20-1529-CR

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN ROBERT DONZIGER, 11-CV-691,

Defendant-Appellant.

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

BRIEF FOR DEFENDANT-APPELLANT

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Introduction

At the heart of this appeal and petition for mandamus is a straightforward question: May an appointed prosecutor deliberately coverup her firm's attorney-client relationship with an interested party, which dominates an industry to which her firm and its clients are inextricably tied, itself compromising her disinterest in the case? The prosecutor and the District Court in this case say that the answer is "yes." The letter and spirit of the United States Supreme Court's controlling precedent, *Young v. United States ex rel Vuitton et Fils S.A.,* 481 U.S. 787 (1987), as well as ethical norms in this Circuit, are to the contrary. *Vuitton* establishes a "categorical rule" of "rigorous[]" prosecutorial disinterest. *Id.* at 810, 814. The extraordinary misconduct and bias in this case threaten the integrity and reputation of this Circuit and warrant dismissal of the case or, alternatively, disqualification of the prosecutor and remand to a new randomly-appointed District Judge.

While the shift of this case from the civil to the criminal arena required elevated sobriety and care, the opposite has happened. On July 31, 2019, after the United States Attorney for the Southern District of New York declined Judge Kaplan's request to prosecute Appellant-Petitioner Steven Donziger for criminal contempt for allegedly violating orders issued by Judge Kaplan for the

benefit of the Chevron Corporation ("Chevron"), Judge Kaplan invoked Rule 42 of the Federal Rules of Criminal Procedure and appointed lawyers from Seward & Kissel LLP ("Seward") to prosecute Mr. Donziger. Without recusing himself, Judge Kaplan arranged for Judge Preska to preside over Mr. Donziger's trial rather seek random assignment.

For the first eight months of the criminal case, the Seward attorneys either failed to disclose Seward's attorney-client relationship with Chevron to Mr. Donziger or actively covered it up. Seward did not disclose the Seward-Chevron relationship to Mr. Donziger in August 2019 at Mr. Donziger's first appearance in the case or five months later in December 2019 when Mr. Donziger specifically and adamantly requested an evidentiary hearing into the scope of the Seward-Chevron relationship. A19, 23, 27.[1] Instead, Seward partner Rita Marie Glavin actively concealed the fact of Seward's attorney-client relationship with Chevron: she berated Mr. Donziger at a conference before Judge Preska in January 2020 for having the audacity to question Seward's disinterest in the case and urged the District Court to advance the scheduled date for trial as punishment for his audacity. As Ms. Glavin put it, "[L]et's get this case going. No more delay, no more throwing mud . . . ." A33.

[1] "A" refers to the Appendix filed herewith.

Almost three months later, in late March 2020, Seward finally and begrudgingly disclosed the Seward-Chevron attorney-client relationship to Mr. Donziger only after he moved for Seward's disqualification. A49. In so moving, Mr. Donziger proffered an opinion of Professor Ellen Yaroshefsky, an expert in prosecutorial ethics. A86. Although at the time Professor Yaroshefsky was unaware of the then-undisclosed Seward-Chevron attorney-client relationship, she opined that publicly-available information about Seward's industry ties to Chevron and Chevron's partners in the oil and gas industry themselves obviously established that Seward had a financial relationship with Chevron-related entities and should be disqualified. A86-95.

Mr. Donziger's motion for Seward's disqualification and Professor Yaroshefsky's supporting opinion created too great a risk for Seward that its coverup of the Seward-Chevron attorney-client relationship would be exposed; Seward attempted to mitigate its presumably inevitable comeuppance by making a belated disclosure. A96. Even then, Seward asserted attorney-client privilege on Chevron's behalf, itself defeating Seward's claimed disinterest, and otherwise refused to answer non-privileged questions about the representation, perpetuating Seward's coverup. A120-21.

Judges and lawyers steeped in the traditions of this Circuit know how one of its District Judges might be expected to respond to a prosecutor's delayed disclosure of her firm's attorney-client relationship with an interested party eight months into a case, let alone active deceptions in a Southern District courtroom to cover it up. A Judge might invite the United States Attorney or a supervising prosecutor to appear and answer for the prosecutor's conduct, refer the prosecutor to the Department of Justice's Office of Professional Responsibility, rebuke and possibly sanction the prosecutor, or all of the above. Here, of course, Ms. Glavin's prosecutorial decisions are subject to no prosecutorial oversight whatsoever: she is a Seward partner in a private, for-profit law firm and answers to no one in the United States Department of Justice. She has financial interest as retained counsel for Seward's existing clients in the oil and gas industry and in encouraging new clients to engage Seward based on its service of industry interests.

The only theoretical checks on Ms. Glavin's conduct are Judge Kaplan who appointed her and Judge Preska whom Judge Kaplan arranged to preside over Mr. Donziger's trial. Judges Kaplan and Preska, however, did not even raise a judicial eyebrow in response to Ms. Glavin's flagrant misconduct. Instead, Judge Preska denied Mr. Donziger's motion for disqualification, rejected the wisdom of Professor Yaroshefsky's unrebutted expert opinion, and declined

even to learn the underlying facts by questioning Seward's refusal to provide requested information and its assertion of attorney-client privilege on Chevron's behalf. A122-46. Judge Preska thereby permitted Seward to have it both ways: accepting Judge Kaplan's appointment to prosecute as supposedly disinterested, while protecting Chevron's secrets.

Meanwhile, Judge Kaplan did not refute or otherwise address the inference pressed below that he knew about the Seward-Chevron attorney-client relationship before appointing the Seward attorneys to prosecute Mr. Donziger for allegedly violating orders issued for Chevron's benefit. Judge Preska did not refute or otherwise address the inference pressed below that she and Judge Kaplan knew that Ms. Glavin's indignation when requested to address the scope of the Seward-Chevron relationship was manufactured and perpetuated a coverup.

This Court has been prejudiced by Ms. Glavin's misconduct. On an appeal to this Court from Judge Preska's order that monitored home confinement was required as a condition of Mr. Donziger's fully-secured $800,000 bond, Mr. Donziger argued that Ms. Glavin's professed concern about risk of flight (for a law school graduate with a wife and child and surrendered passport) was a pretext, and that Seward's industry ties to Chevron and Chevron's partners in the oil and gas industry proved Seward's bias and disinterest. Second Circuit Case 19-4155, Doc

16 at 8-9. When Ms. Glavin appeared before this Court for oral argument on February 11, 2020, at least seven months *after* she was indisputably aware of her firm's attorney-client relationship with Chevron, she knew that this Court and Mr. Donziger were in the dark about it. Any lawyer faithful to this Circuit's standards of professional ethics would have disclosed the fact of her firm's attorney-client relationship with an interested party for whose benefit the allegedly violated orders were issued. Not here. Ms. Glavin opted to hold the truth close to the vest and cross her fingers that neither this Court nor Mr. Donziger would ever find out.

Ms. Glavin's transgressions are especially unforgivable in light of her role as a senior prosecutor supervising the ill-fated case against United States Senator Ted Stevens. A Special Counsel's investigation into the prosecution of Senator Stevens found that it was "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony." *In re Special Proceedings,* 1:09-mc-00198-EGS, Doc 84 at 1. A prosecutor from the Department of Justice's Public Integrity Section testified to the Special Counsel that Ms. Glavin favored withholding exculpatory FBI 302s from Senator Stevens. As the Public Integrity prosecutor testified, "Ms. Glavin said words to the effect of we'll have to play this one close to the vest or we have to play our cards close to the vest on this one. I

was stunned .. . [t]hat that position [Ms. Glavin's interpretation of the Jencks Act] was being taken in the particular case." *Id.* at 99-100.

