14-826-cv(L)

14-832-cv(Con)

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION,

Plaintiff-Appellee,

- v. -

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

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION'S OPPOSITION TO THE DONZIGER APPELLANTS' MOTION FOR JUDICIAL NOTICE

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STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents.

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PRELIMINARY STATEMENT

Once again, Appellant Steven Donziger tries to dress up a public-relations stunt as a motion for judicial notice. This time, more than six months after oral argument, Donziger claims that "[n]ew developments" "exonerate" him and "cast grave doubt" on the district court's numerous findings of wrongdoing (*none of which Donziger has challenged on appeal*). Dkt. 461-1 at 1, 3. He references media articles he himself generated touting the "new developments," but, as before, Donziger's claims cannot withstand even brief scrutiny. For example, he says that "a new contemporaneous email has been discovered" (*id.* at 10), but the document is both old and unhelpful to Donziger—which is why *Chevron* submitted it below. 691 Dkt. 755-10, Ex. 3251. And as the accompanying chart makes plain, there is no material difference between Alberto Guerra's testimony before the BIT tribunal and in the trial in this case. He admitted to the same acts of "past dishonesty" in both (SPA277), and the district court expressly considered, evaluated, and made findings concerning the same inconsistencies in Guerra's account (SPA264–67) on which Donziger now relies, as well as Guerra's admission "that he came forward because he believed he would be 'rewarded handsomely'" (SPA264).

The present request is also procedurally improper, as none of the three sets of materials Donziger now asks this Court to judicially notice has been presented to the district court or has any bearing on any issue actually raised on appeal.

Donziger did not challenge the evidentiary sufficiency of Judge Kaplan's factual findings and has not even tried to make a motion under Rule 60. (This is because Donziger (once again) can only ignore the copious (and unrefuted) evidence that—completely independent from Guerra's testimony—proves that the LAP team secretly wrote the Ecuadorian judgment, such as the impossible-to-explain-away overlap between the text of the judgment and the LAPs' internal work product.)[1] Nor did Donziger challenge the correctness of Judge Kaplan's decision to exclude evidence of environmental contamination as legally irrelevant to the determination that Donziger engaged in acts of racketeering—the evidentiary sufficiency of which, again, Donziger does not challenge on appeal—or whether Chevron was entitled to equitable relief from a corruptly obtained judgment. Donziger has waived these (and other) issues, and no amount of repetitive post-argument briefing can revive them.

Beyond Guerra's BIT testimony, Donziger also seeks judicial notice of documents that Chevron filed in response to the Canadian lawsuit seeking enforcement of the Lago Agrio judgment, and transcripts of the BIT arbitral tribunal's "site visits" to Ecuador. Dkt. 461-1 at 1–2. But these materials do not relate to the merits

[1] Donziger also ignores that the judgment against him does not depend on Guerra's testimony. Donziger's misconduct encompasses acts of extortion, obstruction of justice, witness tampering, and wire and mail fraud (to name but a few), which have nothing to do with the bribery of Guerra.

of the judgment against Donziger and thus cannot possibly "exonerate" him. To the extent Donziger suggests these materials demonstrate a risk of inconsistent results with this action, that is a red herring, as Chevron explained in its supplemental brief. *See* Dkt. 426-1 at 8–9. This Court has already held in a related appeal that any conflict with a potential ruling from the BIT tribunal "remains purely hypothetical," and thus "there is no reason for [a court] to forestall or resolve any entirely hypothetical conflicts between as-yet-nonexistent rulings." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 399 (2d Cir. 2011). The same logic applies to the Canadian proceedings, where that court is free to determine what effect and weight, if any, to give to the rulings of the district court and Ecuador's courts.

Donziger's request to have this Court prejudge the outcomes that Donziger claims are supposedly "likely" in other proceedings turns preclusion law on its head. And it bears repeating that Donziger is subject to a *RICO* injunction, for having been found to have violated U.S. law in multiple, unchallenged ways. That cannot possibly rise or fall based on what Chevron asserts by way of an answer to a litigation that Donziger and his cohorts commenced in Canada or anywhere else. Furthermore, neither Donziger nor the LAPs are parties to the BIT, and both have long claimed not to be bound by anything that happens in that arbitration. *See* Dkts. 366-11, 366-12, 431-11.

