18-855-cv(L)

18-2191-cv(Con)

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION,

Plaintiff-Counter-Defendant-Appellee,

- v. -

DONZIGER & ASSOCIATES, PLLC, STEVEN DONZIGER,
THE LAW OFFICES OF STEVEN R. DONZIGER,

Defendants-Counter-Claimants-Appellants.

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 1:11-CV-00691-LAK-JCF
THE HONORABLE LEWIS A. KAPLAN

BRIEF OF PLAINTIFF-APPELLEE CHEVRON CORPORATION

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Defendants,

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

Defendants-Counter-Claimants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents.

CORPORATE DISCLOSURE STATEMENT

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

Dated: March 11, 2019

/s/ Randy M. Mastro
Randy M. Mastro

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PRELIMINARY STATEMENT

This is a meritless appeal over which the Court largely lacks jurisdiction. The only properly appealable decision that Defendant Steven Donziger challenges is the district court's post-judgment cost award, which he treats as a throw-away at the end of his brief. Donziger's real object is to shut down discovery into the illicit dealings through which he has continued to line his pockets in violation of the injunction entered in this case. His already discovered contumacious conduct is the subject of contempt motions that remain pending before the district court. Donziger's desire to block further discovery and shield from scrutiny his continuing pattern of fraud and racketeering activity does not render interlocutory rulings appealable. Moreover, even if these contempt-related rulings were appealable, Donziger's appeal of them would be untimely. Accordingly, this appeal should be summarily rejected.

This Court is very familiar with Donziger's misconduct. While he poses as an environmental activist, Donziger is an adjudicated racketeer, having committed numerous criminal acts as part of a years-long scheme to extort and defraud Plaintiff Chevron Corporation ("Chevron"). Donziger's illegal campaign against Chevron culminated in his procurement of a multi-billion-dollar judgment in Ecuador using corrupt means, including outright bribery of judges and the court's supposedly neutral "global" court expert, whom Donziger described as akin to a U.S. "spe-

cial master." The district court, after a lengthy trial, made numerous factual findings concerning Donziger's illegal conduct, and Donziger did not challenge any of those findings on appeal. This Court affirmed the judgment, upholding the district court's equitable remedies designed to prevent Donziger from profiting from his misconduct, and the Supreme Court denied Donziger's petition for a writ of certiorari. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2268 (2017).

Despite the finality of the district court's judgment and the injunction against him, Donziger continues his wrongful scheme, operating as if the district court's judgment did not exist. Last year, Chevron obtained evidence that Donziger was attempting to enrich himself by selling interests in the fraudulent Ecuadorian judgment—in direct defiance of the injunction this Court affirmed. Armed with that evidence, Chevron moved to hold Donziger in contempt, and sought discovery from Donziger and his associates to determine the extent and scope of his contempt. Although Donziger did not contest the evidence showing his attempted monetization of the Ecuadorian judgment, he was desperate to shield from discovery the full scope of his efforts to illicitly profit from the Ecuadorian judgment. Donziger, therefore, filed a barrage of nonsensical motions—including a facially frivolous Rule 12(b)(6) "motion to dismiss" Chevron's contempt motion—that were procedurally flawed and substantively bankrupt. It is the district court's reso-

lution of these Donziger motions, all of which relate to the ongoing and unresolved contempt proceedings below, that is the focus of this misguided appeal.

This Court, however, does not have jurisdiction over the district court's denial of Donziger's contempt-related motions until the district court resolves Chevron's contempt motions. Donziger's attempts to avoid this obvious jurisdictional defect—by claiming the district court has somehow *sub silentio* "modified" the injunction or has issued rulings falling within the narrow collateral order doctrine—are all without merit. And even if this Court had jurisdiction, Donziger comes nowhere close to establishing any reversible error in any of the district court's largely discretionary rulings. In fact, Donziger ignores (and therefore has waived any challenge to) many of the dispositive procedural defects that the district court found in his motions and that, standing alone, compel affirmance.

