the district court should have balanced the various factors differently,” it cannot prevail. *Id.* at 360.

As to the first two factors, Appellants do not dispute that—at a minimum—this action will completely resolve the controversy in the United States, where Chevron is located and where Appellants previously intended to enforce the Judgment. *E.g.*, *Shell*, 2005 WL 6184247, at *13 (declaring Nicaraguan judgment non-recognizable throughout U.S.). Moreover, resolution of this claim will be dispositive of comparable foreign actions. *See supra* Section I.C.2. Indeed, as the District

Court concluded, its ability to enjoin those within its jurisdiction from proceeding abroad itself establishes that this case will be dispositive of foreign suits.¹⁵

SPA107-08.

As to the third factor, Chevron’s declaratory-judgment action cannot be dismissed as forum shopping. *The New York Times Co. v. Gonzalez*, 459 F.3d 160, 167 (2d Cir. 2006). While Chevron merely seeks “to have enforceability adjudicated”—fairly—“in a single forum at one time,” SPA90, Appellants “are engaged in procedural fencing” through which “[t]hey hope to benefit from burdens imposed by a multiplicity of proceedings” (SPA91), beginning with the fora in which Patton Boggs’s “political connections and strategic alliances” will overcome normal barriers to enforcement. 14A3714-45.

B. The Judgment Is Unrecognizable and Unenforceable on Multiple Grounds

Based on the substantial and largely uncontested factual record, the District Court found that at least three independent grounds in Chevron’s declaratory-

¹⁵ Appellants err in characterizing the District Court’s holding on this point as “eliminat[ing] the first two Dow Jones factors.” LAPs.Br.58. Of course, most DJA cases do not involve injunctions against litigating suits in foreign courts. *E.g.*, *Jenkins v. United States*, 386 F.3d 415, 418 (2d Cir. 2004). The District Court’s analysis is accordingly only applicable in narrow circumstances similar to this case.

judgment claim support the injunction. *See* SPA81-88. Appellants barely attempt, and certainly do not succeed, in demonstrating error in any of these findings.

1. Fraud

The District Court found “ample evidence of fraud in the Ecuadorian proceedings,” which at a minimum raised “serious questions going to the merits of [Chevron’s] claim.” SPA-86. Skirting that evidence, Appellants argue the Judgment is enforceable despite the fraud, because their fraud did not rise to the level of “a fraud on the court” or was “already litigated.” LAPs.Br.76.

Appellants are wrong. Chevron is entitled to a declaration of non-recognition under New York and federal law, because the Judgment was fraudulently procured. N.Y. C.P.L.R. 5304(b)(3); *Hilton v. Guyot*, 159 U.S. 113, 202, 203 (1895). Scholars and courts alike recognize that fraud is a universal ground for non-recognition in civilized nations. *E.g.*, *supra* Section I.C.2; *Chevron Corp. v. Camp*, 2010 WL 3418394, at *6 (W.D.N.C. 2010) (“[T]he concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court.”); Story, *supra*, § 244; FLA.

The Supreme Court has long held that “[t]here is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments.” *United States v. Throckmorton*, 98 U.S. 61, 65 (1878); *Tamimi v. Tamimi*, 328 N.Y.S.2d 477, 480 (N.Y. App. Div. 1972) (recognizing that “every judgment

may be impeached for fraud” including “foreign judgments”). Among other things, fraud that vitiates a judgment exists where: (1) “there was in fact no adversary trial or decision of the issue in th[e] case,” *or* (2) “the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practi[c]ed on him by his opponent,” *or* (3) where “there has never been a real contest in the trial or hearing of the case[.]” *Throckmorton*, 98 U.S. at 65-66; *see also Indus’l Dev. Bank of Israel Ltd. v. Bier*, 565 N.Y.S.2d 980, 982 (N.Y. Sup. Ct. 1991); *Tamimi*, 328 N.Y.S.2d at 484.

That is precisely the fraud at issue here. Indeed, Appellants’ fraud is far more egregious than that which courts have found to block recognition. *See, e.g., In re Topcuoglu’s Will*, 174 N.Y.S.2d 260, 262 (1958) (lying to Turkish court); *The W. Talbot Dodge v. 789 Packages of Whiskey*, 15 F.2d 459, 462 (S.D.N.Y. 1926) (using a “pretend[.]” sale to “deceive the court”); *Aoude*, 892 F.2d at 1118 (“A ‘fraud on the court’ occurs where” a party “interfere[d] with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier.”); *In re Weil*, 609 N.Y.S.2d 375, 376 (N.Y. App. Div. 1994); *Mata v. Am.*

Life Ins. Co., 771 F. Supp. 1375, 1389 (D. Del. 1991).¹⁶ The very fact that the fraud was perpetrated by Appellants' *attorneys* constitutes extrinsic fraud. *See, e.g., Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

Moreover, using blackmail and intimidation tactics against the judge and corrupting an independent agent of the court charged with making crucial technical recommendations is extrinsic fraud. *Aoude*, 892 F.2d at 1118 (recognizing that "improperly influencing the trier" constitutes fraud on the court); *accord In re Bridgestone Firestone, Inc. Tires Prod. Liab. Litig.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006) (refusing to recognize Mexican judgment where plaintiff colluded with judicial officer), *rev'd on other grounds*, 533 F.3d 578, 593-94 (7th Cir. 2008).

Finally, Appellants' suggestion that Chevron's extreme diligence in raising fraud with the obviously corrupt and biased Ecuadorian court gives *res judicata* effect to that same court's fraud findings is absurd. Fraud in the procurement of a judgment overrides any argument for *res judicata* or issue estoppel, both of which give way where a judgment was procured by fraud. *Throckmorton*, 98 U.S. at 65-

¹⁶ Commentators suggest that extrinsic and intrinsic fraud can serve as a basis for a New York court to deny recognition to a foreign-country judgment. 11-5304 Weinstein, Korn & Miller, *New York Civil Practice: C.P.L.R. 5304.02* (2011). Chevron has overwhelming evidence of both.