Finally, Donziger gives his "Robin Hood" defense one more try. He specu-

lates that the arbitral tribunal's site visits indicate that the Lago Agrio judgment *might have* been awarded against Chevron even absent Donziger and the LAPs' wrongdoing. Dkt. 461-1 at 13. This is just another variation of Donziger's misguided "causation" theory that Chevron has refuted several times in these appeals and below. *E.g.*, Dkt. 253 at 102–19. And regardless, Donziger's "evidence" of environmental contamination is simply the arguments advanced by the Republic of Ecuador's ("ROE") counsel and experts—not the findings of the BIT tribunal.

In sum, the Court should reject Donziger's latest ploy to evade responsibility for his ongoing racketeering scheme.

ARGUMENT

A. Judicial Notice Cannot Be Used to Inject "New" Evidence for the First Time on Appeal, or to Resurrect Waived Issues

Donziger seeks judicial notice of materials that, he claims, "exonerate [him] of the allegations of wrongdoing that Chevron has levied against him." Dkt. 461-1 at 3. Donziger's request ignores the current procedural posture of this case—Chevron has not merely "levied" "allegations" against Donziger, but has *proven* Donziger's misconduct with extensive evidence at a lengthy trial.

As Chevron has explained, neither Donziger nor the LAPs challenged *any* of the district court's numerous findings regarding their misconduct or the wholesale corruption that produced the Lago Agrio judgment. *E.g.*, Dkt. 366-1 at 6; Dkt. 426-1 at 2. Nor did any Appellant challenge the district court's credibility

findings as to Guerra, which are owed "special deference" on appeal. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 502 (2d Cir. 1996). Likewise, no Appellant challenged as "arbitrary or irrational" the district court's decision to exclude, as irrelevant, evidence of the alleged environmental conditions in Ecuador. *Provost v. City of Newburgh*, 262 F.3d 146, 163 (2d Cir. 2001).[2] As a result, Donziger has waived any argument that might relate to the supposedly exculpatory "developments" that he is asking this Court to judicially notice.

Furthermore, "[i]t is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000); *see also* Dkt. 366-1 at 6–7. Courts also may not take judicial notice of the *contents*—as opposed to the existence—of filings in another judicial or quasi-judicial proceeding. *See* Dkt. 366-1 at 7. Thus, the Court could, at most, take notice of the fact that Guerra testified in the BIT proceedings, that Chevron and the LAPs are filing documents with the Canadian court in the LAPs' enforcement action, or that the BIT panel took a "site visit" to Ecuador. But Donziger's request goes far beyond that. He is seeking improperly to rely on the *contents* of these materials, which he falsely claims consist of "fresh

[2] Donziger affirmatively stated that all issues on appeal were subject to "de novo" review. Dkt. 150 at 67–68. This confirmed that Donziger did not intend to invoke this Court's highly deferential review of any of the district court's factual findings, credibility determinations, or evidentiary rulings.

evidence of Guerra's admitted lies, new exculpatory evidence, and site visits establishing Chevron's extensive pollution in Ecuador." Dkt. 461-1 at 6.[3]

B. Guerra's BIT Testimony Does Not "Exonerate" Donziger

Notwithstanding Donziger's PR rhetoric, Guerra's BIT testimony was consistent in all material respects with his testimony in this case. Moreover, Guerra's BIT testimony could not possibly "exonerate" Donziger anyway, because the judgment against him is premised on far more than Guerra's account.

1. Guerra's BIT Testimony Is Consistent With His Testimony at Trial Below in All Material Respects

In the BIT proceeding, as in the trial below, Guerra testified that he met with Donziger and others to solicit a $500,000 bribe on Zambrano's behalf (Dkt. 461-2 at 600:7–22); that Guerra edited a draft of the Lago Agrio judgment on Fajardo's computer (*e.g.*, *id.* at 601:9–17); that the LAP team paid Guerra to ghostwrite orders in the case against Chevron (*id.* at 675–78); that Guerra in fact did so (*e.g.*, *id.* at 877:8–14); and that Zambrano paid Guerra to ghostwrite orders for his other cases (*id.* at 629:10–19, 739:1–13). Donziger's "examples" of Guerra's supposed

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[3] Previously in this appeal, Donziger sought judicial notice to advance new arguments based on evidence not before the district court regarding forensic analyses of Zambrano's hard drives. Chevron responded that, far from being exculpatory, the forensic analyses are consistent with the district court's findings, confirm that Zambrano perjured himself, and provide *even more* evidence of overlap between the judgment and the LAP team's internal work product. Dkt. 366-1 at 10–15. Donziger's latest motion adds nothing new on that issue. Dkt. 461-1 at 9–10.