As for the only aspect of this appeal over which the Court has jurisdiction—the costs awarded to Chevron—Donziger falls well short of establishing any abuse of discretion. Donziger's objections to the clerk's taxation of costs were untimely and failed to comply with the rules governing such objections. Moreover, the bulk of Donziger's complaints were not even directed to the *amount* of costs taxed, but instead to Chevron's entitlement to costs at all—an issue Donziger waived when he failed to challenge in his prior appeal the district court's finding that Chevron was entitled to prevailing-party costs. And the few arguments Donziger makes

about the actual amount of costs awarded are all without merit. For example, Donziger argues that the costs award should be reduced because he has limited means, but he has refused to present any evidence supporting that claim. His claimed impoverishment also is inconsistent with his previous representation that he was able to bond the cost award, and with the record evidence showing that he has received millions of dollars from his unlawful conduct.

Accordingly, this Court should now affirm the award of costs to Chevron and dismiss the remainder of this appeal for lack of jurisdiction.

JURISDICTIONAL STATEMENT

The Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's supplemental judgment awarding costs to Chevron. The Court, however, lacks jurisdiction to review any of the other orders Donziger has attempted to appeal, as explained below in Argument Part II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in rejecting Donziger's objections to the taxation of costs where he (a) failed to contest the propriety of awarding costs in the prior appeal in this case, (b) failed to comply with the rules governing objections to the taxation of costs, and (c) failed to provide any evidence of his alleged financial hardship or identify any other reason why the amount of costs awarded should be reduced?

2. Does this Court have jurisdiction to review orders issued in connection with ongoing contempt proceedings that have yet to conclude?

3. Assuming for the sake of argument that the Court had jurisdiction, did the district court (a) err in denying Donziger's motion to dismiss Chevron's contempt motion on the ground that Federal Rule of Civil Procedure 12(b)(6) does not permit a motion to dismiss a motion, (b) abuse its discretion in denying Donziger's motion for a declaration that he is not in contempt on the grounds that such relief is not available via motion and that resolving Chevron's contempt motion would be a better remedy than issuing a declaratory judgment, or (c) abuse its discretion in denying Donziger's motion for a protective order from Chevron's post-judgment discovery on the grounds that he failed to timely raise any First Amendment objections, that he lacks standing to assert the associational rights of third parties, and that no good cause existed for issuance of a protective order?

STATEMENT OF THE CASE[1]

I. Factual Background

A. The District Court Found That Donziger Operated a RICO Enterprise and Imposed Equitable Relief to Prevent Donziger From Profiting From His Misconduct

In *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016), this Court analyzed in depth the district court's "extensive factual findings as to the acts undertaken by Donziger to procure" through corrupt means a multi-billion-dollar judgment in Ecuador. *Id.* at 86; *see generally Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). Donziger "disputed" none of those factual findings on appeal, and this Court observed that the undisputed "record . . . reveals a parade of corrupt actions" by Donziger, "including coercion, fraud, and bribery." *Donziger*, 833 F.3d at 86, 126. This Court agreed with the district court that Donziger and the "team of attorneys, investors, experts, and consultants" working with him "constituted a RICO enterprise, and that Donziger had conducted the affairs of that enterprise in a pattern of racketeering activity." *Id.* at 117.

In order to ensure that Donziger would not profit from his illegal acts, the

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[1] Donziger has filed what he labeled a "joint" appendix, but there was nothing joint about it. Donziger never gave Chevron notice of its contents or the opportunity to add to it other relevant materials. Because Donziger's appendix was not a proper joint appendix, Chevron is filing a supplemental appendix containing additional relevant record materials. Citations to "A" are to Donziger's "joint" appendix, citations to "SPA" are to Donziger's special appendix, and citations to "SA" are to Chevron's supplemental appendix.

district court entered a judgment (the "RICO judgment") granting Chevron various forms of equitable relief: "a constructive trust, disgorgement, and an injunction." *Id.* at 119; *see also* SPA1–5. As this Court explained, the RICO judgment "prevent[s] Donziger . . . from profiting from the [Ecuadorian] Judgment or seeking to enforce it in this country." *Donziger*, 833 F.3d at 119 (quotation marks and citation omitted). Although Chevron does not have sufficient space here to fully document all of Donziger's illegal conduct supporting the RICO judgment, it briefly summarizes here the key corrupt acts.[2]