As a result of misconduct in the prosecution of Senator Stevens, the Department of Justice went to great lengths to ensure that prosecutors understand the letter and spirit of their ethical obligations. *See* Statement for the Record of the Department of Justice to the United States Senate Committee on the Judiciary, Hearing on the Special Counsel's Report of the Prosecution of Senator Ted Stevens, March 28, 2012.[2] Ms. Glavin appears not to have learned from experience. Her dissembling about the Seward-Chevron attorney-client relationship itself proves that she fully appreciated its materiality: while characterizing defense counsel's questions about Seward's relationship with Chevron as "throwing mud," she urged that the scheduled date for trial be advanced. Meanwhile, she held the Seward-Chevron attorney-client relationship close to the vest just as in *Stevens*.

Judge Preska tolerated the prosecutor's irrefutable mendacity and

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[2] Available at *https://www.justice.gov/sites/default/filesltestimonies/witnesses/attachments/03/28/12/03-28-12-doj-statement.pdf* (detailing the Department's multi-faceted renewed efforts beginning in 2012 to encourage candor from its prosecutors).

turned a blind eye to the fact and appearance of especially unacceptable prosecutorial misconduct. More, even after Seward later disclosed the Seward-Chevron attorney-client relationship, Judge Preska denied Mr. Donziger's motion to disqualify Seward without (1) probing Seward's refusal to answer simple questions about the underlying representation of Chevron; or (2) adequately reconciling Seward's claim of privilege on Chevron's behalf with its prosecution of Chevron's longstanding adversary. Even more, Judge Kaplan appears to have appointed Seward to vindicate orders issued for Chevron's benefit despite knowing about the Seward-Chevron attorney-client relationship. He also remained silent as Seward deliberately misled Mr. Donziger.

Over the many months that Ms. Glavin was concealing the Seward-Chevron attorney-client relationship, she was adamantly urging that Mr. Donziger's fully-secured $800,000 bond be conditioned on monitored home confinement, now in its *eleventh month* and counting, for a misdemeanor punishable by no more than imprisonment of *six months*. Ms. Glavin did so despite Mr. Donziger's proffer of 27 additional sureties, including professors and other accomplished professionals; and the public support of 29 Nobel Laureates and 475 lawyers and legal organizations around the world, including the President of the Paris Bar. *See* 19-cr-561 (LAP), Doc 85. Mr. Donziger proposed reasonable

alternatives to monitored home confinement such as a monitored curfew and a daily two-hour monitored window to attend to his family's neighborhood errands and to help relieve his son's isolation occasioned by the pandemic without school and his usual activities. These reasonable modifications to Mr. Donziger's pretrial release *unopposed by Pretrial Services* were *opposed by Ms. Glavin*.[3] If Ms. Glavin is not actually motivated by allegiance to Chevron, Seward's clients in the oil and gas industry which benefit from Chevron ties, and her former government colleagues who now work for Chevron's counsel Gibson Dunn, it sure looks like it.

John R. Horan, a former Assistant United States Attorney for the Southern District of New York serving as Referee over Mr. Donziger's disciplinary proceedings, recommended in February 2020 that interim suspension of Mr. Donziger's license to practice law, based upon Judge Kaplan's civil judgment against Mr. Donziger, be lifted. Referee Horan afforded Judge Kaplan's civil judgment "considerable," but not "decisive" weight, noting that "[t]he extent of [Mr. Donziger's] pursuit by Chevron is so extravagant, and at this point so

[3] Mr. Donziger has separately noticed an appeal to this Court from the District Court's orders of May 29 and June 3, 2020, denying his application for elimination of monitored home confinement and, alternatively, a daily two-hour window to leave home to attend to the needs of his quarantined thirteen year-old son and errands within his Upper West Side neighborhood. Once this appeal is perfected, Mr. Donziger intends to move to consolidate it with this case.

unnecessary and punitive." Referee Horan found that Mr. Donziger, who testified in late 2019 during the pendency of the criminal case, was "candid and clear and showed no sign of dissembling or evasiveness," also concluding that none of the witnesses who attested to Mr. Donziger's honesty, integrity, and credibility "are the sort who would carelessly toss off an opinion about character or misrepresent his reputation in the world community." A57-58.

Appellate deference to lower courts sometimes helps realize the benefit of resolution of issues from different judicial perspectives. See, e.g., Baker and Kornhauser, "A Theory of Judicial Deference," Nov. 2, 2015, at 2[4] ("deference allocates the power to make decisions between the appellate courts and the initial decision-maker"); Committee Note to Rule 13, Southern District Rules for the Division of Business Among District Judges (noting the "desirability of enriching the development of the law by having a plurality of judges examine in the first instance common questions of law"). Appellate deference, however, is not absolute. Proceedings in lower courts sometimes undermine the integrity, reputation and appearance of fair justice. No matter how strongly any particular

[4] Available at *https://www.semanticscholar.org/paper/A-Theory-of-Judicial-Deference-Baker-Kornhauser/2404694bf932e09908a54ae72dd167821cfb5fc4*.

participant may feel about a particular issue or defendant, nothing justifies injury to the process itself.

Seward's approach to this prosecution, validated by the District Court, gives voice to the view that this criminal case is fueled by something other than vigorous application of the law and the facts. We have arrived at too precarious a point in our experiment in constitutional democracy to permit even the appearance that personal or ideological agendas are interfering with the fair administration of justice. We respectfully urge this Court to act.

I RELIEF SOUGHT BY PETITIONER-APPELLANT

The prejudice to Mr. Donziger, entering his eleventh month of monitored home confinement pressed by Seward prosecutors who should not have been appointed in the first place, is irreparable. This case should be remanded for dismissal with prejudice. Alternatively, the Seward prosecutors should be summarily disqualified and the case remanded to a new randomly-assigned Judge for appointment of a truly disinterested prosecutor. Alternatively, the case should be remanded to a new randomly-assigned Judge for a hearing into Seward's claim of attorney-client privilege and evaluation under all the circumstances (including Seward's coverup of its attorney-client relationship with Chevron) of Seward's qualifications to prosecute this case.

II ISSUES PRESENTED BY THE PETITION

1. Are private lawyers qualified to prosecute charges of criminal contempt where (a) their firm has an attorney-client relationship with the corporation for whose benefit the underlying orders were issued and on whose behalf the firm asserts attorney-client privilege; (b) they actively coverup and deliberately deceive the defendant about their firm's attorney-client relationship with that corporation; and/or (c) their firm's industry ties to that corporation and its industry partners demonstrate the firm's disqualifying interest in the case, even apart from the attorney-client relationship, as determined by the unrefuted opinion of an expert in prosecutorial ethics?

2. Should a case of misdemeanor contempt punishable by no more than imprisonment of six months be dismissed based on an appointed prosecutor's coverup of her firm's attorney-client relationship with the corporation for whose benefit the underlying orders were issued, while simultaneously urging unnecessary monitored home confinement entering its eleventh month and counting?

III STATEMENT OF THE FACTS

A. Seward's Coverup of the Seward-Chevron Attorney-Client Relationship

By letter dated December 19, 2019, Mr. Donziger's counsel wrote to

Seward, expressing concern about two troubling issues that then appeared to counsel to be separate: (1) whether it was appropriate for Judge Kaplan to appoint lawyers from Seward to prosecute Mr. Donziger, despite Seward's industry ties to Chevron and Chevron-related entities in the oil and gas industry; and (2) the extent of any contact between Seward and Judge Kaplan. A27.