"admissions that he lied while on the witness stand in New York and in his witness statement in this case" do not withstand scrutiny. Dkt. 461-1 at 6.[4]

Guerra initially exaggerated to Chevron in an attempt to improve his negotiating position. Guerra testified in the trial below, exactly as he did in the BIT proceeding, that he initially exaggerated to Chevron about the LAPs offering him a $300,000 bribe to allow them to ghostwrite the judgment. SA2891 at 1197:3–16. Likewise, Guerra testified consistently in the BIT arbitration and the trial below that he overstated other facts to Chevron in an attempt to improve his negotiating position. SA2818–19 at 1124:24–1125:3, SA2854 at 1160:19–21, SA2891 at 1197:13–14. Guerra also testified in both proceedings that he believed his information and link to Zambrano might increase whatever payments he received from Chevron for exposing the "truth regarding the drafting of the judgment." SA1149 ¶ 58, SA2845 at 1151:7–13. None of this is new.

Guerra was initially wrong about the location of the ghostwritten judgment and the "Memory Aid." Guerra admitted during the trial below that when he first met with Chevron's investigators in 2012, he mistakenly thought he had a copy of the Lago Agrio judgment on a flash drive or his computer (which would

[4] Attached for the Court's reference as Exhibit A is a chart comparing Guerra's testimony before the BIT arbitral tribunal with his testimony in the proceedings below on all of the issues that Donziger identifies in his motion.

have been consistent with his prior dealings with Zambrano). SA2814–15 at 1120:22–1121:5. Guerra later remembered that he edited the judgment on Fajardo's computer, and every instance of his sworn testimony, including before the BIT, reflects this. SA1143 ¶¶ 47–49, SA2702–04 at 1008:7–1010:20; Dkt. 461-2 at 601:9–17, 786:15–18. Guerra also acknowledged during the trial below, as he did in the BIT proceeding, that he initially thought Fajardo sent him a "Memory Aid" in an email, but he later remembered that he was given a printed copy of it (which Guerra found and produced). SA2706 at 1012:3–23. This is not new.

Guerra received certain benefits from Chevron. In the trial below, as in the BIT proceeding, Donziger and the LAPs took issue with certain benefits that Chevron provided to Guerra and how those benefits purportedly affected his credibility. SA2919–22 at 1225:16–1228:25, SA2925 at 1231:3–6. Likewise, Donziger and the LAPs raised below the fact that Guerra met with Chevron's lawyers before testifying (SA2743–47 at 1049:9–1052:7), so that is not new either.

Guerra testified that Zambrano offered to give him a share of the bribe. Guerra has consistently maintained that Zambrano promised to pay him once Zambrano received his agreed-to bribe from Donziger and the LAP team. SA1142 ¶ 43. In the BIT proceeding, Guerra acknowledged that he misspoke when he said in this case that Zambrano promised him a precise "20%" of the total bribe—rather than some other amount. Guerra explained that he got confused because, in their

other dealings, Zambrano regularly gave him "20 percent of what [Zambrano] would receive." Dkt. 461-2 at 840:8–24. Guerra attested to his "expectation" that he would receive 20%, but clarified in his BIT testimony that "there was no specific offer [of 20%] by Mr. Zambrano" with respect to the Chevron case. *Id.*

This minor clarification is inconsequential. Guerra's testimony before the BIT tribunal is consistent with his testimony in this case on these fundamental points: (i) Zambrano did solicit, and the LAP team did promise him, a bribe, and (ii) Zambrano promised Guerra some amount of the payment (20% or otherwise) for his assistance in editing the ghostwritten judgment. SPA253–58. Guerra made clear in the BIT that he and Zambrano "did discuss that [Zambrano] would share with me from what he received." Dkt. 461-2 at 731:19–20.