Falsification of an Expert Report. The initial phase of the Ecuadorian proceedings involved "judicial inspections," in which experts nominated by each side filed reports regarding specific sites, and then a panel of neutral experts would resolve any differences for the court. *Donziger*, 974 F. Supp. 2d at 411–12. The plaintiffs in the Ecuadorian action (referred to as the "Lago Agrio Plaintiffs" or

[2] Donziger concedes he is not "allowed to challenge Judge Kaplan's findings in this post-judgment appeal." Donz. Br. at 13 n.7. Nonetheless, Donziger devotes substantial portions of his brief to attacking those findings, and claims they "are being questioned" in his disciplinary proceeding before the New York State Bar. *Id.* at 4 n.2. But the First Department recently held that the referee presiding over the proceeding "may not reexamine th[e] Court's determination" that Donziger "committed professional misconduct" warranting his suspension from the practice of law, which was based on the findings of the district court in this action. *In re Donziger*, 2019 WL 237480, 2019 N.Y. Slip. Op. 60992(U) (1st Dept. Jan. 17, 2019); *see also In re Donziger*, 163 A.D.3d 123, 125 (1st Dept. 2018) (holding that "Judge Kaplan's findings constitute uncontroverted evidence of serious professional misconduct which immediately threatens the public interest").

"LAPs") nominated as their expert Dr. Charles Calmbacher. But after inspecting the first two sites, Calmbacher "concluded that [he] did not see significant contamination that posed immediate threat to the environment or to humans or wildlife around it." SA1100–01; *see also Donziger*, 974 F. Supp. 2d at 412–13.

After Calmbacher returned to the United States, the LAP team—which Donziger led—asked him to sign and initial blank pages on which to print his final report for the court. *Donziger*, 833 F.3d at 89. But the LAP team printed a different report on those pages, which stated—*contrary to Calmbacher's findings*—that the site was contaminated with "highly toxic chemicals" and that Chevron was responsible. *Id.* When later shown the report filed under his signature, Calmbacher testified, "I did not reach these conclusions and I did not write this report." *Id.* As the district court found, the submitted reports "were not the reports [Calmbacher] wrote and did not reflect his views" and "someone on the LAP team used the blank pages Calmbacher had initialed and his signature pages to submit over his name two reports that contained conclusions he did not reach." *Id.*

Corruption of the Ecuadorian "Global" Court Expert. In another effort to fabricate environmental evidence favorable to the LAPs, Donziger blackmailed the then-presiding Ecuadorian judge to put an end to the judicial inspections process, designate a single supposedly impartial and independent "global damages" expert, and appoint to that critical role Richard Cabrera, with whom Donziger and his as-

sociates had a corrupt agreement that allowed them to secretly ghostwrite the report that Cabrera submitted as his own. *Donziger*, 974 F. Supp. 2d at 422–39. Before Cabrera's appointment as the "neutral" expert, the LAPs' agents, including Donziger, held a secret planning session with Cabrera to plan his report, which "Donziger in an unguarded moment[] acknowledged . . . would be the product of the LAPs and their 'team of Ecuadorian technical people and . . . American consultants.'" *Id.* at 425.

The LAP team also began "secretly giving [Cabrera] money" and set up a "new and secret bank account through which they could pay Cabrera surreptitiously." *Donziger*, 833 F.3d at 94. These payments "were made as part of even more extensive efforts to ensure that Cabrera 'would totally play ball with' the LAPs." *Id.* at 95. In return for these secret payments, Cabrera allowed the LAP team to control his field work and ghostwrite his report. *Id.* at 95–97.