66; *Tamimi*, 328 N.Y.S.2d at 479-80.¹⁷

2. Lack of Impartial Tribunals

The District Court’s factual findings about the lack of impartial tribunals and due process in Ecuador were based on extensive, unrebutted evidence. Such findings *require* the court to deny recognition of a foreign-country judgment. N.Y. C.P.L.R. 5303, 5304(a)(1); *Hilton*, 159 U.S. at 123. The burden to show that the foreign forum provides impartial tribunals and due process falls on the party seeking judgment recognition. *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 286 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 134 (2d Cir. 2000); *see also S.C. Chimexim S.A. v. Velco Enters. Ltd*, 1999 WL 223513, at *6 (S.D.N.Y. Mar. 17, 1999).

The District Court found, based on unrebutted evidence, that—starting in 2004—the Ecuadorian judiciary suffered a series of political purges that, among other things, left it without a Supreme Court for an entire year and from which the country “appears never to have recovered.” SPA50. Since President Correa’s election in 2006, the situation has only worsened due to “threat[s] of] violence, re-

¹⁷ The Ecuadorian appeal changes nothing as the appellate court “necessarily will understand the LAPs have the full support of President Correa,” and no judgment rendered on the Lago Agrio court’s record could ever be recognized in U.S. courts—or elsewhere. SPA60; *accord Aoude*, 892 F.2d at 1121.

mov[al], and/or prosecut[ion]” aimed at judges. SPA51-53; 15A4187-89; 15A4193-94. Prosecutor General Pesántez has lodged criminal complaints against judges, and stated that the judiciary should be purged yet again. 15A4188-89. The pervasive politicization of Ecuador’s judiciary is extensively set forth in the declaration submitted by Dr. Vladimiro Álvarez Grau¹⁸ and corroborated by the U.S. State Department, independent reports, and even videotaped statements made by the LAPs’ attorneys and “expert” reports submitted by the LAPs that “tell essentially the same factual story as Alvarez.” SPA84-85.

In 2009, the President of the Civil and Criminal Commission of the National Assembly pronounced “[o]ur system of justice has completely collapsed.” 15A4200. The Judicial Council has also since declared that currently “the Judicial Branch is not independent.” *Id.* Numerous independent commentators have observed that the rule of law is not respected in cases which have become politicized. 15A4203-06.

This evidence is more than sufficient to support the court’s finding that

¹⁸ Appellants’ personal attacks on Dr. Álvarez—who has practiced law for nearly 40 years, has held numerous public and academic offices, and submitted 130 exhibits with his report—are unsubstantiated and were never raised below. 15A4174-80; 15A4266-76.

Chevron is likely to succeed on its contention that Ecuador lacks impartial tribunals. “Evidence that the judiciary was dominated by the political branches of government ... would support a conclusion that the legal system was one whose judgments are not entitled to recognition.” *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 n.3 (2d Cir. 2000) (quoting Restatement (Third) of Foreign Relations § 482 cmt. b (1987)). Indeed, all relevant factors evidencing a biased judiciary are present here—the Ecuadorian judiciary is “highly politicized”; its “judges are subject to continuing scrutiny and threat of sanction”; and its courts “cannot be expected to be completely impartial toward U.S. citizens.” *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995); *see also Bridgeway*, 45 F. Supp. 2d at 287; *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000); *accord* SPA81-86, 48-56. Although U.S. courts generally try to avoid making pronouncements about a foreign sovereign’s courts, this Court must do so here, where the Recognition Act expressly requires it. N.Y. C.P.L.R. 5304(a)(1). *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1351 (S.D. Fla. 2009), *aff’d*, 635 F.3d 1277 (11th Cir. 2011).

Appellants’ reliance on *Chimexim* and other cases to argue that the Judgment is recognizable even though “corruption remains a concern” is misleading. LAPs.Br.74; *see also* ROE.BR.4-5. In *Chimexim*, the judgment-debtor “failed to submit any expert opinion suggesting that Romanian tribunals are not impartial”

and made only “general (and conclusory) assertions” that ““corruption remains a concern’ in Romania,” while the judgment-creditor presented un rebutted expert affidavits about the soundness of the Romanian judiciary. *S.C. Chimexim S.A. v. Velco Enterprises. Ltd.*, 36 F. Supp. 2d 214 (S.D.N.Y. 1999). This case is the *exact opposite* of *Chimexim*. See, e.g., SPA84-85.

Moreover, it is untrue that there are “virtually no differences” between the State Department reports on Ecuador today and those from the late 1990s. LAPs.Br.68-69. Appellants cherry-pick statements about Ecuador’s judiciary that have frequently appeared in reports, but omit statements consistent with the court’s findings that the judiciary has deteriorated since 2004. For example, in 2004, the State Department report for Ecuador noted that “Congress voted to replace 27 of the 31 Supreme Court justices ... [which arguably] overstepp[ed] its constitutional authority” (RJN.Ex.1 at 4), and in 2005 it noted “[t]he Constitutional Tribunal has been dissolved since December 2004” (RJN.Ex.2 at 4). In more recent years, the State Department expressly mentioned this case, as well as the politically motivated prosecution of Chevron’s attorneys. RJN.Ex.3 at 10.

Any objective study shows Ecuador lacks impartial tribunals. The District Court’s preliminary injunction findings cannot possibly constitute an abuse of discretion. *Bridgeway*, 201 F.3d at 143.

3. Due Process

Chevron presented ample evidence that domestic and international due process were violated in procuring the Judgment, including evidence of executive and public interference, improper *ex parte* dealings (including blackmailing judges), and the imposition of disproportionate punitive damages with no basis in law. *See, e.g.*, 20A5379-84; 15A5380-81; 19A5327-30; SPA28-36. These violations of due process render the Judgment unenforceable. *See* N.Y. C.P.L.R. 5304(a)(1); *Hilton*, 159 U.S. at 202; U.S. Const. amends. V, XIV; NY Const. art. 1, § 6; Restatement (Second) of Conflict of Laws § 98 (c) (1971).

