UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-826-cv (L), 14-832-cv (CON)

Caption [use short title]

Chevron Corporation, Plaintiff-Appellee,

v.

Hugo Gerardo Camacho Naranjo, Javier Piaguaje Payaguaje, Steven Donziger, The Law Offices of Steven R. Donziger, Donziger & Associates PLLC, Defendants-Appellants.

Motion for: consultation with the panel that decided Chevron Corp. v. Naranjo to determine whether the appeals should be assigned to the same panel

Set forth below precise, complete statement of relief sought:

Appellants respectfully suggest that this Court may wish to seek the opinion of the panel that decided Chevron v. Naranjo, 11-1150-cv(L) as to whether these appeals should be referred to the Naranjo I panel in the interests of judicial efficiency.

MOVING PARTY: Appellants Naranjo & Donziger et al.

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Chevron Corporation

MOVING ATTORNEY: Deepak Gupta

OPPOSING ATTORNEY: Theodore B. Olson

[name of attorney, with firm, address, phone number and e-mail]

Gupta Beck PLLC
1735 20th Street, NW, Washington, DC 20009
(202) 888-1741, deepak@guptabeck.com

Gibson Dunn
1050 Connecticut Ave, NW, Washington, DC 20036
(202) 955-8668, tolson@gibsondunn.com

Court-Judge/Agency appealed from: The Honorable Lewis A. Kaplan, U.S. District Court, S.D.N.Y.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: s/ Deepak Gupta **Date:** 10/7/2014

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 14-826-cv(L)

No. 14-832-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 DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Lewis A. Kaplan)

Defendants-Appellants' Joint Motion Requesting that the Court Consult With the Panel That Decided *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), to Determine Whether These Consolidated Appeals Should Be Assigned to the *Naranjo* Panel

Burt Neuborne
40 Washington Square South
New York, NY 100012
(212) 998-6172

Counsel for Hugo Camacho Naranjo and Javier Piaguaje Payaguaje

Deepak Gupta
Gupta Beck PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

Counsel for Steven Donziger, The Law Offices of Steven Donziger, and Donziger & Associates, PLLC

Defendants-Appellants Hugo Camacho Naranjo, et al. respectfully suggest that, in connection with the assignment of these consolidated appeals, this Court may wish to seek the opinion of the panel that decided *Chevron Corp. v. Naranjo* (*"Naranjo I"*), Nos. 11-1150-cv(L), 11-1264-cv(CON), 667 F.3d 232 (2d Cir. 2012) (Pooler, Wesley, Lynch, JJ.), as to whether these appeals should be referred to the *Naranjo I* panel in the interests of judicial efficiency. That appeal was "an earlier, related proceeding," Chevron Br. 5, that arose out of the same factual dispute, involved the same parties, and originated with the same district judge (Kaplan, J.). And the massive record compiled in that case (the joint appendix contained 37 volumes) makes up much of the record here, only now the appendices have swollen to 53 volumes.

Just as importantly, the central legal issues in these appeals directly implicate this Court's decision in *Naranjo I*: A key question on appeal is whether Judge Kaplan's latest injunction runs afoul of *Naranjo I*, which vacated his previous injunction against the same parties, enjoining enforcement of the same Ecuadorian judgment. The *Naranjo I* panel's familiarity with the voluminous record and the complex history of this dispute, coupled with the similarity of the issues on appeal, might counsel in favor of assignment to that panel in the interests of judicial efficiency. For this reason, the Court may wish to give that panel the opportunity to decide whether to grant this motion.

1. Chevron brought this litigation against Amazon rainforest communities and their advocates in an effort to collaterally attack an Ecuadorian judgment—secured after two decades of hard-fought litigation—holding Chevron accountable for polluting the land and water of an area of Ecuador the size of Rhode Island. When the action was first filed, it included a request that the Ecuadorian judgment be deemed "unenforceable and non-recognizable, including but not limited to under the United States Constitution, federal common law, New York common law principles of comity, and/or New York's Recognition of Foreign Country Money Judgments Act," on "grounds of fraud, failure to afford procedures compatible with due process, lack of impartial tribunals, and contravention of public policy." Dist. Ct. Dkt. 1, at 144 ¶ 394 (Compl.). Based on that claim, Judge Kaplan issued a preliminary injunction barring enforcement of the Ecuadorian judgment anywhere on the globe. *See* Dist. Ct. Dkt. 181. The defendants (also appellants here) promptly appealed.

Two months after the defendants filed their notices of appeal, the district court severed the non-recognition claim from the other claims (including a RICO claim) and fast-tracked it for trial. Dist. Ct. Dkt. 328. In doing so, the court recognized that the factual and legal issues raised in *Naranjo I* would likely dispose of the rest of the proceedings because the question whether the Ecuadorian judgment is legally enforceable outside of Ecuador—and whether a U.S. court

sitting in diversity in New York has the authority to decide that question preemptively, in the absence of any enforcement proceeding—was the overarching issue in the case. "The core of this case," Judge Kaplan remarked, "is the issue of the enforceability of the Judgment outside of Ecuador. Once that issue is decided, one way or the other, it is likely that the rest of the case will vanish or at least pale in significance. Such a decision probably would be dispositive of the unjust enrichment count, dramatically narrow or eviscerate the RICO and fraud claims, and leave little incentive to pursue what remains." Dist. Ct. Dkt. 278, at 13.