After the report ghostwritten by the LAP team was filed under Cabrera's name, the LAP team submitted sham objections to the report they had just written to "create the impression that the LAPs 'w[ere] dissatisfied with the Report and that Cabrera had not gone far enough in assessing damages.'" *Id.* at 98 (quoting *Donziger*, 974 F. Supp. 2d at 444). The LAP team sought to "maximize the deception" by filing a response criticizing the report as unjustly favorable to Chevron and seeking $11 billion more in damages. *Id.* Then they ghostwrote Cabrera's re-

ply, granting their own request. *Id.* In short, "Cabrera was not even remotely independent" and "Donziger knew at every step that what he and the LAP team did with Cabrera was wrong, deceptive, and illegal." *Id.* (quoting *Donziger*, 974 F. Supp. 2d at 446, 460).

Ghostwriting the Ecuadorian Judgment. Not satisfied with manufacturing environmental evidence, the LAP team also secretly ghostwrote the multi-billion-dollar Ecuadorian judgment in their favor. *Donziger*, 833 F.3d at 106–112; *Donziger*, 974 F. Supp. 2d at 501–02, 580. That judgment includes "substantial passages and references that do not appear anywhere in the Lago Agrio Record, but that do appear verbatim or in substance in a number of documents from the LAPs' files." *Donziger*, 974 F. Supp. 2d at 526. The district court found that "Defendants had remarkably little to say regarding the evidence of the extensive overlap between the Judgment and their internal work product," and that they "utterly failed to explain how or why their internal work product—their 'fingerprints'—show up in the Judgment." *Id.* at 483, 498. On the basis of the LAP team's "fingerprints" on the judgment, the district court concluded that "the LAPs wrote the Judgment in its entirety or in major part[.]" *Donziger*, 833 F.3d at 111 (quoting *Donziger*, 974 F. Supp. 2d at 502).

Donziger's team was able to ghostwrite the Ecuadorian judgment because they bribed the judge presiding over that litigation, Nicolás Zambrano. As the dis-

trict court found, a former Ecuadorian judge, Alberto Guerra, "facilitated a deal among Zambrano [and] Donziger . . . pursuant to which [the LAP team] promised to pay Zambrano $500,000 in exchange for Zambrano permitting [them] to write the decision." *Donziger*, 974 F. Supp. 2d at 503; *see also Donziger*, 833 F.3d at 113. Both Zambrano and Guerra testified at trial, and the district court largely credited Guerra's account of the corrupt deal between Donziger's team and Zambrano. *See Donziger*, 974 F. Supp. 2d at 533–35.

Although Donziger fills his brief with various baseless and unsupported attacks on Guerra (*see, e.g.*, Donz. Br. at 15, 50–51), Donziger failed to challenge on appeal any of the district court's factual findings or credibility determinations relating to Guerra. *Donziger*, 833 F.3d at 86. And in evaluating Guerra's testimony, the district court recognized Guerra's admitted "self interest," prior "dishonest[y]," and several minor inconsistencies in his account, but noted that "[f]rom the standpoint of demeanor, Guerra was an impressive witness" and "testified clearly, directly, and responsively." *Donziger*, 974 F. Supp. 2d at 518. The district court also found that Guerra's testimony was "corroborated by independent evidence Chevron produced at trial." *Id.* at 506. By comparison, Zambrano, whom Donziger and the LAPs brought to testify at the trial, "was not a credible witness." *Id.* at 483–92, 521.

B. No Court Outside Ecuador Has Enforced the Judgment Donziger Procured Through Fraud and Bribery

Since the issuance of the Ecuadorian judgment, Donziger and the LAPs have attempted to enforce the judgment in Argentina, Brazil, and Canada. But contrary to Donziger's claim that Chevron "is slowly losing on the merits in enforcement proceedings" abroad, Donz. Br. at 7, these foreign enforcement efforts have been uniformly unsuccessful.