Even assuming, as Appellants suggest, that Ecuadorian judicial procedures allow *ex parte* dealings (LAPs.Br.24-25), their meetings with sitting judges and independent officers of the court where the theory of the case was discussed, judges were blackmailed, and judicial reports and opinions were secretly authored, proves—rather than refutes—Chevron’s argument.¹⁹ *See, e.g.*, 20A5380-84; SPA28-36; SPA40-41; *Bridgeway*, 45 F. Supp. 2d at 286-87.

¹⁹ Appellants argue that the relevant inquiry under the Recognition Act focuses on the judicial *system* (LAPs.Br.73), but the court cannot view Ecuador’s court system in a vacuum without looking at what happened in this prominent case. *See, e.g., Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 208 (E.D.N.Y. 2003). In-

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C. Appellants' Estoppel Argument Fails as a Matter of Law

This Court has already concluded that Appellants “have failed to demonstrate any misrepresentation by Chevron that would justify applying equitable estoppel,” because “Texaco ... reserved its right to challenge any judgment [under the Recognition Act],” and, therefore, “Chevron can raise its due process claims ... without contravening Texaco’s prior positions.” *Republic of Ecuador*, 638 F.3d at 400, 397-98. Similarly, an international arbitral tribunal proceeding pursuant to the UNCITRAL rules has unanimously rejected ROE’s identical argument that Texaco’s statements in *Aguinda* somehow preclude Chevron from subsequently challenging the current “fairness and competency of Ecuadorian courts.” RJN.Ex.11 at ¶349 (noting “significant changes that took place in Ecuador in 2004”); *id.* at ¶353 (rejecting FNC-based waiver argument).

FNC and judgment recognition are fundamentally distinct doctrines. The question of whether a fraudulent Ecuadorian judgment rendered without impartial tribunals and due process can be embraced by a U.S. court and granted the same

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deed, it would violate the Constitution to hold otherwise. U.S. Const. amends. V, XIV; *cf. Plastics Eng’g Inc. v. Diamond Plastics Corp.*, 764 S.W.2d 924, 926 (Tex. App. 1989), *overruled on other grounds, Don Dockstader Motors Ltd v. Patel*, 794 S.W.2d 760, 761 n.2 (Tex. 1990); *see Osorio*, 665 F. Supp. 2d at 1351.

force and effect as a U.S. judgment, *see Osorio*, 665 F. Supp. 2d at 1322, is fundamentally concerned with basic principles of fairness and due process, and our nation's sovereignty. It has nothing to do with the question of which forum is most convenient, and differs significantly from the question of whether, over a decade ago, Ecuador was an "adequate" alternative forum to support a dismissal of the claims that the *Aguinda* plaintiffs had pleaded, for FNC purposes. *Compare Hilton*, 159 U.S. at 164-65 (explaining recognition principles) *with Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) ("central purpose of any *forum non conveniens* inquiry" is simply "to ensure that the trial is convenient.").

In *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 198, 205 (2d Cir. 1987), this Court reversed a district court's conditional FNC dismissal, which required agreement that Union Carbide would be "bound by ... [and] satisfy any judgment rendered by" the foreign court. 634 F. Supp. 842, 852 (S.D.N.Y. 1986). The Court rejected this argument, concluding instead that "[a]ny denial by the Indian courts of due process can be raised by [Union Carbide] as a defense to the plaintiffs' later attempt to enforce a resulting judgment [] in this country." 809 F.2d at 205. This Court also observed that fraud "conceivably could occur in the future," which was another reason it was improper to require consent to judgment satisfaction as a condition of FNC. *Id.* at 204; *see also Pahlavi*, 58 F.3d at 1413;

Shell, 2005 WL 6184247, at *5; *Delgado v. Shell Oil Co.*, 231 F.3d 165, 175 n.21 (5th Cir. 2000).

Thus, *even if* Texaco's representations were attributable to Chevron and *even if* Texaco had not expressly reserved its right to raise those very same defenses, under *Union Carbide*, Appellants' estoppel argument fails.

Finally, Appellants' own unclean hands also bar them from raising the equitable remedy of estoppel. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50 (2d Cir. 2004) (estoppel is "an equitable doctrine" unavailable to parties with "unclean hands"); *see also Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962) (attorney misconduct is attributable to the client).

D. The Preliminary Injunction Is Also Warranted on Alternative Grounds

This Court "may affirm" the grant of a preliminary injunction "on any ground supported by the record." *Grand River*, 481 F.3d at 66 (citation omitted). Even if this Court rejects Chevron's declaratory-relief claim, the preliminary injunction should be kept in place in light of Chevron's RICO and state-law claims, which are based on—among other things—Donziger and his co-defendants' racketeering enterprise aimed at extorting a "settlement" from Chevron; defendants'

common law fraud—the underlying allegations of which Appellants do not deny even before this Court, and unjust enrichment.²⁰ These claims were fully briefed and support the injunction. The District Court had no need to, and did not, reach them, because Chevron was “sufficiently likely” to succeed on its declaratory-relief claim. SPA91.

At a minimum, if this Court elects not to affirm outright on Chevron’s alternative claims, Chevron requests that it “leave the preliminary injunction intact” to give the District Court an opportunity to consider its other grounds on remand, particularly when these claims offer “sufficiently serious questions going to the merits to be a fair ground for litigation,” and when the “balance of hardships tip[s] decidedly toward [the movant],” as is surely does here. *Inverness Corp. v. Whitehall Labs.*, 819 F.2d 48, 50-51 (2d Cir. 1987); *Motorola Credit*, 322 F.3d at 137 (keeping injunction in place while remanding for further consideration of state-law claims).

IV. The Balance of Hardships Favors Chevron

The District Court found that, even if Chevron had raised only “serious

²⁰ Should this Court want to consider these claims or Chevron’s other grounds to support its declaratory-relief claim, Chevron respectfully directs the Court to its briefing below. *See* 2A270-91; 19A5291-5300; Dkt. 324 at 8-35.

questions” as to the merits of its claims, the preliminary injunction was justified because the balance of the hardships tips decidedly in favor of Chevron, which “clearly is able to pay the judgment in the event it ultimately proves to be enforceable.” SPA77-79; *see Register.com*, 356 F.3d at 424. Appellants contend that Judge Kaplan somehow erred in so finding because he did not consider an argument they never raised below, *i.e.*, “whether, for example, an indigenous child growing up in a rain forest has at least as urgent an interest in drinking unpoisoned water and in eating food grown in non-toxic soil” as Chevron has in due process. Donziger.Br.62.