Guerra traveled to Lago Agrio to ghostwrite orders for Zambrano. Guerra also testified in both the BIT proceeding and the trial in this case that he had an illicit agreement with Zambrano in which Zambrano would pay Guerra to ghostwrite orders on his civil cases. *E.g.*, SA1130–34 ¶¶ 13–20. As the district court found, Zambrano confirmed the details of this arrangement in his testimony. SPA239.

Donziger seizes on Guerra's acknowledgement in the BIT that he misspoke about the purpose of two specific trips in August 2010. Guerra mistakenly thought those two trips were for ghostwriting orders for the Chevron case, when in fact Zambrano was not presiding over the case at that time. Dkt. 461-1 at 6–7. This

immaterial clarification does not change the admitted fact that Guerra worked as Zambrano's secret ghostwriter and that, at some point, Guerra began traveling to Lago Agrio to work on orders for the Chevron case. SPA243–54.[5] Donziger also ignores evidence of Guerra's other trips to Lago Agrio, including in December 2010, to work on orders for the Chevron case. SA1142 ¶ 44 (citing PX 1722).

Corroboration of Guerra's testimony. Donziger falsely states that Guerra "conceded in his arbitral testimony that there is no evidence (aside from the so-called Memory Aid) corroborating his allegation that the [LAPs] bribed Zambrano and ghostwrote the judgment." Dkt. 461-1 at 8. There are, among other things, the hundreds of draft orders found on Guerra's computer, bank deposit slips showing payments made to Guerra by Zambrano and LAP employees, email communications referring to Guerra and Zambrano in code, records showing shipments from Guerra to Zambrano and other third parties, and the verbatim overlap between the judgment and the LAPs' unfiled work product. *See* SPA236–58.[6]

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[5] The district court did not specifically rely on Guerra's August 2010 trips to Lago Agrio. Rather, the court generally noted that "there were times when [Guerra] traveled to Lago Agrio to work on the court rulings for the Chevron case." SPA256. That is not disputed.

[6] Donziger's claims of a lack of corroboration ring particularly hollow given the LAP team's repeated refusals to produce documents from their agents in Ecuador, who would have the relevant materials—discovery misconduct for which the district court sanctioned Appellants (another ruling they do not challenge on appeal). *See Chevron Corp. v. Donziger*, 296 F.R.D. 168, 224 (S.D.N.Y. 2013).

2. The District Court's Judgment Does Not Hinge on Guerra

Regardless of Guerra's BIT testimony, the district court's extensive, unchallenged findings describe a racketeering scheme that is far broader than the LAP team's bribing of Zambrano and ghostwriting of the Lago Agrio judgment—the only subjects on which Guerra testified below. The district court found Donziger liable for numerous RICO predicate acts that do not involve Guerra or Zambrano, including extortion (SPA369–91), wire fraud (SPA391–94), money laundering (SPA395–99), obstruction of justice (SPA399–401), witness tampering (SPA402–03), and violations of the FCPA with his corruption of Cabrera (SPA403–10).

To take just one example, Donziger does not dispute that he and his co-conspirators arranged for Cabrera's appointment by threatening the judge (SPA81–88), secretly met with Cabrera before he was appointed to plan the expert report (SPA88–95), paid Cabrera outside of the normal court process through a "secret account" to ensure that he would "totally play ball" (SPA101–07), secretly ghostwrote Cabrera's report (SPA115–22), and promoted that ghostwritten report as an "independent" estimate of Chevron's liability in an attempt to "magnify the pressure on Chevron" (SPA374–76). None of this has anything to do with Guerra.[7]

Chevron's proof of the LAP team's judgment ghostwriting was also exten-

[7] Similarly, Donziger caused the "deliberately misleading Fajardo Declaration" to be filed in federal courts across the country, conduct that the district court aptly described as "obstruction of justice, plain and simple." SPA400–01.

sive, and went far beyond Guerra's testimony. Donziger has *never* presented any viable explanation for the substantial verbatim overlap between the LAP team's confidential, internal work product and the Lago Agrio judgment, which "firmly establish[es] that the LAPs wrote at least material portions of the Judgment." SPA212–26. And as the district court recognized, Donziger has "had remarkably little to say regarding the evidence of the extensive overlap between the Judgment and [the LAP team's] internal work product," which "ended up verbatim or in substance in the Judgment, despite that it appears nowhere in the record." SPA224.

