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.

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE,
Defendants-Appellants

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

Donziger Appellants' Motion for Judicial Notice

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March 19, 2015

The Donziger Appellants respectfully request that this Court take judicial notice of certain publicly available documents (attached to this motion) filed in parallel arbitration proceedings between Chevron and the Republic of Ecuador. Those proceedings, described in our opening brief at pages 21-22, involve Chevron's effort to collaterally attack the same Ecuadorian judgment at issue here.

1. Throughout this litigation, both sides have brought documents from the arbitration to the attention of the district court and this Court—not for the truth of matters asserted, but rather to keep the U.S. courts apprised of developments in parallel proceedings. Most recently, Chevron filed a Rule 28(j) letter on March 12, 2015, informing this Court of a new decision in which the tribunal rejected one of Chevron's primary arguments: it concluded that a 1995 settlement agreement between Chevron and the Republic did not bar private-party litigation in Ecuador over environmental pollution. *See* Dkt. 346-1. In the district court, the Donziger Appellants introduced into the record those filings of the Republic that were available at the time. This motion adds documents made available since then.

2. Federal Rule of Evidence 201 authorizes this Court to take judicial notice of documents that are "not subject to reasonable dispute" because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be disputed." Fed. R. Evid. 201(b); *Oneida Indian Nation of N.Y. v. State of N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982). The scope of sources that may be

judicially noticed is broad and includes documents from other legal proceedings. *See, e.g., Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337–38 (2d Cir. 2006); *Rivera-Powell v. N.Y. City Bd. of Elecs.*, 470 F.3d 458, 464 (2d Cir. 2006); *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000). Such documents are appropriate where the purpose is to establish that particular matters have been raised or stated in another forum. *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992). That rule extends equally to international arbitration proceedings, "to establish the fact of the arbitration proceeding" and "the nature and extent of [the parties'] claims and arguments in that proceeding." *Pennecom B.V. v. Merrill Lynch & Co.*, 2003 WL 21512216, at *2 (S.D.N.Y. 2003); *see Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 244 n.14, 246 (S.D.N.Y. 2002). In this case, the documents demonstrate that the arbitral tribunal is considering the same allegations but on the basis of a more developed record.

In *Kramer v. Time Warner Inc.,* this Court observed that "courts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." 937 F.2d 767, 774 (2d Cir. 1991). There, the Court found no cause to disturb the district court's judicial notice of documents from parallel litigation to "illustrate[] its point that the instant suit had no place in federal court." *Id.* at 773. Here, too, the nature and availability of proceedings in

other forums—including enforcement proceedings in Canada and elsewhere, as well as remedies available in Ecuador itself—helps illustrate our central point: that this unprecedented preemptive attack on a foreign judgment has "no place in federal court. *Id.; see Chevron Corp. v. Naranjo,* 667 F.3d 232, 246 (2d Cir. 2012).

3. The attached documents, which have all been publicly released by the Republic, include the following: (1) Track 2 Supplemental Counter-Memorial on the Merits of The Republic of Ecuador; (2) Annex A to the Supplemental Counter Memorial on the Merits; (3) Supplemental Report Regarding the Environmental Contamination from Texpet's Activities; (4) Photographic Collection from 2013 and 2014 Site Investigations; (5) Supplemental Foreign Law Declaration of Fabián Andrade Narváez; (6) Opinion of Philippe Grandjean, M.D.; (7) Expert Opinion of Blanca Laffon, Ph.D; (8) Supplemental Memorial Expert Report of Jeffrey W. Short, Ph.D, Regarding Activities and Environmental Conditions; (9) Supplemental Opinion of Harlee Strauss, Ph.D Regarding Human Health Risks and Health Impacts Caused by Crude Oil Contamination.[1]

4. The first document listed above, the Republic's Counter-Memorial, is attached in the redacted form in which it was released. The Courthouse News

[1] The documents were all obtained from (and are available from) a government website: http://eeuu.embajada.gob.ec/es/documentos-caso-chevron-chevron-case-documents-2/

Service, however, has obtained and published an unredacted version.[2] That version is available at http://www.courthousenews.com/2015/02/27/GOEbrief.pdf.

We bring this development to the Court's attention because the unredacted document reveals the existence of exculpatory forensic evidence—evidence that has not been made available to Mr. Donziger and that apparently contradicts the most serious of the district court's findings of misconduct. Specifically, on page one the document explains that former Judge Zambrano's computer hard drives "have now been forensically analyzed, and they show exactly what one would expect to see on two computers that were used over multiple months to draft and edit the Lago Agrio Judgment. Judge Zambrano wrote the Judgment. Alberto Guerra's story that he edited a draft Judgment written by Pablo Fajardo, which Fajardo then delivered to Zambrano immediately before Zambrano issued it, has now been shown to be false." At pages 17-19 and 30-40, the evidence is described in detail. That such evidence is now being considered by the tribunal—and may be considered in future enforcement proceedings—underscores the prematurity and impropriety of the unprecedented preemptive collateral attack at issue here.[3]

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[2] *See* Klasfield, *Amazon Judge's Data Secretly Scanned in $9.8B Chevron Fight*, Courthouse News Service (Feb. 27, 2015), http://www.courthousenews.com/2015/02/27/amazon-judges-data-secretly-scanned-in-9-8b-chevron-fight.htm.

[3] The underlying forensic report is apparently in Chevron's possession but has not been released to the public or to Mr. Donziger. Given the apparently exculpatory nature of the report, Mr. Donziger has communicated with all relevant parties and requested that they take immediate steps to turn over the report.

CONCLUSION

For the foregoing reasons, the Donziger Appellants respectfully request that the Court take judicial notice of the attached documents.

Dated: March 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, I electronically filed the foregoing motion for judicial notice 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: March 19, 2015

/s/ Deepak Gupta
Deepak Gupta