2. A panel of this Court (Pooler, Wesley, Lynch, JJ.) reversed and vacated the district court's injunction, emphasizing the "grave[]" international comity concerns raised by an action seeking to preemptively deny recognition to a foreign judgment, particularly on the ground that the legal system of a sister sovereign is systemically incapable of delivering justice. *Naranjo I*, 667 F.3d 232, 244 (2d Cir. 2012). The panel also remanded with instructions that the claim for non-recognition be dismissed "in its entirety." *Id.* at 247. The panel explained that New York's Recognition Act "and the common law principles it encapsulates" are intended to "provide for the enforcement of judgments, not to prevent them." *Id.* at 241. The panel thus concluded that there is "*no legal basis* for the injunction that Chevron seeks, and, on these facts, there will be no such basis until judgment-

creditors affirmatively seek to enforce their judgment in a court governed by New York or similar law." *Id.* at 242 (emphasis added).

Given that background, Chevron's assertion that "[t]he declaration of nonrecognition under the New York Recognition Act, which was at issue in *Naranjo*, cannot be likened to the relief that is on appeal here, which is based on . . . RICO," Chevron Br. 94, directly implicates the *Naranjo I* panel's concern that, following the remand for dismissal, Chevron would nevertheless ask for the same thing under RICO. *See* Oral Arg. Tr. 9/16/11, at 76:19-78:21 (Judge Lynch: "If we were to reverse this order, speaking of predictions and what's going to happen in a red hot second, are you telling us that you would then go back to Judge Kaplan and ask to reactivate the RICO claims and seek the same injunction under those claims?"). Although the panel lacked the jurisdiction (and clairvoyance) necessary to anticipate and reverse a future injunction grounded in RICO, the Court did include an extensive discussion of the serious international comity concerns implicated by "[a] decision by a court in one jurisdiction, pursuant to a legislative enactment in that jurisdiction, to decline to enforce a judgment rendered in a foreign jurisdiction." *Naranjo I*, 667 F.3d at 243-44.

3. Following the *Naranjo I* appeal, Chevron again asked Judge Kaplan to deem the Ecuadorian judgment to be procured by fraud and unenforceable. Following three years of hotly contested motions practice, the district court held a

seven-week bench trial, during which the integrity of the Republic of Ecuador's legal system was ostensibly put on trial.

Judge Kaplan again gave Chevron the injunction it asked for, this time under RICO and the common law. The district court opinion now on appeal declares that the Ecuadorian trial court's judgment was procured by fraud; condemns the entire Ecuadorian judiciary based primarily on the testimony of a political opponent of the nation's current President; concludes, based on the testimony of a handsomely paid fact witness, that a New York lawyer (Defendant Steven Donziger) engaged in bribery; refuses to give the Ecuadorian intermediate appellate court's decision any weight as a *de novo* review of the record; permanently enjoins the defendants from seeking to enforce the judgment anywhere in the United States; and permanently enjoins the defendants from taking any action to collect on the Ecuadorian judgment anywhere in the world. *See* Dist. Ct. Dkt. 1874; Dkt. 1875 ¶ 5 ("Dozinger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment."); *id.* ¶ 8 ("[T]his Judgment is binding upon the parties; their officers, agents, servants, employees, and attorneys; and other persons who are in active concert and participation with any of the foregoing.").

4. The central question in these appeals is whether the district court's judgment is consistent with this Court's decision in *Naranjo I*. *See, e.g.*, Donziger Br.

84 ("This is *Naranjo* all over again."); *id.* at 86 ("The district court's decision, if upheld, would render *Naranjo* a dead letter."); Naranjo Br. 84 (arguing that, under *Naranjo I*, "the law of this case holds" that the district court was "powerless to issue prospective injunctive relief affirmatively barring the enforcement of [the] foreign money judgment"); Br. of Amici Int'l Law Professors 3 (arguing that the district court's order "is inconsistent with [*Naranjo I*] because the impermissible extraterritorial impact of the constructive trust is identical to the impact of the preliminary injunction previously vacated by this Court"). Indeed, the centrality of *Naranjo I* is underscored by the fact that it is the *only case cited* in Chevron's six-page preliminary statement. Chevron Br. 5 ("[T]he relief granted by the district court . . . is fully consistent with this Court's decision in *Chevron Corp. v. Naranjo*."). Given the importance of *Naranjo I* to these appeals, we respectfully suggest that the panel that decided that appeal might be in the best position to interpret and apply its decision to this same controversy between the parties.