Nor could Guerra's recent BIT testimony alter the fact that Zambrano, the purported author of the judgment, was "unable to answer basic questions" about the judgment (SPA196–99), and his account of how he prepared the judgment was "[s]elf [c]ontradictory and [i]mplausible" (SPA199–204). Zambrano's disastrous performance at trial in this case no doubt explains why he did not appear in the BIT, despite repeated requests from the BIT tribunal that he do so. And Donziger himself introduced evidence that established that Zambrano could not have written the judgment using the computer on which he testified "that the whole writing of the judgment was done." SPA205–07 (quoting SA3373 at 1679:5–7).

Donziger also overlooks the numerous communications showing his planning with the LAP team to ghostwrite the judgment and their illegal arrangement with Guerra. SPA226–30, 245–50. Donziger even *admitted* that he met with

Guerra, who "openly asked for a bribe." SA1654 ¶ 78. While Donziger claims to have rejected Guerra's proposal, this is impossible to square with Donziger's concession that his team later proposed hiring Guerra as an expert witness on the strength of the Ecuadorian legal system. SA4295–96 at 2601:18–2602:3.

Donziger also claims that a "new contemporaneous email has been discovered" that somehow supports his assertions of innocence. Dkt. 461-1 at 10. Once again, this is false. Donziger cites an ROE filing in the BIT proceedings, Dkt. 461-1 at 10, which in turn quotes an email (Dkt. 372-2 at 142) that Donziger received years ago. Chevron filed that email in the court below (691 Dkt. 755-10 (Ex. 3251)), and Appellants chose not to introduce it at trial. This underscores how absurd it is to request judicial notice on appeal to circumvent a trial on the merits.

Regardless, the referenced email is entirely consistent with the district court's findings. Even though the LAP team had bribed Zambrano, they still needed to file their alegato (similar to a closing brief), if for no other reason than to maintain an outward appearance of propriety. Winning a multibillion dollar judgment after failing to timely file a closing brief would have looked bad. That the LAP team would even consider filing a closing brief—which arguably was the most important filing in the case—"even if it [wa]s not complete," Dkt. 461-1 at 10, demonstrates their confidence in their bribery scheme.

3. The District Court Already Took Into Account Donziger's Recycled Attacks on Guerra's Credibility

Donziger's attacks on Guerra's credibility ignore that the district court expressly considered these same arguments. The court noted that Guerra prepared to testify and that Chevron was "supporting him and has assisted his relocation from Ecuador to the United States." SPA262; *see also* 691 Dkt. 1650 (denying motion for sanctions based on Guerra-Chevron agreement). The court also considered Guerra's past dishonesty, including "multiple instances in which he has accepted bribes, lied, and facilitated illegal relationships between parties and judges." SPA262–64. The court also considered the same "inconsistencies" in Guerra's testimony that Donziger now tries to pass off as a recent revelation. SPA264–67.

After taking all of this into account, the district court, as the trier of fact, ultimately credited much of Guerra's testimony and described him as an "impressive witness" from the "standpoint of demeanor." SPA262. This assessment of Guerra's credibility is entitled to "special deference" on appeal, particularly where Donziger has failed even to challenge it. *Hormel*, 73 F.3d at 502.[8]

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[8] The district court came to a markedly different conclusion about the credibility of Zambrano and Donziger after hearing their live testimony. The court described Zambrano as "a remarkably unpersuasive witness" with "internal inconsistences in his trial testimony, and [with] inconsistences between his testimony and other evidence." SPA196; *see also* SPA268 ("Zambrano was not a credible witness."). Similarly, the court described Donziger as "deeply self-interested" and noted that he "has deceived when deception served his interests." SPA271–77.