In addition to being waived, Appellants’ argument is meritless. First, Appellants point to no actual evidence of their claim of harm from poisoned water or toxic soil. All the evidence is to the contrary. Appellants’ consultants have admitted that there was no evidence of contamination “spread[ing] anywhere at all.” Ex.1, CRS-195-05-CLIP-01; *see supra* pp. 29-30; A931; 9A2476 (noting “[n]o groundwater number—not enough data” and “[n]o sediment sampling; not enough data”). Chevron’s tests of all the drinking water sources near the former consortium sites confirmed the absence of petroleum contamination, as Appellants’ Stratus co-defendants have conceded. 21A6010; *supra* pp. 31-32.

Appellants’ purported indignation regarding the weight Judge Kaplan gave their supposedly “urgent” interest in remediation is far from credible. When ROE

belatedly confirmed in 2009 that it was assuming responsibility for *all* remediation, including in the former concession, and that the total “financial cost is extremely low,” just \$96 million, Donziger directed Fajardo to “go to Correa to put an end to this ...” (8A2119-20).

At any rate, the injunction does not harm Appellants’ interest in immediate enforcement of the Judgment, as Appellants can promptly proceed to litigate that question in the Southern District, as the parties had initially contemplated. *See* SPA5, 124.

By contrast, were the injunction lifted, Appellants would be free to carry out their plan to cause as much harm as possible—on a global scale—to Chevron’s goodwill, reputation, and business relationships, which “could not be undone” even if it were to prevail in this action. SPA69. As the District Court correctly found, “there is no contest,” and the balance of the hardships weigh in favor of Chevron. SPA79.

V. The Court Has Personal Jurisdiction over the LAPs

Despite nearly 20 years of working with New York attorneys, filing or intervening in four separate New York actions, lobbying New York officials, making a movie chronicling aspects of this case with a New York filmmaker, and working with New York financial institutions (just to name a few New York activities), the LAP Representatives now assert that the District Court lacked jurisdiction over

them. But these contacts—amply supported by the record below and ignored by Appellants—more than demonstrate Chevron’s “reasonable probability of ultimate success upon the question of jurisdiction,” which is all that is required at the preliminary injunction stage. *Visual Scis., Inc. v. Integrated Commc’ns, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) (citation omitted).

A. The Systematic and Continuous Pattern of Activity in New York Warrants a Finding of General Jurisdiction

Under N.Y. C.P.L.R. 301, a defendant is subject to general jurisdiction if it is “doing business” in the state, meaning that the defendant is “engaged in such a continuous and systematic course” of activity to “warrant a finding of its ‘presence’ in this jurisdiction.” *Laufer v. Ostrow*, 55 N.Y.2d 305, 311 (1982) (quotations and citations omitted). Although the LAPs dwell on the extent to which the doing-business test applies to *individuals* supposedly not engaged in commercial activity,²¹ they never dispute individuals can be subject to general jurisdiction

²¹ The LAPs claim that New York courts are “split” on the issue of whether the doing-business test applies to individuals and that, in any event, the test should only apply to individuals engaged in commercial activity. LAPs.Br.80 (citing *Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579, 586 (N.Y. App. Div. 1981)). But *Nilsa* is the *only* case to hold that the doing-business test should not apply to individuals and the *only* case to impose a commercial limitation on that test. See *FCNB Spiegel v. Dimmick*, 619 N.Y.S.2d 935, 937 n.3 (N.Y. Civ. Ct. 1994). Re-

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based on the actions of their *agents* doing business in the State. *See, e.g., ABKCO Indus., Inc. v. Lennon*, 384 N.Y.S.2d 781, 784 (N.Y. App. Div. 1976); *Wiwa v. Royal Dutch Petroleum, Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (jurisdiction based on agency under C.P.L.R. 301).

Here, there is no question that the LAPs, through their agents, have engaged in a systematic and continuous pattern of business activity in this State. As the District Court properly found, Donziger’s “firm has been the functional equivalent of the LAPs’ New York office,” and the Judgment is “significantly a product of his efforts.” SPA96, 95. Donziger confirms he is “primarily responsible for putting [the Lago Agrio] team together and supervising it.” 6A1410. The LAPs’ relationship with Donziger goes back almost two decades to their filing suit, with his assistance, against Texaco in the Southern District of New York. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. 1993).

Donziger does not just “travel[] to and work[] in Ecuador” (LAPs.Br.81-82), but instead acknowledged that he “spends most of [his] time” in New York be-

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ardless, even if an individual’s activity must be commercial in nature, Donziger and LAPs’ activities in New York in furtherance of their scheme to secure billions of dollars, operates in countless ways as a commercial enterprise and is therefore sufficiently commercial. *E.g.*, 14A3720-23, 3744-45.

cause “there’s so much going on up here now” (8A2046) and that “the work doesn’t let up just because I’m in the US, at all” (8A2023). The work he is referring to included, among other things, soliciting New York resident Joseph Berlinger to make *Crude* (*In re Application of Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034, at *7-8 (S.D.N.Y. May 10, 2010)); communicating with the LAPs’ experts, including Dr. Charles Calmbacher (who sent signed and initialed pages to Donziger in New York later used in the falsified version of his expert report (9A2251-52)); meeting with representatives of the New York Attorney General to try and spur an investigation of Chevron (5A1165-69); meeting with a representative of UBS to discuss Chevron’s disclosures relating to this litigation (12A3298); helping to draft a Chevron shareholder resolution, offered by the Office of the Comptroller of New York City (*see* 12A3309-11); obtaining millions of dollars of funding from the New York-based Burford Group (20A5442, 5456; 14A3702; 15A4114; SER202; 32A8890n.8); and overseeing from his New York office Stratus’s ghostwriting of the Cabrera Report (*e.g.*, 7A1825; 9A2522; 10A2751).