When Seward declined to answer these questions, defense counsel asked Judge Preska to conduct a hearing into the Seward-Chevron ties. A19, 23. At the time, Mr. Donziger and counsel believed from Judge Preska's role as the District Judge presiding over the criminal case that Judge Kaplan had recused himself from the criminal case, and that Mr. Donziger's application for a hearing was made only to one Judge, Judge Preska.

Seward submitted a carefully-worded letter to Judge Preska stating that Seward had conducted an internal conflicts check before accepting Judge Kaplan's appointment in July 2019 and concluded that it had no conflicting loyalties:

> With respect to the defense's claim that (a) two Seward clients receive funding from an entity whose Vice Chairman happens to be on the Chevron Board, and (b) a Seward client receives income from Chevron, even if true this creates no conflict or conflicting loyalty for the prosecution team in this criminal case. In that regard, prior to taking on this representation, Seward performed appropriate conflicts checks (as it does before taking on any representation).

A21. While Seward wrote that it had conducted a conflicts check before accepting Judge Kaplan's appointment, Seward did not disclose that the conflicts check revealed the Seward-Chevron attorney-client relationship, which was otherwise necessarily known to the Seward partnership.

Mr. Donziger's counsel in reply submitted a letter in support of his request that the Seward prosecutors be required to disclose the scope and nature of their relationship with Chevron. The letter argued that Seward's stonewalling "warrants the inference that it has business, professional and/or personal relationships that compromise both the fact and appearance of the necessary 'disinterestedness'" required of a prosecutor. A23. The letter noted that "Ms. Glavin has unlimited and unique access to the facts" and was obliged "as a Seward partner and *de facto* sovereign in this case, to disclose the full extent of Seward's relevant relationships." A24.

Defense counsel's three-page letter included a paragraph that listed three facts gleaned from publicly-available information about the Seward-Chevron relationship:

> (1) Oaktree Capital Group, LLC ("Oaktree"), whose Vice President has served on Chevron's board, significantly invested in Seward clients, according to Seward's website;
>
> (2) Multiple Seward clients, identified in the letter, derived significant income from Chevron; and

> (3) Seward partners appeared to have relationships with Chevron, Oaktree or both.

A24.

On January 6, 2020, at an appearance before Judge Preska, Ms. Glavin scolded Mr. Donziger, with an adamance not adequately reflected in the transcript, for having the audacity to question whether Seward was qualified to assume the mantle of a disinterested sovereign or to ask about Seward's contact with Judge Kaplan. Ms. Glavin at one point turned and dramatically pointed at the defense table as if making an in-court identification at a trial. Seward orally delivered a carefully-worded response to counsel's letter of December 19, 2019, which, in retrospect and in light of Seward's subsequent disclosures, was plainly designed to hide either (1) the fact of the Seward-Chevron attorney-client relationship; (2) Judge Kaplan's appointment of Seward despite his knowledge of the Seward-Chevron attorney-client relationship to Judge Kaplan; or (3) both.

Thus, though defense counsel in his letter had asked Seward only about the extent of Seward's contacts with Judge Kaplan, not whether Seward and Judge Kaplan were coordinating prosecutorial strategy, Seward addressed only the latter unasked question:

> [W]ith respect to [defense counsel' s] claim that Judge Kaplan is any way coordinating with the prosecution team or seeking to influence the prosecution team in its decision making, in its strategy, that is false, and it is

> irresponsible of [counsel] to be making that claim.
>
> The prosecution team, as we prosecute this case, does not seek Judge Kaplan's input in our decisions and the steps that we take, and Judge Kaplan does not offer it or seek to provide it. Period, full stop .. . .

A31.

Seward's subsequent statements at the conference about its relationship with Chevron were carefully worded and delivered as an attack on Mr. Donziger to distract attention from the truth:

> [Defense counsel] is not entitled, nor is Mr. Donziger, to know every communication that the prosecution has with anybody in this case. What he's entitled to is the discovery that he is allowed under the Constitution, under the law, and under the rules. So let me make that very clear, because I think [defense counsel' s] claim is irresponsible and disturbing.
>
> . . .
>
> [I] understand that Mr. Donziger is unhappy that he is being prosecuted criminally in this case. That does not mean that he gets to interview the prosecutor to decide whether the defense believes that the prosecutor has conflicting loyalties, is independent, or impartial. No criminal defendant is allowed that anywhere in this country, whether it be a Rule 42 proceeding or any place else.
> [I]t is a pattern - we expected this would happen in this case, but it is a pattern by Mr. Donziger of attacking judges, attacking lawyers, impugning their reputations, and attacking parties, at every step of this case.
>
> [N]either myself nor [Seward attorneys] Mr. Maloney nor Ms. Armani, who are the three prosecutors appointed to represent this case, nor does my law firm, Seward & Kissel, have existing client relationships that would result in the three appointed prosecutors having conflicting loyalties or having that would cause the independence of our decision making on behalf of our client, the United States in this case, to be anything but impartial and

objective.

[L]et's get this case going. No more delay, no more throwing mud . . . .

A 32-33.

Mr. Donziger's counsel responded that the question was not Mr. Donziger's unhappiness about being prosecuted, but Seward's duty to disclose its ties to Chevron, and that an expert in prosecutorial ethics was prepared to opine about Seward's disinterestedness even absent the requested disclosure:

> It's not enough for Ms. Glavin to say everything's fine and to attack me, or to attack Mr. Donziger. What is required is a disclosure as to what these [Seward-Chevron] interests are.

A34.

> [I]'ve been in contact with an expert in legal ethics . . . . [T]he expert is troubled and is prepared - - - if the record stands as it is - it will be what it is - to explain to the Court that the record as it is is a problem, just based on my research of publicly available information and without knowing more about the relationship to which Seward has unique and unlimited access and won't disclose.

A35.

Defense counsel explained that legitimate concern about any contacts between Seward and Judge Kaplan was elevated by Seward's stonewalling:

> [A]nd my concern is elevated, not mitigated, by the absence of disclosures about the Seward relationship with Chevron . . . and about exactly what Judge Kaplan's role is, and I say that with due respect to the bench generally and to Judge Kaplan specifically. I'm representing a client.

A36.

When Judge Preska asked defense counsel about Ms. Glavin's representation that no contacts with Judge Kaplan were "continuing," defense counsel responded that the absence of actual disclosures justified the inquiry:

> [M]y concern, given the history [of the case] . . . is whether or not Judge Kaplan is speaking to the prosecutors and, if so, what about. I understand there's only so much I can do to get at that issue. All I can do as an advocate, Judge Preska, is call it out and see what the response is. I don't know what more I can do to get at that particular issue. But it remains very troubling to me.

A38.

> Look, I understand that these are difficult and sensitive issues. I've tried to do my best to raise them and discuss them in a professional way with respect to all parties, including Ms. Glavin, but I did what I could. I don't l know that I could have done more. And at this point, I still think the issue with Judge Kaplan is a problem. I don't know what I can do to get at it. I don't know that I can call him as a witness to ask him questions. What I do know is with regard to the other issue [of Seward's disinterestedness], I want an opportunity to go back to my expert and make a more formal submission to your Honor.

A39.