Courts in Argentina and Brazil have refused to recognize the Ecuadorian judgment. *See* SA122. And in May 2018, the Ontario Court of Appeal in Canada affirmed unanimously the judgment of a lower Canadian court dismissing all claims against Chevron Corporation's indirect subsidiary in Canada, Chevron Canada Limited ("Chevron Canada"), and finding both that the company is a separate entity from Chevron Corporation and also that Chevron Canada's assets are protected from seizure by those seeking to enforce the Ecuadorian judgment against Chevron Corporation. SA245. The court further noted that "[w]hat is really driving the appellants' appearance in our courts is their inability to enforce their judgment in the United States," *id.*, where it has already been found to be the product of "a massive fraud," SA276, that involved "both corruption and coercion of judges," SA249. The court then concluded: "What we are really being invited to do is to assist the appellants in doing an end-run around the United States court order by breaking with well-established jurisprudence and creating an exception to the prin-

ciple of corporate separateness that is both ill-defined and will be unnecessary for similarly situated judgment creditors." SA277.

C. A Unanimous International Arbitral Tribunal Recently Ruled That the Ecuadorian Judgment Was Procured Through Corrupt Means

On August 30, 2018, a three-judge international arbitral tribunal acting under the Bilateral Investment Treaty between the United States and Ecuador ("BIT Tribunal") issued a unanimous decision finding that Donziger and his team fraudulently procured the Ecuadorian judgment. The BIT Tribunal found the evidence of corruption so "overwhelming" that, "[s]hort of a signed confession," it "must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal." SA811 (¶ 8.54).

The BIT Tribunal's findings regarding fraud and corruption in the Ecuador litigation are virtually identical to those of the district court. Among other things, the BIT Tribunal found (i) the LAPs blackmailed the then-presiding judge to improperly terminate the judicial inspections and appoint Richard Cabrera as the court's supposedly neutral "global" expert, SA521 (¶ 4.261), SA529 (¶ 4.295), SA663 (¶ 5.248), (ii) the LAP team ghostwrote Cabrera's report, SA513 (¶ 4.227), SA525 (¶ 4.277), SA534–36 (¶¶ 4.311–4.318), SA550 (¶ 4.378), and (iii) that payments to Cabrera "were made corruptly as bribes by certain of the Lago Agrio Plaintiffs' representatives, including Mr Fajardo, Mr Yanza and Mr Donziger," SA531 (¶ 4.303).

On the ghostwriting of the Ecuadorian judgment, the BIT Tribunal concluded that "the circumstantial and other evidence, including testimony by Dr Zambrano in the RICO Litigation, does not support Dr Zambrano's account of writing the Lago Agrio Judgment." SA587 (¶ 5.17). Unlike Guerra, Zambrano refused to testify before the BIT Tribunal (despite the Tribunal's repeated requests), SA458 (¶¶ 4.24, 4.25), so it reviewed his testimony from the RICO trial and found that it was, "on material issues, incredible," SA625 (¶ 5.150). The BIT Tribunal further found that "material parts of the Lago Agrio Judgment . . . were corruptly 'ghostwritten' for [Judge Zambrano] . . . by one or more of the Lago Agrio Plaintiffs' representatives in return for a promise by such representative(s) to pay to Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment's enforcement by the Lago Agrio Plaintiffs." SA835 (¶ 10.4). The BIT Tribunal also concluded that Donziger acted with knowledge of the ghostwriting, and was "privy to such 'ghostwriting' and 'collusion,'" "with others." SA631 (¶¶ 5.163, 5.164).

The BIT Tribunal found Guerra to be credible: "[H]aving seen and heard him in person subject to vigorous cross-examination by [the Republic of Ecuador], the Tribunal considers that Dr. Guerra was a witness of truth in his testimony," and it thus "relied upon his testimony where it can be corroborated by other evidence, at least in part." SA461–62 (¶ 4.38). And contrary to Donziger's claim that "Guerra's testimony had been forensically disproven by a digital analysis of the

issuing judge's computers in chambers," Donz. Br. at 51, the BIT Tribunal concluded, after a thorough examination, that the forensic evidence was "consistent" with its conclusion that "the Lago Agrio Judgment was at least in material part 'ghostwritten' by certain of the Lago Agrio Plaintiffs' representatives, in corrupt collusion with Judge Zambrano." SA742 (¶ 6.111). Based on the forensic evidence, the BIT Tribunal further concluded that "the account given at the RICO trial by Dr Zambrano as to how he wrote personally the full Lago Agrio Judgment on his New Computer (with his student secretary) is inaccurate, incomplete and unreliable." SA742 (¶ 6.109).