These activities clearly constitute “doing business” sufficient to confer general jurisdiction over the LAPs. *See e.g., Wiwa*, 226 F.3d at 97 (defendant’s agent “fielding inquiries from investors and potential investors to organizing meetings between defendants’ officials and investors, potential investors, and financial analysts”); *Frummer v. Hilton Hotels Int’l*, 19 N.Y.2d 533, 537-38 (1967) (defend-

ant's agent had an office and performed publicity and public-relations work in New York); *Zucker v. Baker*, 231 N.Y.S.2d 332, 335-36 (N.Y. Sup. Ct. 1962) (fundraising activities in New York).

Left without support, the LAPs rely on a hypothetical that serves only to illustrate the consequences of general jurisdiction, claiming it would be “outrageous” to subject them to jurisdiction. LAPs.Br.79. But, “[w]hen [defendants’] activities abroad, either directly or through an agent, become as widespread and energetic as the activities in New York conducted by [defendants], they receive considerable benefits from such foreign business and may not be heard to complain about the burdens.” *Frummer*, 19 N.Y.2d at 538.

B. The Court Also Has Specific Jurisdiction Because the LAPs Transacted Business in This State and Chevron’s Declaratory-Relief Claim Arises out of Their Conduct

1. The LAPs’ Purposeful Use of the New York Courts and Actions of Their Agents in New York

Foreign individuals may also be subject to specific jurisdiction based on actions done “in person or *through an agent*,” N.Y. C.P.L.R. 302(a)(1) (emphasis added), so the same facts giving rise to general jurisdiction also support a finding of specific jurisdiction here.

What is more, New York’s highest court has held that under C.P.L.R. 302(a)(1) “[u]se of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident.” *Matter of Sayeh R.*, 91 N.Y.2d

306, 319 (1997). And if “[d]efendants sought out [counsel] in New York and established an ongoing attorney-client relationship with him,” they will have “purposefully avail[ed] themselves of New York’s legal services market” sufficient to warrant a finding of specific jurisdiction. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380-81, 385 (2007).

It could not be more apparent that the LAPs purposefully availed themselves of New York’s courts and legal services, especially when they fail to cite any evidence indicating otherwise.²² The LAPs instituted two lawsuits (*Aguinda* and the suit to enjoin the Treaty Arbitration) and intervened in two other §1782 proceedings in this State intended to further their Ecuadorian lawsuit, all while being represented by New York counsel—and not just Donziger, but others, whom the LAPs do not even acknowledge in their brief (*e.g.*, Emery Celli²³ and Patton

²² In particular, they offer no evidence for the claim that they never “communicated or met with counsel in New York, [or] executed any agreements in New York” or “stepped foot into New York.” LAPs.Br.81. Regardless, New York law clearly provides that “physical presen[ce] in New York ... is immaterial.” *Fischbarg*, 9 N.Y.3d at 381; *see also Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 169 (2d Cir. 2010).

²³ *See* 8A2052; SER180, 184; *Chevron Corp. v. Berlinger*, 629 F.3d 297, 299 (2d Cir. 2011).

Boggs²⁴). The LAPs also “ratified and approved each and every action to date” performed by their counsel who “act[ed] in defense of the Ecuadorian Plaintiffs’ interests in the *Lago Agrio* Litigation and in all other related actions.” SER80-81. Under these circumstances, “[t]he affirmative and deliberate use of the courts of this state by defendant through its attorneys render it amenable to our long-arm jurisdiction.” *Kazlow & Kazlow v. A. Goodman & Co., Inc.*, 402 N.Y.S.2d 98, 99 (N.Y. App. Term. 1977); *see also First City Fed. Sav. Bank v. Dennis*, 680 F. Supp. 579, 585 (S.D.N.Y. 1988) (finding jurisdiction based on agency relationship where principal ratified agent’s actions).

None of the cases cited by the LAPs establishes otherwise. *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 509 (N.Y. 2007), involved only a “prefiling demand letter and [service of] documents” in New York—acts which “were required under English procedural rules governing the prosecution of [the defendant’s] defamation action[.]” there and a far cry from actually *instituting* two lawsuits and intervening in others here.²⁵ Nor can the LAPs escape the reach of *Fischbarg* by contending that

²⁴ See RJN.Ex.10 at 2-3; *Lago Agrio Plaintiffs*, 409 F. App’x at 394.

²⁵ In addition to being inconsistent with their prior characterizations of it, the LAPs’ claim that the *Aguinda* litigation is “stale” and irrelevant finds no support in the cases they cite. *Whitaker v. Fresno Telsat, Inc.*, 87 F. Supp. 2d 227 (S.D.N.Y.

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they did not “control[] or direct[] counsel’s activities in New York.” LAPs.Br.81. There is no requirement that a defendant “direct” an agent’s activities, and the showing for control—to the extent one is even required²⁶—is minimal. *See, e.g., Chloe*, 616 F.3d at 168-69 (explaining only “some control” is required) (citation omitted).

There is indeed evidence that the LAPs ostensibly exercised some level of control over their counsel’s actions, generally through their purported delegation of broad authority to Fajardo who, in turn, coordinated and communicated extensively with Donziger regarding case status and strategy. *E.g., 7A1793; 8A2046, 2111-12*. And it is disingenuous for the LAPs to claim that Donziger’s “activities in New York are not attributable to the Ecuadorian Plaintiffs” (LAPs.Br.84) when they have elsewhere represented to this Court that Donziger is their attorney, that he plays a “central” role in their litigation team, and that Donziger, while in New

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1999), contains no such discussion. *Indemnity Insurance Co. of North America v. K-Line American, Inc.*, 2007 U.S. Dist. LEXIS 43567, at *26-27 (S.D.N.Y. June 14, 2007), involved litigation instituted fifteen years prior and that was resolved in one year, which did not provide a sufficient basis, by itself, for *general* jurisdiction.