> I renew my request to the Court to conduct a judicial inquiry to get at the facts. I understand that could raise various issues. There are ways to do it. But something needs to be done to establish whether the prosecutors are disinterested, as they must be. I renew that.

A45.

Apparently concerned that colloquy at the conference about Seward's contacts with Judge Kaplan could later be interpreted as a flat Seward lie if the

truth ever emerged, Seward went back to the issue in an effort to massage the record so that it might serve to protect Seward if ever called to account for its deceit:

> [W]ith respect to the issue on Judge Kaplan, what [counsel] was asking is that he wants to know about any and all contacts that the prosecution had with Judge Kaplan, or with chambers. I told him he's not entitled to that. He'll get what he's entitled to under the law and under discovery.
>
> [T]here is no need, in our view, to go down the road for [counsel] to talk about every conversation that I've ever had with Judge Kaplan that related to this case. Suffice it to say, as I made the representation to the Court, the prosecution does not seek Judge Kaplan's input with respect to our prosecution decisions or our strategy, and Judge Kaplan does not weigh in on our prosecution decisions or strategy.

A42-44.

At the end of the conference on January 6, 2020, Judge Preska's ruling was restricted to the three listed facts in counsel's three-page letter submitted in advance of the conference. A45. Judge Preska did not address Seward's unique and unlimited access to the relevant facts or the inference of coverup justified by Seward's stonewalling. Judge Preska did not otherwise ask Seward *anything* about the Seward-Chevron relationship. Instead, Judge Preska resolved Mr. Donziger's application solely by finding that the three facts listed in defense counsel's letter were "way too attenuated to require any additional disclosures." A45. As to whether Seward had spoken *ex parte* to Judge Kaplan,

Judge Preska said, ["w]ith respect to contacts with Judge Kaplan, I am satisfied with the prosecutor's representations with respect to that." A45.

B. Unaware of the Seward-Chevron Attorney-Client Relationship, Professor Yaroshefsky Concluded that Seward's Industry Ties to Chevron and Chevron's Partners in the Oil and Gas Industry Required Seward's Disqualification

On February 27, 2020, in moving to disqualify Seward, Mr. Donziger proffered an opinion of Professor Yaroshefsky (A86-95) that "[e]ven based solely on the limited public record of Seward's financial interest in Chevron-related entities," much of it gleaned from Seward's own website, Seward was not disinterested and should be disqualified. A95.

Seward's industry ties to Chevron were undisputed. Chevron and a few other oil companies control the oil industry in the United States and hold an overwhelming market share. Seward is "particularly well-known" for its representation of entities related to offshore drilling and services. Seward's "Maritime Practice 2018 Year in Review, dated February 12, 2019, asks "[a]s we look forward and ponder what 2019 will hold for *us and our clients*, many of the questions we asked ourselves last year still seem salient . . . . *Will oil prices recover* enough to bring badly needed stability to the offshore drilling and services sectors." It was that very year, 2019, in which Judge Kaplan appointed Seward to prosecute alleged violations of orders issued for Chevron's benefit. A88.

Seward clients which derive significant revenue from Chevron include Euronav, reportedly the world's largest independent crude oil tanker operator, which has described its business as including chartering "[v]essels to leading international energy companies, such as Chevron." On June 18, 2018, Seward announced that it had "[a]dvised Euronav on its merger with Gener8 Maritime," a company whose annual report cites its strong relationships with customers like Chevron. Another Seward client, Dorian LPG, a liquified petroleum gas shipping company and leading owner and operator of gas carriers, announced in October 2015 that it was in the process of clinching a five-year time-charter with Chevron. A89.

According to Chambers USA, a service whose ranking of law firms is touted on Seward's website, Seward reported to Chambers that its main areas of practice include "maritime," identifying just one representative engagement: "represent[ing] Scorpio Tankers Inc, in connection with its merger with Navig8 Product Tankers Inc . . . . creating the largest U.S.-listed owner of petroleum product tankers." According to Scorpio, the merger improved its "[c]hances to gain contracts among customers like oil majors Total and Chevron. A89.

While publicly-available information did not reveal the facts of Seward's direct intersection with Oaktree Capital Management ("Oaktree"), a fund

with $120 billion of assets under management, Oaktree is significantly connected to Chevron and at least four of Seward's clients. Two of Oaktree's directors serve or have recently served on Chevron's Board of Directors. Meanwhile, Seward's website touted Oaktree's investments in Seward clients, including Kudu Investment Management LLC, Eagle Bulk Shipping Inc, and TORM PLC. A89-90.

Thus, even unaware of the Seward-Chevron attorney-client relationship and Ms. Glavin's furious dissembling about it, Professor Yaroshefsky concluded that Seward was not qualified to assume the mantle of the Department of Justice. Professor Yaroshefsky concluded that Seward's interests were so aligned with Chevron's as to create a financial conflict of interest:

> In such a highly concentrated industry, the Seward firm's financial and business interests are dependent on the good will of Chevron and its related entities and other giants in the oil industry. Seward would not seek to act contrary to the interests of the few controlling large industry oil and gas companies and related entities.

A93. She explained that "lawyers, like all people, are subject to influences that affect their decision making:"

> Inevitably, one's perspective, bounded by their role and experience, results in rationalizations in favor of clients, even if unintentionally. Even when people set out to make impartial judgments about a course of action, however, self-interest has a way of creeping in - unconsciously - to the

> decision process. Somehow the information is processed in a way that makes the outcome more desirable to the decision maker.

A93-94 (citation and quotation marks omitted) (even mere "[c]ognitive biases [can be] a chronic issue is all matters, but studies point to particularized cognitive biases for prosecutors because of the significant power they wield and their unreviewable discretion").

Professor Yaroshefsky concluded that disqualification was required whether or not the three Seward prosecutors themselves served Chevron-related entities:

> [A]lthough it is not known whether or not any of the three appointed special prosecutors at Seward have personally performed legal services on behalf of any Chevron-related entities, the entire firm should be disqualified because of its financial interests in Chevron-related work. Thus, unlike ethics rules governing lawyers who move from government to private practice and vice versa, where screening of individual lawyers is permissible in particularized matters, no such screening prevents disqualification of the Seward firm here. *See* NYRPC I .11 (discussing screening for government lawyers). The firm's financial interest is disqualifying for the entire firm.

A94.

Professor Yaroshefsky concluded that "[i] is an understatement to say that there is a potential and opportunity for bias by Seward lawyers:"

> It is equally an understatement to say that Seward counsel in the special prosecutor role undermines public trust and confidence in the perception of fairness of the legal system. The facts demonstrate a disqualifying conflict of interest under any objective standard.

. . . . .

> [T]his longstanding, highly publicized, contentious case is the subject of ongoing controversy of international dimension with wide-ranging consequences including public perception of the fairness of the system of justice in the United States.

A94. Professor Yaroshefsky' s expert opinion that the Seward attorneys were disinterested and should be disqualified was not rebutted in District Court.