C. Donziger's Arguments About the Supposed "Risk of Inconsistent Results" Are Contrary to the Law

Donziger contends that the Canadian filings and BIT panel's site visit transcripts "heighten the likelihood of inconsistent results and illustrate why this proceeding is . . . unnecessary." Dkt. 461-1 at 1. However, as Chevron explained in its supplemental brief, there is no legal basis for an appellate Court to "abstain" or otherwise stay a district court's judgment out of concern for potential inconsistency with a future ruling in a different case. Dkt. 426-1 at 7–9. This Court already held in a related appeal that any conflict that may arise from a future ruling in the BIT proceeding "could be resolved in any resulting proceedings to enforce the judgment." *Republic of Ecuador*, 638 F.3d at 399. That same logic would apply to any eventual rulings by the Canadian court. Donziger offers no response to this Court's sensible approach to hypothetical future conflicts.

Indeed, following Donziger's argument to its logical conclusion would upend traditional estoppel doctrines. He suggests that even absent a demonstrated error on appeal, this Court should vacate the district court's findings solely because there is a risk that a different court in a later proceeding, involving some of the same facts, may reach a different result. *See* Dkt. 461-1 at 6. This approach would invite litigants perpetually to re-start litigation anew every time a related proceeding is filed, since the later proceedings would necessarily involve a "more developed record." *Id.* But of course that is not, and never has been, the law.

D. Chevron's Canadian Filing Provides No Support for Donziger's "Causation" and "Redressability" Arguments

Donziger seeks judicial notice of statements in Chevron's Canadian Statement of Defense (the equivalent of Chevron's answer to a complaint) that the Canadian plaintiffs are bound by the district court's findings with respect to their fraudulent procurement of the Lago Agrio judgment. Dkt. 461-1 at 14. Donziger argues that these statements advance his "causation" and "redressability" arguments because, he claims, they show that Chevron's "true agenda" in this action was to obtain an "advisory opinion." *Id.* at 2, 14–15.

Contrary to Donziger's claims, however, Chevron has never argued that the district court's judgment redresses Chevron's injuries merely because "the findings are entitled to preclusive effect abroad." Dkt. 461-1 at 15. Rather, the injunction prevents Donziger and his agents from seeking to enforce the Lago Agrio judgment in the United States, and it prevents them from profiting from the Lago Agrio judgment. *See* Dkt. 253-1 at 70–72. This relief redresses several of Chevron's injuries that are fairly traceable to Appellants' misconduct, including the loss of revenue streams from the seized trademarks in Ecuador; the seizure of a $96 million arbitral award Chevron obtained against the ROE; and the expense of legal fees to defend against current and future enforcement proceedings. SPA325–30.

Nor is Donziger correct that Chevron is relying on the judgment below to "preempt" the Canadian proceedings. Dkt. 461-1 at 15. The opposite is true: ra-

ther than have the district court "dictat[ing] to the entire world which judgments are entitled to respect," the Canadian court may now "mak[e] [its] own decision[] about the enforceability" of the Lago Agrio judgment. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 242–43 (2d Cir. 2012); *see also* Dkt. 253 at 92–95. For their part, the Canadian plaintiffs (all of whom were named as defendants in this action) have "asked the court to grant preclusive effect to the Ecuadorian intermediate court's judgment." Dkt. 461-1 at 4–5. And the case will now proceed as this Court predicted in *Republic of Ecuador*: the Canadian court will determine what effect and weight, if any, to give the district court's factual findings and those of the Ecuadorian courts, and how to "resolve[]" any conflicts between them. 638 F.3d at 399.[9]

E. Transcripts of the BIT Tribunal's Site Visit Are Irrelevant Here

Donziger argues that transcripts of the BIT panel's Ecuadorian site visits contain "evidence of environmental harm persisting in the impacted areas." Dkt. 461-1 at 13. As the district court correctly held, the merits of the environmental claims in Ecuador were irrelevant to the legal claims and defenses here, which do not involve "what happened in the Oriente more than twenty years ago and who, if anyone, now is responsible for any wrongs then done." SPA16; *see also* 691 Dkt. 1321 at 12. Appellants have waived any argument that the district court

[9] Ironically, by insisting that *this* Court must preemptively determine the "preclusive effect of the decision below" in the Canadian proceedings (Dkt. 461-1 at 2), Donziger runs headlong into *Naranjo*.

abused its discretion by not considering the merits of the environmental claims in Ecuador or by excluding purported evidence of environmental conditions there.