²⁶ Indeed, neither *Fischbarg* nor C.P.L.R. 301 requires that the client “control” his attorney’s actions to be subject to jurisdiction. *See Wiwa*, 226 F.3d at 95.

York, engaged in privileged attorney-client communications and created protected attorney work product on their behalf. *E.g.* RJN.Ex.8 at 24-25, Ex.9 at 1-2, Ex.10 at 7-12; *see also In re Payroll Express Corp.*, 186 F.3d 196, 208 (2d Cir. 1999) (“A principal may not disavow an act of an agent while simultaneously taking advantage of the benefits of the fraudulently procured bargain.”). In short, because actions of a subagent may be “attributed to [the principal] for jurisdictional purposes,” *Time Inc. v. Simpson*, 2002 U.S. Dist. LEXIS 24335, at *10 (S.D.N.Y. Dec. 18, 2002), the District Court did not err, let alone clearly so, in finding jurisdiction over the LAPs based on their New York counsel’s actions.

2. The LAPs’ Actions in New York Are Related to the Declaratory-Relief Claim

A plaintiff need not, as the LAPs assert, establish that each aspect of its claim arises out of the defendants’ New York activities; all that is required is that the claim generally relates to the activities in New York. *See Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103-06 (2d Cir. 2006); *Kronisch v. United States*, 150 F.3d 112, 130-31 (2d Cir. 1998). And so long as the activities are “not ‘merely coincidental’ occurrences that have a tangential relationship to the present case,” a nexus will be found. *Fischbarg*, 9 N.Y.3d at 384 (citation omitted).

The LAPs have repeatedly asserted that the Lago Agrio litigation is simply a re-filing of the initial *Aguinda* action (*e.g.*, 13A3590, 14A3802, 15A4315); they

cannot now claim otherwise in an attempt to avoid jurisdiction. *See Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, 2011 U.S. Dist. LEXIS 36406, at *11-12 (S.D.N.Y. Mar. 31, 2011). Similarly, their suit to stay the Treaty Arbitration was premised on their argument that Chevron’s defense against the Judgment should be restricted to New York’s Recognition Act—the same statute that forms the basis for Chevron’s present claim. *See* 8A2052; 14A3756. Chevron’s claim also arises out of its § 1782 actions, which were commenced to obtain discovery for use in the Ecuadorian litigation and which uncovered much of the fraud here. Finally, there is a clear nexus between Donziger’s conduct and Chevron’s claim given the “central” role he played in the Ecuadorian litigation and the Judgment that resulted from his efforts. *See* RJN.Ex.8 at 24; SPA95-96.

C. The Exercise of Jurisdiction Comports With Due Process

The District Court properly concluded that exercise of jurisdiction over the LAPs accords with due process. The LAPs’ conduct satisfies the “minimum contacts” test because they have met the requirements for New York’s long-arm statute and thus have “purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). And because Chevron has made a “threshold showing of minimum contacts,” *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996), the LAPs must come forward with a “compelling case that the

presence of some other considerations would render jurisdiction unreasonable,” *Burger King*, 471 U.S. at 477. This they cannot do.

There is no burden on the LAPs to litigate here, given that they have filed or intervened in four separate New York actions. New York and Chevron also have an interest in resolving this action here. The LAPs argued the Recognition Act was the only basis for Chevron to challenge the enforceability of the Ecuadorian Judgment (14A3756, 16A4317-18; 19A5201), the fraud that permeates the Judgment was orchestrated by Donziger in this State, and was targeted at this State. Finally, the enforceability of the Judgment must necessarily take place in a forum outside of Ecuador, and the LAPs have identified no forum that has a greater interest in deciding the claims currently before the Southern District.

VI. Appellants’ Additional Arguments Are Meritless

A. Appellants Had a Fair Opportunity to Oppose Chevron’s Application

In asserting that his due-process rights were violated because he was not given additional time to respond to Chevron’s motion (Donziger.Br.46-51), Donziger first asserts without support that he “only was able to retain counsel to represent him in this action on February 17—one day before the preliminary injunction hearing.” Donziger.Br.48. This is untrue. Donziger had previously retained Gerald B. Lefcourt, P.C., who issued press statements *as his lawyer* immediately after Chevron filed its complaint on February 1 and accompanied him to the

PI hearing. 20A5833, 5848; 21A6037. Donziger has never explained why either Mr. Lefcourt or Donziger's counsel in the § 1782 action could not have continued to represent him.

Donziger next contends that he offered to “stipulate to a 60-day extension of the district court’s TRO to permit Donziger to submit, and the court to consider, a substantive opposition.” Donziger.Br.25. Donziger’s offer was a hollow one. As the District Court informed Donziger on more than one occasion (19A5262; 21A6067-68), the court was restricted by Rule 65 from extending the TRO for more than 14 days, absent stipulation of *all* defendants, and a stipulation by Donziger alone would not have bound the LAPs. *See, e.g., Zupnick v. Fogel*, 989 F.2d 93, 98-99 (2d Cir. 1993). The LAPs, however, refused to stipulate. SPA116. Instead, they argued below, as Appellants do here, that the District Court “unnecessar[il]y rush[ed] to judgment,” because the Judgment is “not final and enforceable.” Donziger.Br.49-50; 22A6142-52. But if true, then it would have been costless for the LAPs to agree to extend the TRO. 32A8895. Because they would not, the District Court had to resolve the preliminary injunction motion before the TRO expired, which necessarily required proceeding in an expedited fashion. *See Inverness Corp.*, 819 F.2d at 51.

Even as expedited, however, Appellants were given a meaningful opportunity to oppose Chevron’s motion. After Chevron filed its application for a prelimi-

nary injunction on February 3, the LAPs submitted a 67-page opposition brief on February 8 (16A4298-375), along with over 1200 pages of exhibits (SPA112). The District Court held a hearing that day that was attended by Donziger and the LAPs' counsel, but only counsel for the LAPs presented argument while Donziger declined the court's invitation. 19A5200. Appellants were given until February 11 to file additional opposition papers, which the LAPs did. 19A5241-60. At the next hearing, on February 18, counsel for both Donziger and the LAPs appeared and presented oral argument. 21A6035-117.