C. Seward's Belated Disclosure of the Seward-Chevron Attorney-Client Relationship and Bogus Assertion of Attorney-Client Privilege

Professor Yaroshefsky's opinion, submitted in support of Seward's disqualification, addressed Seward's above-quoted letter about a conflicts check, concluding that it was inadequate and should not be the last word:

> [T]he precise inquiries in the conflicts check were not disclosed. Thus, it is not known whether the Chevron-related entities were part and parcel of that conflicts check, nor whether the role of Seward in Chevron-related entities was part of that determination.
>
> . . . .
>
> [M]s. Glavin's statement that the firm's conflict check did not determine the existence of such a conflict of interest is not dispositive of the issue. Court[s] have disqualified lawyers after determining that a conflicts check was inadequate or that the firm's analysis of no conflict was erroneous. *See e.g.,* Altana Pharma AG v. Teva Pharm. USA Inc., 2006 WL 8440776, at 2-5 (D.N.J. Feb. 16, 2006) (court reverses the firm 's initial view that a conflict did not exist). In re MF Glob. Inc., 464 B.R. 594 (Bankr. S.D.N.Y. 2011) (ordering additional disclosures to court to determine disinterestedness and conflict of interest stating that boilerplate disclosure of prospective connections is rarely satisfactory.)

A93-94.

Only then, on March 24, 2020, after Professor Yaroshefsky directly called into question the adequacy of the Seward internal conflicts check, did Seward disclose the Seward-Chevron attorney-client relationship. A96. Seward's belated disclosure made it undeniable that Ms. Glavin herself knew of the Seward-Chevron attorney-client relationship no later than July 2019, and that the Seward partners who had themselves represented Chevron permitted Ms. Glavin to accept Judge Kaplan's appointment to prosecute Chevron's adversary in litigation.

Seward's disclosure established with certainty that Ms. Glavin was fully aware of the Seward-Chevron attorney-client relationship and covered it up on (1) January 6, 2020, when she appeared before Judge Preska and furiously opposed Mr. Donziger's request for a hearing into the Seward-Chevron relationship; and (2) February 11, 2020, when she appeared for oral argument in this Court after Mr. Donziger had expressly argued that Seward's professed concern about risk of flight was a pretext borne of disqualifying bias. *See* Second Circuit Case No. 19-4155, Doc 16 at 8-9.

Even then, Seward's disclosure was crabbed and incomplete. A96. Rather than rebut Professor Yaroshefsky's opinion, Seward submitted a declaration of Seward partner Mark Hyland that he had overseen the conflicts check before

Seward agreed to accept Judge Kaplan's appointment. Mr. Hyland determined that Seward's work for Chevron "[i]n the last ten years" consisted of "preparation of corporate forms and the issuance of related legal opinions for two of [Chevron's] foreign affiliates" in 2016 and 2018. Mr. Hyland said that his conflicts check "did not identify any conflicts that would preclude the appointment" of the Seward prosecutors. Mr. Hyland did not proffer any particular professional expertise underlying his conclusion. According to Seward's website, Mr. Hyland has worked at Seward as a commercial litigator since 1980. A96. It was plainly in Mr. Hyland's personal financial interests, as well as those of his private, for-profit law firm, to obtain Judge Kaplan's appointment and deepen Seward's relationship with Chevron, Seward's industry clients, and other potential industry rainmakers.

Mr. Donziger's counsel asked Mr. Hyland in an email to disclose the identity of the foreign affiliates and the subject matter of the opinions. Mr. Hyland responded that the requested information was privileged. Defense counsel via email posed the following additional questions to Mr. Hyland:

> 1. To clarify, is it your position that the identity of the foreign affiliates referred to in your declaration is privileged?
>
> 2. Is it your position that the "corporate forms" are themselves privileged, that is, (a) any form or template used is itself privileged; and/or (b) questions asked or information requested for which the corporate forms were prepared

> are themselves privileged?
>
> 3. Were the "corporate forms" filed with, submitted to, or otherwise provided to any third party or anyone outside of Chevron? If so, is it your position that the "corporate forms" as prepared are privileged?
>
> 4. You limit your declaration to the firm's work for Chevron and/or affiliates for "the last ten years." Did your firm perform any work for Chevron and/or any affiliate before "the last ten years" and, if so, what work?
>
> 5. As co-General Counsel to the firm, did the firm disclose the fact of the firm's representation of Chevron and/or foreign affiliates to Judge Kaplan in or about July 2019 at the time that attorneys from the firm were approached by and accepted Judge Kaplan's appointment to prosecute Mr. Donziger, and, if not, do you know why not?

Mr. Hyland responded that his previously submitted declaration:

> contains the information Seward & Kissel LLP deems appropriate to provide in connection with your motion to disqualify the firm. As a clarifying point to your email, please note that Chevron - not Seward & Kissel LLP - is asserting privilege.

A120-21.

Mr. Hyland's responses raised at least three ostensibly insurmountable bars to Seward assuming the mantle of a disinterested sovereign, all in the context of Ms. Glavin's frantic dissembling when first called on to reveal the extent of the Seward-Chevron relationship. *First*, Seward is simultaneously prosecuting Chevron's adversary in criminal litigation while asserting attorney-client privilege on undisclosed facts, preventing reconciliation of the two positions. *Second*,

Seward cannot fairly purport to be truly disinterested while asserting Chevron's attorney-client privilege on matters plainly not privileged, such as the identity of the two Chevron foreign affiliates for which Seward provided services, and the subject matter of the "corporate forms" and legal opinions. *Third*, Seward refuses to provide answers necessary to qualify as a disinterested sovereign and evaluate its claim of privilege, including how the forms or information requested thereby could themselves be privileged; whether dissemination of completed forms to third-parties served to waive any privilege; and the nature of any Seward services for Chevron prior to the last ten years.

Mr. Hyland's response that Seward deemed it inappropriate to say whether it disclosed the Seward-Chevron attorney-client relationship to Judge Kaplan before accepting the appointment to prosecute Chevron's adversary in the underlying litigation created a separate problem. It is theoretically possible that the Seward prosecutors, at the moment in July 2019 when they indisputably knew of their firm's attorney-client relationship with Chevron, decided to accept Judge Kaplan's appointment, keep the apparent conflict to themselves, and gamble that neither Judge Kaplan nor Mr. Donziger would ever find about it, all with the approval of the Seward partnership which necessarily knew of the relationship

before July 2019. It is theoretically possible that Seward might have done so, but it seems unlikely. If Seward truly had not disclosed the Seward-Chevron relationship to Judge Kaplan, Seward presumably would have fallen on its sword and said so, rather than deem the question inappropriate to answer and permit the inference that Seward and Judge Kaplan were acting together to hide the fact of the Seward-Chevron attorney-client relationship from Mr. Donziger.

D. In Denying Mr. Donziger's Motion to Dismiss the Case or Disqualify Seward, the District Court (1) Did Not Address Seward's Coverup of the Seward-Chevron Attorney-Client Relationship; (2) Did Not Question Seward's Refusal to Answer Questions About the Representation; or (3) Respond to Inferences that Seward Disclosed the Seward-Chevron Attorney-Client Relationship to the District Court Before Accepting the Appointment to Prosecute Chevron's Adversary

In a petition for a writ of mandamus argued before the Court on May 12, 2020, Mr. Donziger argued that Judge Kaplan in December 2019 had abused his authority by issuing rulings in the civil case that affected the criminal case after arranging for Judge Preska to handle the criminal case, apparently recusing himself. *See In re Donziger*, Second Circuit Case 20-464 (declining to stay post-judgment civil hearing and permitting a magistrate judge to grant Chevron's motion *in limine* to preclude Mr. Donziger's assertion of his Fifth Amendment privilege).[5] Upon accepting the Court's invitation to respond to Mr. Donziger's petition for mandamus, Judge Kaplan told the Court that, in fact, he had never recused himself from the criminal case while nonetheless arranging for Judge Preska to preside over it. According to Judge Kaplan, he and Judge Preska shared authority over the criminal case.[6] *See* Case 464, Doc 35.