Donziger nonetheless seeks to back-door environmental evidence into the appeal through his "causation" theory—speculating that his fraud, extortion, and other misconduct should not matter because the Lago Agrio judgment *might have* been awarded against Chevron anyway even absent the adjudicated wrongdoing. Dkt. 461-1 at 12–13. The district court correctly rejected this tactic: "An innocent defendant is no more entitled to submit false evidence, to coopt and pay off a court-appointed expert, or to coerce or bribe a judge or jury than a guilty one." SPA16. Regardless of what the transcripts of the BIT panel's site visits contain, they would not immunize Donziger's misconduct or remove the indelible stain from the Lago Agrio judgment. *See, e.g.*, *United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939); *see also Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 618 (1993).

Donziger's assertion that "Chevron has not meaningfully contested" the environmental allegations against it is also false. Dkt. 461-1 at 13. Chevron has vigorously disputed those allegations in the Ecuadorian courts and in the BIT proceeding. Chevron also established in the BIT proceeding how the 1995 Settlement Agreement with the ROE is dispositive of all environmental issues. *See* Dkt. 426-1 at 5–6. And even though it had no obligation to do so, Chevron demonstrated in

this appeal that Donziger's environmental allegations were not supported by the evidence cited—where evidence was cited at all—and that many of the allegations were rebutted by evidence in the record. Dkt. 253 at 147–50.

Donziger also misconstrues the nature of the BIT panel's site visits, which were not "an evidence collection exercise," but rather, as the panel explained, "[t]he evidence is in, and we're here to understand that evidence." Dkt. 461-3 at 144:14–19. Likewise, Donziger's cherry-picked excerpts from the site visit transcripts do not quote findings by the BIT tribunal, but simply the flawed arguments of the ROE's counsel and experts, each of which Chevron rebutted:

- Donziger notes that liquid oil was found in the soil at Shushufindi-34, Dkt. 461-1 at 11, but fails to mention that remediating Shushufindi-34 "was left as the responsibility of Petroecuador." Dkt. 461-3 (Ex. B) at 39:13–17.
- Chevron only "conceded oil on the ground," Dkt. 461-1 at 11, when noting that "Petroecuador . . . had responsibilities to do remediation, and they haven't done it all." Dkt. 461-3 (Ex. B) 47:20–48:6.
- Donziger quotes the ROE's expert's discussion of exposure to pollution at Aguarico-06, Dkt. 461-1 at 11–12, but omits that Petroecuador was responsible for closing the pits and remediating this site, Dkt. 461-3 (Ex. B) at 159:21–160:3. Chevron's expert also testified regarding the lack of evidence of human exposure under the ROE's theory. *Id.* at 186:19–187:5.

- Contrary to the passage quoted by Donziger, Dkt. 461-1 at 12, TexPet completed the remediation it was required to do at Shushufindi-55 under the supervision of the ROE. Dkt. 461-3 (Ex. B) at 243:25–244:23.
- Donziger quotes the ROE's expert's discussion of "extensive soil and groundwater contamination" at Lago Agrio-02. Dkt. 461-1 at 12. Chevron's expert, however, cited evidence demonstrating the contaminants had not migrated. Dkt. 461-3 (Ex. B) at 348:12–19 ("outside the pit the soil borings are clean").
- Chevron's counsel stated that "there have been impacts," Dkt. 461-1 at 12, when explaining how those impacts "are the responsibility of Petroecuador." Dkt. 461-3 (Ex. B) at 370:24–371:1.
- Chevron's expert explained that the oil contamination in the water supply surrounding Pit 3 at Lago Agrio-02, Dkt. 461-1 at 12, "is completely attributable to Petroecuador." Dkt. 461-3 (Ex. B) at 328:22–329:3.

CONCLUSION

Donziger cannot use judicial notice on appeal to introduce "developments" that supposedly "exonerate" him, particularly when these developments do not bear on any issue he raised in these appeals. In any event, the developments themselves cast no doubt on any of the district court's factual findings or legal conclusions. The Court should deny Donziger's motion.

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Respectfully submitted,

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