The “sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court.” *United States v. Alabama*, 791 F.2d 1450, 1458 (11th Cir. 1986). Far shorter time periods than Appellants were afforded here have been held sufficient. *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 986 (11th Cir. 1995) (one weekend); *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153 (10th Cir. 2001) (three days). Moreover, any error in the briefing schedule was not prejudicial, as Donziger could have—but chose not to—advanced all of the same arguments he ultimately proffered within the District Court’s schedule, and each is meritless. *Dominion Video*, 269 F.3d at 1154.

The cases cited by Appellants involve situations nothing like the present one. In *Garcia v. Yonkers School District*, 561 F.3d 97, 105 (2d Cir. 2009), the

preliminary injunction hearing was held on the same day the complaint was filed, defense counsel was handed the papers supporting the motion as he walked into the hearing, and no briefing was allowed. Similarly, in *Rosen v. Siegel*, 106 F.3d 28, 32 (2d Cir. 1997), without providing any notice to the defendant, the district court issued a preliminary injunction in response to a request made by letter. And in *Marshall Durbin Farms, Inc. v. National Farmers Organization, Inc.*, 446 F.2d 353, 355 (5th Cir. 1971), plaintiffs introduced 68 affidavits for the first time at a hearing, defendants were never given copies of 21 of the affidavits, and the district court refused to postpone the hearing to allow defendants to adequately respond to the new evidence.²⁷

Appellants also argue that the District Court should have held an evidentiary hearing before issuing a preliminary injunction, but there is no such requirement. *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989). By failing to timely request an evidentiary hearing—as Appellants did here—a party waives its right to one. *Id.*; SPA119n.408.

Even if it had not been waived, an evidentiary hearing was not required.

²⁷ Contrary to the impression created by Donziger’s selective quoting from *Marshall Durbin*, the presentation of affidavits for the first time at the hearing was what put defendants in an “impossible position.” 446 F.2d at 357.

Appellants did not submit any affidavits from individuals with personal knowledge denying Chevron’s allegations or otherwise contesting its evidence, and thus failed to dispute any material facts. *E.g., Md. Cas. Co. v. R.A.B.L.R.*, 107 F.3d 979, 984 (2d Cir. 1997). Nor would a hearing have been practicable. *See SEC v. Frank*, 388 F.2d 486, 490-91 (2d Cir. 1968) (Friendly, J.) (“[I]t will sometimes be apparent that the magnitude of the inquiry would preclude any meaningful ‘trial-type’ hearing [before expiration of a TRO].”).²⁸

B. The LAPs’ Untimely Unclean-Hands Defense Was Properly Rejected

Although the LAPs filed substantial briefing and voluminous exhibits (*see supra* Section VI.A) opposing the TRO and the injunction, the LAPs never raised Chevron’s supposed unclean hands in either of those filings, or at either hearing. SPA134.²⁹

²⁸ If the Court were to find the District Court’s procedures insufficient, the proper course would be to remand while keeping the preliminary injunction intact. *Rosen*, 106 F.3d at 33; *Inverness*, 819 F.2d at 51.

²⁹ Appellants’ “*see generally*” cite to their supposed preservation of this issue cites only to timely papers not raising this argument and untimely papers the District Court properly rejected. LAPs.Br.90.

Instead, they “first raised this issue in an untimely and unauthorized filing,” purportedly filed in support of a higher bond, on February 28—nearly three weeks late and only days before the TRO expired. *Id.* And on March 4, the Friday before the TRO was to expire on March 8 due to the LAPs’ refusal to stipulate to an extension, they noticed a motion for leave to file a third opposition. SPA125. Even if the District Court could have nonetheless accepted those documents—which is far from clear, since the LAPs did not (and do not) attempt to demonstrate good cause or excusable neglect for their untimely filing, as required by Rule 6(b)—“the proposition that [the court] was *compelled* to receive them—that it was an abuse of discretion to *reject* them—cannot be accepted.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894-98 (1990); *see Shapiro v. Cantor*, 123 F.3d 717, 722 (2d Cir. 1997).

Appellants’ proposed rule excepting unclean hands from normal procedural rules, and instead commanding courts to consider it “at any stage in the proceedings and whether formally pleaded by the parties or not,” is improper. LAPs.Br.89. At most, the cases on which Appellants rely, *see* LAPs.Br.89 n.189, *permit* a court to consider unclean hands *sua sponte*; none of those cases *requires* a court to do so when the argument is raised after the record is closed and without any semblance of an excuse. *See Filtron Mfg. Co., Inc. v. Fil-Coil Co., Inc.*, 1981 WL 1288, at *6 (E.D.N.Y. Mar. 12, 1981); *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 113 (2d Cir. 2002). To the contrary, Appellants’ au-

thority cautions *against* limitations on the district court's "free and just exercise of discretion" in considering unclean hands. *Goldstein v. Delgratia Mining Corp.*, 176 F.R.D. 454, 458 (S.D.N.Y. 1997)). Moreover, this Court has characterized unclean hands as an affirmative defense, necessarily indicating that it is waivable. *United States v. Bedford Assocs.*, 657 F.2d 1300, 1303 (2d Cir. 1981); *Burns v. Imagine Films Entm't, Inc.*, 165 F.R.D. 381, 393 (W.D.N.Y. 1996); *see also* Fed. R. Civ. P. 8(c). In any event, Appellants will have their chance to argue that unclean hands should be a valid defense to Chevron's claims on the merits of Chevron's declaratory-judgment action in November.