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[5] By Order dated May 13, 2020 [Case 20-464, Doc 85], the Court denied the petition, finding no exceptional circumstances warranting mandamus relief.

[6] In Judge Kaplan's submission to this Court, he claimed that the law permits a Judge to retain authority over a criminal contempt case after arranging

By the time of Seward's disclosure of the Seward-Chevron attorney-client relationship, Mr. Donziger had already moved, *inter alia*, for recusal of any Southern District Judge and disqualification of Seward based on Professor Yaroshefsky's opinion. Upon Seward's disclosure of the Seward-Chevron attorney-client relationship and Judge Kaplan's brief to this Court that he had not recused himself from the criminal case, Mr. Donziger moved to dismiss the case with prejudice or, alternatively, for Judge Kaplan's recusal *nunc pro tunc* as of July 2019, so that a randomly-assigned Judge could be assigned to the criminal case and appoint a truly disinterested prosecutor. A100-19.

Mr. Donziger argued in support of dismissal that the prejudice of Seward's attorney-client relationship with Chevron was irreparable on either of

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for another Judge to preside over it. While a Judge has authority to keep a criminal contempt case, none of the cases cited by Judge Kaplan in his submission permit a Judge simultaneously to keep and transfer the case. *See, e.g.*, *Goldfine v. United States*, 268 F.2d 941, 947 (1959) (finding no abuse of discretion in judge's failure to disqualify himself *sua sponte*, especially as the defendants commended the judge for making "every conscious effort to be objective and impartial"); *Nilva v. United States*, 352 U.S. 385, 396 (1957) (while acknowledging that a judge might abuse discretion in retaining and adjudicating his own charges of criminal contempt, finding no such abuse in the judge's *keeping* Nilva's case); *United States v. Berardelli*, 565 F.2d 24, 30 (2d Cir. 1977) (not error for Judge Bartels to preside over contempt trial of witness who refused to testify at a trial presided over by Judge Bartels pursuant to immunity granted by Judge Bartels). *See also United States v. Rojas*, 55 F.3d 61 (2d Cir. 1995) (defendant on appeal did not challenge Judge Duffy's exercise of discretion to keep the case); *United States v. Terry*, 802 F. Supp. 1094 (S.D.N.Y. 1992) (Judge Ward *kept* Terry's case).

two grounds. *First*, it appeared that Judge Kaplan knew of the Seward-Chevron attorney-client relationship before appointing Seward anyway. Neither he nor Judge Preska took any action when Seward responded to a specific request for information about Seward's relationship with Chevron by covering it up. *Second*, even if Judges Kaplan and Preska first learned of the Seward-Chevron attorney-client relationship when Seward disclosed it to Mr. Donziger, the fact of the coverup defeated any claim that the relationship was immaterial. The Seward lawyers did not momentarily forget about their firm's attorney-client relationship with Mr. Donziger's adversary in the underlying litigation or fail to appreciate its importance. To the contrary, Ms. Glavin crafted carefully-worded statements deliberately designed to hide the truth and urged that the date for the scheduled trial be advanced, thereby limiting the window in which the truth might emerge. The prejudice is irreparable: Mr. Donziger had already been confined to home for eleven months (and counting) and can never recoup that time.

As for disqualification, Mr. Donziger also argued that it was impossible to have confidence that Seward could faithfully honor its duties as *de facto* sovereign going forward. As an example advanced by Mr. Donziger [A119], Ms. Glavin had assured Judge Preska that she would honor her obligation to disclose, pursuant to the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), any

false or misleading information provided to Seward by Chevron. The degree to which Ms. Glavin actively concealed the Seward-Chevron relationship in response to a specific request renders it impossible to have confidence that she could even *see* anything provided by Chevron or her former government colleagues at Gibson Dunn as false or misleading, let alone disclose it to their adversary. Alternatively, Mr. Donziger asked that a new randomly-assigned Judge appoint a truly disinterested prosecutor or at least direct Seward to answer the questions which Mr. Hyland refused to answer so Seward's qualifications to prosecute this case could be properly evaluated. A115, 119.

By Order issued on May 7, 2020 [A122], Judge Preska denied all of Mr. Donziger's requests for relief. Judge Preska correctly noted that *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. at 787, is the key relevant authority [A134], but she glossed over its holding. The United States Supreme Court in *Vuitton*, as the Supreme Court itself described it, "establish[ed] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment" [*id.* at 814] as a basic notion of constitutional due process and fairness. *See id.* at 808-14. The Supreme Court noted that federal prosecutors are prohibited from representing the government in any matter in which they or their business associates have *any* interest. *Id.* at 803

(citing 18 U.S.C. §208(1). Thus, "[i]t is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a *rigorously disinterested fashion* . . . ." Id. at 810 (emphasis added).

If any prosecutor in any case had waited *eight months* to disclose her firm's attorney-client relationship with an interested party and the firm's continuing assertion of attorney-client privilege on that party's behalf, any Judge in this Circuit could reasonably be expected to blow a judicial gasket. Not here. Judge Preska neither rebuked nor even mildly criticized Seward. Judge Preska's discussion of the issue was relegated to a footnote. She said that Mr. Donziger sought dismissal "because the prosecutors waited too long to disclose Seward's prior relationship with Chevron" and that he had not demonstrated any prejudice from "the timing" of the disclosure. A141 n7. Seward had not just *delayed* disclosure, however, but deliberately concealed it – in Judge Preska's own Courtroom – in response to a specific request for disclosure. Yet Judge Preska did not even raise a judicial eyebrow. She ignored what should have been seen as a shocking breach of professional ethics and proper protocol that disqualified Seward as disinterested, let alone rigorously so.

Likewise, despite Seward's refusal to answer questions about its representation of Chevron, Judge Preska, in the same footnote, found that "the

information Seward already provided makes clear that the prior Chevron matters create no potential conflicts for the special prosecutors. No further information is needed." A141 n.7. The only information provided by Seward, however, was that it had completed corporate forms and issued legal opinions for foreign affiliates within the last ten years. Far from making "clear" that Seward was disinterested, Seward asserted attorney-client privilege or otherwise refused to disclose the identity of the foreign affiliates; the subject matter of the "corporate forms;" how the forms or information requested thereby could themselves be privileged; whether dissemination of completed forms to third-parties served to waive any privilege; and the nature of any Seward services for Chevron prior to the last ten years.

Just as Judge Preska failed to ask the Seward prosecutors *anything* when Mr. Donziger in December 2019 requested a hearing about the Seward-Chevron relationship, Judge Preska in denying disqualification declined to ask Seward *anything* about Seward's refusal to answer questions about its representation of Chevron. Judge Preska did not even ask Seward to reconcile its assertion of attorney-client privilege on Chevron's behalf with prosecuting Chevron's adversary for allegedly violating orders issued for Chevron's benefit.

Instead, despite the Supreme Court's self-described "categorical rule"

barring "subtle calculations of judgment," and its command "that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion," Judge Preska determined that Seward's legal services for Chevron were not sufficiently significant to undermine the rigorous disinterest categorically required of prosecutors.