The BIT Tribunal further held that Ecuador breached its obligations under a 1995 settlement agreement releasing Texaco Petroleum Company ("Texpet")—today an indirect subsidiary of Chevron—and its affiliates from the same environmental claims on which the $9.5 billion Ecuadorian judgment was based. SA836 (¶ 10.8). The BIT Tribunal found that "TexPet spent approximately US$ 40 million on environmental remediation and community development in Ecuador under the 1995 Settlement Agreement," carried out by a "well-known engineering firm specialising in environmental remediation," and that Ecuador in 1998 executed a final release agreement "certifying that TexPet had performed all its obligations under the 1995 Settlement Agreement." SA469 (¶¶ 4.67, 4.68, 4.69). The BIT Tribunal found "no cogent evidence" supporting Ecuador's claim that TexPet

failed to comply with the settlement agreement. SA501 (¶ 4.179). To the contrary, Ecuadorian officials testified that TexPet's "technical work and environmental work was done well," while Ecuador's national oil company "during more than three decades, had done absolutely nothing" to address its own environmental remediation obligations in the area, even though it had received 97.3% of the oil production revenues from the project. SA501 (¶¶ 4.180, 4.181), SA468 (¶ 4.64).

II. Procedural Background

A. Chevron Is Awarded Prevailing Party Costs

The March 2014 RICO judgment provided that "Chevron shall recover of Donziger . . . the costs of this action pursuant to Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920." SPA4. Donziger appealed but did not challenge the award of costs. *See generally* SA965–1099, SA1105–79.

After this Court affirmed the RICO judgment, Chevron filed a timely notice of taxation of costs. SA31. Donziger moved to hold Chevron's bill of costs in abeyance pending the resolution of his petition for a writ of certiorari. SA33. The district court granted Donziger's motion only "to the extent that the Clerk shall not tax costs until . . . the determination of the petition [for certiorari]." SA35.

The Supreme Court denied Donziger's petition on June 19, 2017. *Donziger v. Chevron Corp.*, 137 S. Ct. 2268 (2017). That same day, Chevron requested that the district court reactivate its bill of costs. SA36. The district court's July 17,

2017 order directed the clerk to "proceed to tax costs," SA37, and Chevron refiled its notice of taxation, and costs were to be taxed on August 1, 2017 at 10:00 a.m. SA38. The local rules required Donziger to object to costs "prior to the date and time scheduled for taxation." S.D.N.Y. L. Civ. R. 54.1(b). He did not do so. Instead, three hours after the "date and time of taxation," Donziger filed a letter (not a motion) to the clerk, "not . . . [to] present[] a full opposition to the taxation request," but to "request that any taxation be held in abeyance pending resolution of a number of critical and related legal and factual issues that are now pending or will soon be presented to the district court." SA40. Even though Donziger's letter was untimely, on August 8, 2017, the clerk entered a bill of costs that granted in part and denied in part Chevron's request and noted that "[o]bjections [were] [f]iled." SA47. The clerk taxed costs in the total amount of $944,463.85, which consisted of special master fees in the amount of $872,387.63, fees for service of papers of $1,550.00, interpreters' costs of $23,400.00, and court reporter fees of $47,126.22. *Id.*[3]

Federal Rule of Civil Procedure 54(d)(1) states that "[o]n motion served within the next 7 days [after the Clerk has taxed costs], the court may review the

[3] The clerk declined to award certain printing and deposition transcript costs, which reduced the award by $14,233.50. SA47.

clerk's action." Fed. R. Civ. P. 54(d)(1). Donziger filed a letter, not a motion, objecting to the taxation of costs eight days later, on August 16, 2017. SA58–62.