5. Another reason this Court may wish to consider assigning this appeal to the *Naranjo I* panel is that two members of that panel also served on the panel in *Republic of Ecuador v. Chevron Corp.*, Nos. 10–1020–cv (L), 10–1026 (Con), 638 F.3d 384 (2d Cir. 2011) (Jacobs, Pooler, Lynch, JJ.)—another case involving the same underlying controversy and similar legal issues. The decision in that appeal—which required a careful review of the two-decade-old litigation record from an earlier

iteration of this long-running dispute—is also directly implicated in this appeal. The *Republic of Ecuador* panel concluded that Chevron "remains accountable for" its earlier promise to this Court (in *Aguida v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)) "to satisfy any judgments in [the Ecuadorians'] favor," which Chevron said it would contest "only in the limited circumstances permitted by New York's Recognition [Act]." *Republic of Ecuador*, 638 F.3d at 389 & n.3. Chevron now contends that it is not bound by its previous promises because the above "quotes are dicta." Chevron Br. 121 n.31. On this question, too, the *Naranjo I* panel might be best positioned to determine whether this Court meant what it said the first time and whether this Court's previous reading of the litigation record was correct or whether this Court's statements should be disregarded as mere dicta.

* * *

In light of the extensive and complex history of this gargantuan litigation, and the common record and legal questions at issue on appeal, the Court may wish to refer this motion to the original panel in *Naranjo I*. That panel is likely in the best position to decide whether efficiency and sound judicial administration would be served by having that same panel hear this appeal and thus assess whether Judge Kaplan's latest anti-enforcement injunction against the Ecuadorian judgment comports with the international-comity principles announced in that panel's opinion.

Dated: October 7, 2014

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta
Gupta Beck PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptabeck.com

Burt Neuborne
40 Washington Square South
New York, NY 100012
(212) 998-6172
burt.neuborne@nyu.edu

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014, I electronically filed the foregoing motion and accompanying Declaration of Burt Neuborne with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: October 7, 2014

/s/ Deepak Gupta
Deepak Gupta

DECLARATION OF BURT NEUBORNE

Burt Neuborne, counsel in 14-832, submits the following declaration in connection with the pending motion in 14-828 (L) and 14-832 (CON) requesting the Court to consult with the panel that decided *Chevron Corporation v. Naranjo*, 667 F.3d 232 (2d Cir. 2012) (*Naranjo I*) prior to assigning the consolidated appeals herein.

1. As the accompanying motion makes clear, the factual overlap between the issues before the Circuit in *Naranjo I* and in these consolidated appeals is substantial. Given the enormous and complex factual record, judicial efficiency calls for the assignment of these appeals to appellate judges who have acquired a familiarity with the facts.
2. Equally important, one of the principal dispositive legal issues raised in these consolidated appeals is the meaning and *stare decisis* effect of *Naranjo I.* In *Naranjo I*, the panel ruled that the New York Recognition Act does not provide a judgment debtor with a statutory cause of action empowering a state or federal judge sitting in New York State to issue affirmative equitable relief enjoining the

enforcement of a foreign judgment on the grounds that it had been procured by fraud.

3. Instead, under the New York Recognition statute as construed by the panel, judgment debtors in New York are instructed to raise the issue of fraud as a defense, if and when a judgment creditor seeks to enforce the judgment in a New York court.

4. The *Naranjo I* panel explained that it was construing the New York Recognition Act narrowly in order to prevent judges sitting in New York State from purporting to exercise extraterritorial control over the validity and enforceability of foreign judgments in other fora.

5. In the wake of *Naranjo I*, Chevron returned to the same New York federal judge who had issued the unauthorized affirmative injunction under the New York Recognition Act, and persuaded him to issue a virtually identical injunction, this time under the common law, against Hugo Camacho Naranjo and Javier Piaguaje Payaguaje enjoining each of them from enforcing the identical foreign judgment anywhere in the United States.

6. One of the central issues on this appeal will be whether a New York judge possesses common law power to issue such an injunction in the teeth of the *Naranjo* panel's ruling that such an injunction is improper under the New York Recognition Act.
7. If the *Naranjo I* panel intended to place limits on the extraterritorial power of judges sitting in New York to purport to control the enforcement of foreign judgments elsewhere, recognizing a common law power to issue such an injunction renders the *Naranjo* panel's limited construction of the New York Recognition Act a nullity.
8. In *Naranjo I*, the panel was concerned over the spectacle of a New York federal judge using the New York Recognition Act to instruct judges throughout the world as to the validity and enforceability of foreign judgments. Chevron claims to have cured that problem by confining its injunction to the United States. But, as Texaco learned a generation ago in *Texaco v. Pennzoil Co.,* 481 U.S. 1 (1987), judges in New York have no more supervisory power over their state and federal colleagues sitting throughout the United States than they have over their international colleagues sitting in Canada or Brazil.

9. In each case, *Naranjo I* teaches that autonomous judges in San Francisco and Singapore must be permitted to decide for themselves whether or not to recognize a foreign judgment, free from the tutelage of a judge sitting in New York.

10. Given the obvious attempt by Chevron to circumvent and eviscerate the panel's opinion in *Naranjo I*, it appears appropriate to, at a minimum, notify the panel before assigning the consolidated appeals herein.

Dated: October 6, 2014
New York, New York

Respectfully submitted

/s/ Burt Neuborne

Burt Neuborne
40 Washington Square South
New York, New York 10011
212 573-4906

Attorney for Appellants in 14-832