ARGUMENT

THE CRIMINAL CASE SHOULD BE DISMISSED OR SEWARD DISQUALIFIED AND THE CASE REMANDED TO A NEW RANDOMLY-ASSIGNED DISTRICT JUDGE

Introduction

The following facts were not refuted in District Court:

- Judge Kaplan appointed Seward with knowledge of the Seward-Chevron attorney-client relationship;

- Neither Judge Kaplan nor Judge Preska corrected Seward in January 2020 when Seward dissembled in response to Mr. Donziger's specific request that Seward disclose the scope of Seward's relationship with Chevron;

- Judge Preska did not ask Seward any questions in January 2020 when Mr. Donziger sought to probe the Seward-Chevron relationship or later when Seward refused to answer questions about its representation of Chevron and asserted attorney-client privilege;

- When Mr. Donziger appealed the conditions of his pretrial release to this Court in February 2020, Seward did not disclose the Seward-Chevron attorney-client relationship despite Mr. Donziger's express argument that Seward's professed concern about risk of flight was a pretext borne of prosecutorial bias; and

> • Mr. Donziger will be subject to monitored home confinement for over a year, even if the pandemic permits his case to be tried in September 2020 as scheduled, for a misdemeanor, for which the maximum authorized sentence is imprisonment of six months, despite a record that overwhelmingly establishes no risk of flight.

The Court should treat this submission as an interlocutory appeal and dismiss the case because of irreparable prejudice from truly shocking prosecutorial misconduct and judicial bias. Alternatively, the Court should treat this submission as a petition for mandamus, disqualify Seward, and remand the case to a new randomly-assigned District Judge. *See, e.g., United States v. Wilson*, 920 F.3d 155 (2d Cir. 2019) (remanding to a new Judge upon vacating sentence imposed pursuant to a breached plea agreement).

A. Seward is Not Disinterested Under *Vuitton*

Judge Preska denied disqualification, noting that the appointed attorneys in *Vuitton* represented the party for whose benefit the allegedly violated order was issued in that very case. *Vuitton's* holding, however, does not turn on an attorney's ministerial act of appearing in a particular case, but on the attorney's relationship with the client. As Professor Yaroshefsky explained in her opinion, *Vuitton* is not confined to actual prosecutorial interest in a particular case, but *any* interest, direct or indirect, that may undermine the attorney's disinterestedness and the public's confidence in the integrity of the legal profession:

> *Vuitton* reaffirmed the government's interest in "[d]ispassionate assessment of the propriety of criminal charges for affronts to the judiciary" and held that the *"[p]otential* for private interests to influence the discharge of public duty" and the appointment of [a directly or indirectly] interested party creates, at a minimum *opportunities* for conflicts to arise, and create[s] at least *appearance* of impropriety . . . . *Vuitton* did not require proof of an actual conflict . . . .

A91-92. *See Vuitton* at 803 ("federal prosecutors are prohibited from representing the Government in any matter in which they, their family, or their business associates have *any* interest" (citing 18 U.S.C. 208(1)).

Vuitton categorically prohibits appointment of an interested prosecutor. As *Vuitton* explains, "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Id.* at 813 (emphasis in original). The Supreme Court barred precisely the types of "subtle calculations of judgment" [*see id.* at 814] in which Judge Preska engaged because "[i]t is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a *rigorously disinterested fashion* . . . ." *Id.* at 810 (emphasis added).

The absence of rigorous disinterest is not in the margins of this case. That rigor was thrown to the wind when Seward failed to disclose the scope of its relationship with Seward when it accepted Judge Kaplan's appointment and when it later hid the ball when specifically asked about it. Seward effectively

disqualified itself at the conference on January 6, 2020, by dissembling about the very circumstances at the heart of any attorney's disinterest: the scope of the relationship. Seward's disinterest was on display in Judge Preska's own courtroom when Seward went to such great lengths to cover it up. Judge Preska's analysis turned a blind eye to what she witnessed in her own courtroom. *See, e.g., United States v. Di Stefano,* 555 F.2d 1094, 1104 (2d Cir. 1977) (adverse inferences from deception "have independent probative force"). *United States v. Johnson,* 513 F.2d 819, 824 (2d Cir.1975). As *Vuitton* teaches: "what is at stake is the public perception of the integrity of our criminal justice system - justice must satisfy the appearance of justice . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." *Id.* at 812.

The District Court ruled that Seward's work for Chevron "has *absolutely* nothing to do with this case" [A139], and that any connection "is *too far fetched* to merit serious attention." A140 (emphasis added). The absolutes with which the District Court expressed its view are irreconcilable with the District Court's failure to learn the facts by probing Seward's refusal to answer questions and assertion of privilege. Seward's refusal to answer questions and assertion of privilege on Chevron's behalf are by themselves evidence that Seward is conflicted and not disinterested, let alone rigorously so. As this Court instructs, because the

"concept of [a disinterested prosecutor] is not altogether easy to define," "the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *Wright v. United States,* 732 F.2d 1048, 1056 (2d Cir. 1984) (citations and quotation marks omitted). It is the "myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record," which permits an inference of disqualifying bias on the record of this case without the District Court's "subtle calculations" about prosecutorial judgment.

Even indulging the District Court's calculations of prosecutorial judgment, they missed the mark. The District Court saw too attenuated a connection between Seward's past preparation of corporate forms and legal opinions for foreign affiliates and the prosecution of Mr. Donziger by the particular appointed Seward prosecutors. In so ruling, Judge Preska was not faithful to the principle that "[a]n attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences." *Hempstead Video, Inc. v. Incorporated Village of Valley Stream,* 409 F.3d 127, 133 (2d Cir. 2005); New York Rules of Professional Conduct 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one

of them practicing alone would be prohibited from doing so . . . .").

More, the attorney-client privilege protects "confidential communications between a lawyer and a client relating to legal advice sought by the client." *In re Nassau County Grand Jury Subpoena Duces Tecum*, 4 N.Y.3d 665, 678 (2001). It does not protect the identity of a client [*id.* at 679], such as the identity of the Chevron foreign affiliates that attorney Hyland claimed was privileged. "[T]he privilege applies only to *confidential communications* with counsel . . . it does not immunize the underlying factual information . . . from disclosure to an adversary." *Niesig v. Team I*, 76 N.Y.2d 363, 372 (1990). Even a privileged communication may cease to be so if it is later disclosed to a third-party. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). Thus, attorney-client privilege does not protect the subject matter of the corporate forms prepared by Seward, the forms or requested information themselves, nor the completed forms as provided by Seward or Chevron to third parties. Just the "appearance" of conflicting interests can be a factor compelling disqualification. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 130 (1996); *see also People v. Adams*, 20 N.Y.3d 608, 612 (2013) ("[T]he appearance of impropriety itself is a ground for disqualification . . . when the appearance is such as to 'discourage[] public confidence in our government and the system of

law to which it is dedicated").

Judge Preska also failed to appreciate Seward's disqualifying allegiance to Chevron's commercial interests. As Professor Yaroshefsky noted, Seward in its own marketing for 2019, the very year Seward was appointed, expressly identified Chevron's interests as its own. Seward asked clients how the price of oil would affect "*us and our clients*" in "offshore drilling and services sectors." Multiple Seward clients derive significant revenue from Chevron and endeavor to contract with Chevron to enhance their commercial standing. Seward's relationship with Oaktree, touted on Seward's website, is plainly as significant as it is opaque. Oaktree is significantly connected to Chevron and multiple Seward clients, itself disqualifying Seward as rigorously disinterested, even absent more information about Seward's ties to Oaktree, which was among the things that Seward refuses to provide.