Chevron's bill of costs contained copies of the bills it had paid for the special masters, but the invoices for one of the special masters did not contain detailed time records. Accordingly, on November 9, 2017, the district court ordered that special master to provide "time records . . . sufficient to show the services . . . included in the bill of costs taxed by the Clerk." SA64. The district court also requested that the special masters provide a recommendation with respect to the allocation of the special masters' costs between Defendants, including Donziger, and Chevron. *Id.* The special masters provided the necessary time records on November 21, 2017, SA110, and filed their recommendation on the allocation of their fees and costs on December 8, 2017, SA81. The special masters noted that "Defendants were staggeringly uncooperative" and that "much of the work [they] were required to do" was caused by Defendants' conduct during discovery, including "Defendants' obstructive behavior." SA86, SA95. The special masters "recommend that our fees and costs be allocated as follows: 85 percent to Defendants . . . and 15 percent to Chevron." SA96.

On December 6, 2017, the district court found that the special masters' hours and hourly rates "all were reasonable and appropriate," SA68, and on December 27, 2017, it adopted the findings set forth in the special masters' report (while

reserving the decision on the final cost allocation), SA105. After each order was filed, Donziger submitted "intemperate, unsupported and hyperbolic letter[s] complaining of the Court's determination[s]." SA119; *see* SA69–80; SA106–09.

On March 1, 2018, the district court issued an order granting Donziger's motion to review the taxation of costs "to the extent that the amount taxed for special master expenses is reduced to $741,526.49"—i.e., to 85% of the total costs taxed, as recommended by the special masters—but denied it in all other respects. SA159. The court held that "none of Donziger's arguments for review of the Clerk's taxation of costs has merit," explaining that "[a]ll or substantially all of his arguments could be rejected on the ground that he disregarded court rules in seeking review of the Clerk's actions," and that "[e]ven if the Court were to reach the merits notwithstanding that procedural default, the arguments would fail." SA149–50.

B. Chevron Seeks Contempt Sanctions Based on Newly Discovered Evidence

On March 19, 2018, Chevron filed an application by order to show cause seeking leave to conduct post-judgment discovery, a preservation order, and a hearing on its application to have Donziger held in contempt of the RICO judgment. SA160–83. Chevron's motion was based, in part, on evidence that on November 6, 2017, Donziger met with litigation funder Elliott Management Corporation seeking financing in exchange "for an interest in proceeds that may result from

enforcement" of the Ecuadorian judgment. SA178. In his pitch to Elliott, Donziger stated "that he had raised $33 million from third-party funders and individuals in support of judgment enforcement efforts against Chevron, . . . that between 15–20% of the Ecuadorian judgment had been committed to fifteen people," and that Donziger retained a 6.3% share personally. *Id.* Chevron's motion was supported by a declaration from an Elliott employee, handwritten notes taken during the meeting, email correspondence with Donziger and his associates, and a draft non-disclosure agreement proposed by Donziger. A144–58.

The Court issued a modified version of Chevron's proposed order to show cause and held that "leave of Court [was] not required" for Chevron to conduct post-judgment discovery. SA187. Chevron then served Donziger with discovery. Chevron also pursued discovery from third parties, including the other individual who participated in the meeting with Elliott, financial institutions expected to possess relevant information regarding Donziger's finances, and other third parties identified through the discovery process.

Donziger's response to Chevron's discovery requests was to stonewall. On May 4, 2018, after Donziger informed Chevron that he would not appear for a deposition and would not commit to providing responses to the discovery requests, Chevron filed a motion to compel Donziger to respond. SA215–21. The court ordered Donziger to sit for a deposition and to respond to particular discovery re-

quests by June 15, 2018, and subsequently ordered Donziger to respond to other requests. SA236–40; SPA140–41. But Donziger failed to provide a complete response, producing a total of twenty-two pages in response to more than thirty requests, and at deposition he raised baseless objections to justify his refusals to answer. A259–61.