Even if Appellants' argument were properly before this Court, at best it would warrant remand to permit the District Court to decide in the first instance whether and to what extent equity might bar relief. *E.g.*, *A. H. Emery Co. v. Marcan Prods. Corp.*, 389 F.2d 11, 18 (2d Cir. 1968). Remand would also be necessary to permit Chevron to fully rebut Appellants' false and misleading allegations and allow the District Court to resolve the parties' factual disputes and determine whether unclean hands is a legally valid defense to an action seeking a declaration of non-enforceability. *E.g.*, *Henry v. U.S. Trust Co. of Cal., N.A.*, 569 F.3d 96, 100 (2d Cir. 2009). Because Chevron's rebuttal evidence is not properly within the record on appeal, Chevron will not include it here. If this Court elects to consider the factual disputes over unclean hands that were neither timely put before nor re-

solved by the District Court, however, Chevron respectfully requests that it grant Chevron's concurrently filed motion to supplement the record on appeal to consider the rebuttal evidence it had no opportunity to put before the District Court, and incorporates that evidence in full here.

C. Appellants' Objections to the Form of the Injunction Were Waived and Lack Merit

None of Appellants' varied objections to the form of the preliminary injunction were raised in the 84 pages of briefing the LAPs timely submitted in opposition thereto, despite the fact that identical language of the injunction was included in the TRO and Chevron's initial application. These objections were thus waived. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215-16 (9th Cir. 2009); *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003).

Nor did the District Court abuse its "wide range of discretion." *Etuk v. Slatery*, 936 F.2d 1433, 1443 (2d Cir. 1991). Appellants' arguments that the injunction prevents them from obtaining counsel, raising funds, conducting legal research, or preparing for enforcement actions *to be filed in* the event the injunction is lifted (32A8893) contradict the plain language of the injunction.

As Judge Kaplan found, Appellants' true agenda is not to engage in "harmless preparatory efforts." 32A8928. Rather, what they want—and what they belatedly requested—was "an order immunizing [defendants], their counsel and their agents ... from contempt for doing the work necessary to seek enforcement, *even if*

that work is then used to seek enforcement in violation of the preliminary injunction.” 32A8926 (emphasis added). In the guise of their “overbreadth” argument, the LAPs sought an order providing that “*notwithstanding the Preliminary Injunction*” (32A8886 (emphasis added)), any of the agents of the 47 LAPs (most of whom have defaulted here) could receive “any moneys flowing” from a “foreign sovereign’s enforcement of the judgment.” 32A8875. The LAPs’ counsel here have *yet* to deny that their co-counsel are planning to violate the injunction (*see, e.g.*, 32A8296n.3) and that *more than* “a proclivity for unlawful conduct has been shown.” *Russian Media Group, LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) (citation omitted). The District Court in no way abused its discretion in enjoining Appellants not only from themselves filing enforcement proceedings, but also from funding, advancing, and benefitting from those proceedings.

Moreover, Appellants’ assertion that the terms “advancing in any way” and “benefitting from” are impermissibly vague fail because “Rule 65(d) does not require the district court to ‘predict exactly what [a litigant] will think of next’” or “describe all possible, permissible future” conduct. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 241 (2d Cir. 2001) (citation omitted). Instead, the injunction need only “apprise those within its scope of the conduct that is being proscribed,” “when read in the context of” accompanying opinions. *Id.* (quotation omitted). The injunction here sufficiently notifies Appellants that they may not

aid, abet, or receive “any moneys from,” any enforcement or attachment actions filed while the injunction is in place. *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985).³⁰

VII. On Remand, Judge Kaplan Should Continue to Preside

“Reassignment is warranted only in the rarest of circumstances,” and none of the three factors warranting it are present here. *United States v. Zavala*, 2007 U.S. App. LEXIS 25542, at *9-10 (2d Cir. Nov. 1, 2007). First, any concern that Judge Kaplan would have “substantial difficulty” in putting out of his mind “previously-expressed views or findings determined to be erroneous,” *Martens v. Thomann*, 273 F.3d 159, 174 (2d Cir. 2001) (citation omitted), comes into play only if the district court’s findings are reversed or vacated, outcomes not appropriate here. *Spiegel v. Schulmann*, 604 F.3d 72, 83 (2d Cir. 2010). Moreover, Judge Kaplan has not even reached final conclusions on the questions before him, instead

³⁰ Appellants argue for the first time that the District Court abused its discretion in banning “any and all enforcement proceedings,” and not just “multiple proceedings and seizing or attaching assets.” Donziger.Br.64. Even if this argument had been put before the District Court, that court would properly have declined to undertake a proceeding-by-proceeding review of Appellants’ vexatious litigation strategy to approve or reject it—particularly since the present suit provides a sufficient forum that *any* further litigation is unnecessary, except to circumvent the District Court’s jurisdiction. 22A6257.

emphasizing that “all findings at this stage [are] provisional” and that “the evidence is not conclusive and certainly would be open to further examination at trial.” SPA16, 30; *see also* SPA39, 81.

Second, reassignment is not necessary “to preserve the appearance of justice.” *Martens*, 273 F.3d at 174 (citation omitted). Appellants’ complaints about Judge Kaplan rest exclusively on opinions he formed “on the basis of facts introduced or events occurring in the course of the current [or] ... prior proceedings,” which do “not constitute a basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Appellants do not attempt to and cannot establish any purported bias that “arises from an extrajudicial source.” *Kensington Int’l Ltd. v. Rep. of Congo*, 461 F.3d 238, 245 (2d Cir. 2006).

Finally, reassignment “would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Martens*, 273 F.3d at 174 (citation omitted). Judge Kaplan has a wealth of knowledge over this complex case, having presided over two key § 1782 proceedings and now the preliminary injunction stage of this case. Notably, Appellants have appealed Judge Kaplan’s rulings twice before and have never asked for reassignment. *See Lago Agrio Plaintiffs*, 409 F. App’x 393; 14A3977-78. This Court has affirmed his prior rulings and expressly commended “the exemplary manner in which the able District Judge has discharged his duties,” adding that “all concerned, not least this Court,

are well served” by his stewardship. *Lago Agrio Plaintiffs*, 409 F. App’x at 396.

No development in this litigation warrants a different conclusion.

CONCLUSION

The status quo preliminary injunction should be affirmed.

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Respectfully submitted,

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1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by this Court's Order of May 12, 2011, permitting principal briefs not to exceed 21,000 (Doc. 135). The word count of the brief is 20,967. This word count was determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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/s Randy M. Mastro _____