Thus, even unaware of the Seward-Chevron attorney-client relationship, Professor Yaroshefsky concluded that Seward's interests were so aligned with Chevron's as to create a financial conflict of interest. The later revelation of the Seward-Chevron attorney-client relationship proved that Professor Yaroshefsky was correct that Seward's "financial and business interests are dependent on the good will of Chevron and its related entities and other giants

in the oil industry." It was in fact "an understatement to say that there is a potential and opportunity for bias by Seward lawyers," and that "[i]t is equally an understatement to say that Seward counsel in the special prosecutor role undermines public trust and confidence in the perception of fairness of the legal system."

It is possible that Seward covered up the Seward-Chevron attorney-client relationship at least in part to protect the District Court. Seward might have believed it appropriate to hold the attorney-client relationship close to the vest rather than reveal that Judge Kaplan appointed Seward aware of the Seward-Chevron attorney-client relationship. If so, Seward is no less disinterested, and this case is no less salvageable. Any Seward concern about untoward appearances if it were known that Judge Kaplan appointed Seward with knowledge of the Seward-Chevron attorney-client relationship proves that this prosecution is borne of disqualifying judicial and prosecutorial bias causing irreparable prejudice. Whatever Seward's motivation, a coverup was necessary because the underlying fact of the Seward-Chevron attorney-client relationship was diametrically at odds with the rigorous disinterest required by *Vuitton* and the constitutional guarantees of due process and fundamental fairness.

B. The Extraordinary Misconduct and Bias in this Case Requires Dismissal or, Alternatively, Remand to a New, Randomly-Assigned Judge for Appointment of a Truly Disinterested Prosecutor

While the District Court disagreed with inferences to be drawn upon application of the facts to *Vuitton*, it did not refute the inference that Judge Kaplan appointed Seward knowing of the Seward-Chevron attorney-client relationship and took no action when Seward covered it up. The degree of misconduct and bias in this case corrupts the entirety of the criminal case, requires dismissal and should not await appeal. The irreparable prejudice cannot adequately be remedied even by disqualification and recusal: the disinterested prosecutor simultaneously secured monitored home confinement on a human rights advocate for eleven months (and counting) for a misdemeanor punishable by no more than a term of imprisonment of six months despite overwhelming evidence that he is not a risk of flight.

As the Supreme Court explained in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949), some issues "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." An appeal of a collateral order requires an order conclusively determining the disputed question, that resolves an important issue completely

separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *Will v. Hallock*, 546 U.S. 345, 349 (2006). These conditions are "stringent," id. (internal quotation marks omitted), and "[t]he justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes," *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009). Moreover, "the issue of appealability under [28 U.S.C.] §1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) (alteration, citation, and internal quotation marks omitted).

This case does not present a garden-variety claim of prosecutorial conflict of judicial bias that can await appeal in the usual course. It is instead a prosecution contaminated from its inception by judicial appointment of a disinterested prosecutor who covered up her interest without correction by the appointing Judge. There is no "category" to which this claim belongs [*see Digital Equip. Corp.* 511 U.S. at 868] because it stands alone in so many unprecedented ways. Judge Preska should have dismissed this case for reasons completely separate from the merits of the action, which are effectively unreviewable on

appeal; this Court should do so now.

Alternatively, mandamus is available. *See Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petroleum Corp.,* 948 F.2d 111, 115 (2d Cir.1991) ("We have often deemed it appropriate to treat an appeal dismissed for lack of jurisdiction as a petition for a writ of mandamus."); *Richardson Greenshields Secs., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987) ("[W]e may in appropriate circumstances treat an attempted appeal as a request for leave to file a petition for a writ of mandamus."); *SEC v. Rajaratnam*, 622 F.3d 159, 169 (2d Cir. 2010) ("Even though we lack interlocutory jurisdiction to review the district court's order, a writ of mandamus may still be appropriate").

Mandamus relief is available for disqualification of an interested prosecutor and recusal of a biased Judge. It may be appropriate in "situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981); *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 236–37 (2d Cir. 2016) (collecting cases from other Circuits invoking mandamus to address attorney conflicts, including *Matter of Sandahl*, 980 F.2d 1118, 1122 (7th Cir. 1992) (granting writ and directing district court to vacate disqualification

order); *In re Am. Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992) ("American claims that immediate review of its disqualification motion is appropriate . . . . We agree"); *Christensen v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 844 F.2d 694, 697 (9th Cir. 1988) (noting that the effect of an order disqualifying counsel "is irreversible"); *In re Am. Cable Publ'ns, Inc.*, 768 F.2d 1194, 1197 (10th Cir. 1985) (granting writ and directing district court to vacate disqualification order)).

Mandamus is reserved precisely for extraordinary cases [*Kerr v. United States District Court,* 426 U.S. 394, 402 (1976); *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980) (per curiam)] where the petitioner has demonstrated that his right to the relief is "clear and indisputable." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 18 (1983); *Allied Chem. Corp.,* 449 U.S. at 35; *In re IBM Corp.,* 618 F.2d 923, 927 (2d Cir. 1980). "[W]e have repeatedly held that mandamus is appropriate in recusal motions, believing that there are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *Id.* at 926 (quoting *Rosen v. Sugarman,* 357 F.2d 794, 797 (2d Cir.1966)). *See also In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in the courts requires that questions of disqualification must be disposed of at the earliest possible opportunity).

Mr. Donziger has previously challenged Judge Kaplan's rulings and impartiality. Mr. Donziger's appeal from Judge Kaplan's finding of civil contempt, which preceded and is the predicate for the criminal case, is the subject of pending appeals in this Court, which might moot all or part of the criminal case if sustained. Mr. Donziger argued below in conjunction with his motion to disqualify Seward and recuse the District Court that Judge Kaplan's invocation of criminal contempt was not "[t]he least possible power adequate to the end proposed." *See Vuitton*, 481 U.S. at 801. This appeal and petition raises issues of a different dimension. *See In re IBM,* 618 F.2d at 926 ("[t]he question here is not whether the trial judge has abused his discretion but whether he could exercise any discretion because of a personal, extrajudicial bias which precludes dispassionate judgment").

A judge's power to resort to criminal contempt to vindicate judicial authority must be exercised "delicate[ly] . . . to avoid arbitrary or oppressive conclusions" [*see Cooke v. United States*, 267 U.S. 517, 539 (1925)], precisely because it is a judge who is the complainant, may charge the crime in lieu of a grand jury, and imposes punishment absent any pre-determined legislative parameters. *See, e.g., Bloom v. Illinois*, 391 U.S. 194, 202, 207 (1968) (cautioning against "vesting the judiciary with completely untrammeled power to punish

contempt"); *Lewis v. United States*, 518 U.S. 322, 328-29 (1996) (contempt "often strikes at the most vulnerable and human qualities of a judge's temperament"); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("a judge should not himself give vent to personal spleen or respond to a personal grievance"); *Sandstrom v. Butterworth*, 738 F.2d 1200, 1208 (11th Cir. 1984) ("a single-minded focus on authority and order to the necessary exclusion of due process serves neither value well"). *See also Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974) (there is "no justification for dispensing with the ordinary rudiments of due process"). "[T]he answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision." *Green v. United States*, 356 U.S. 165, 188 (1958).

CONCLUSION

The appointment of and failure to disqualify Seward threaten the integrity and reputation of this Circuit. We respectfully urge the Court to dismiss this case or, alternatively, to disqualify Seward and remand the case to a new randomly-assigned Judge for appointment of a truly disinterested prosecutor.

Respectfully submitted,

_____s/_____
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: June 18, 2020

Respectfully submitted,

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