Chevron thus filed a second motion to compel. SA314–19. The district court again ordered Donziger to respond to the discovery requests and sit for a further deposition, and due to Donziger's "stonewalling of post-judgment discovery" ordered a forensic inspection of Donziger's electronic devices and media. A260. On March 5, 2019, the district court adopted a protocol for this forensic inspection, and appointed a neutral forensic expert to conduct the inspection. *See* SA896–97; SA898–913; SA914–22. As the district court explained, this forensic inspection was necessary "only because Donziger unjustifiably has refused to comply with his discovery obligations." SA912.

Although Chevron has received little post-judgment discovery from Donziger himself, third-party discovery provided further evidence of Donziger's contumacious behavior, and Chevron filed an additional motion to have Donziger held in contempt on October 1, 2018. SA844–89. That motion presented evidence showing that, since the RICO judgment issued in March 2014, Donziger raised over $2.4 million by selling shares in the Ecuadorian judgment to at least seven in-

vestors on at least ten occasions. SA851–54. An expert accounting analysis of Donziger's bank records revealed that he personally received over $1.5 million in investor funds. SA854. Donziger transferred nearly $300,000 in investor monies to his wife and used investor funds to pay personal bills (including thousands of dollars on wine, gym memberships, a bar tab, and credit card bills) and to continue the pressure campaign against Chevron that the court had already determined to be extortionate. SA854–55, SA863–66; *Donziger*, 974 F. Supp. 2d at 579–80. The district court has yet to resolve either of Chevron's contempt motions.

C. Donziger's Motions Seeking to Halt the Contempt Proceedings and Discovery Into His Compliance With the RICO Judgment

Donziger filed a sequence of baseless and procedurally deficient motions seeking to derail the district court's consideration of Chevron's contempt motion and to preclude Chevron from obtaining discovery regarding his compliance with the RICO judgment.

On May 31, 2018 Donziger filed a motion for "declaratory relief" and to "dismiss" Chevron's pending contempt motion. SA296–307. Donziger sought, through this unorthodox vehicle, what he called a "declaratory judgment" stating that the district court's April 2014 order largely denying a motion to stay the RICO judgment pending appeal permitted the beneficiaries of the Ecuadorian judgment to raise funds, provided that the investment agreements were not secured by the interests in the Ecuadorian judgment personally held by Donziger or other individu-

als named in the RICO judgment. SA296. Donziger further asked the court to "dismiss" Chevron's pending contempt motion on the basis that the conduct Chevron alleged was not improper under Donziger's interpretation of the RICO judgment. SA306.

Two weeks later, on June 15, 2018, Donziger filed a motion for a protective order forbidding "the disclosure of, or any inquiry into matters that would tend to reveal, the identity of any funder or other material supporter of the Ecuador Litigation and/or the internal operational, organizational, administrative, or financial management practices of individuals and organizations who directly or indirectly oppose Chevron Corporation as regards the Ecuador Litigation." A182–83. Donziger argued that disclosure of funders' identities would chill associational rights. A178. Soon afterward, on June 19, 2018, Donziger moved for an emergency stay of an order relating to third-party discovery pending resolution of the motion for a protective order. SA308–11.

The court denied these motions in a brief order on June 25, 2018, SA313, and explained its reasoning in a detailed opinion two days later, SPA105–39. The district court identified numerous procedural defects with Donziger's motion for declaratory relief and to dismiss Chevron's motion to dismiss, and further concluded that the court would not choose to exercise its discretion to grant declaratory relief even if declaratory relief were available via a motion. SPA121–23.

The court also identified procedural deficiencies in the motion for a protective order, though it also gave thorough consideration to the substance of Donziger's First Amendment objections. SPA128–39. The court found that Donziger's desire to thwart Chevron's efforts through appropriate litigation to vindicate its legal rights did not provide a basis for a protective order, SPA128–31, that Donziger had not demonstrated a clearly defined threat of serious injury absent a protective order, SPA132–35, that Donziger lacked standing to assert the First Amendment claims, SPA136–37, and that the First Amendment claims in any event lacked merit, SPA137–39. The disposition of the motion for a protective order mooted the motion for an emergency stay. SPA118.

SUMMARY OF ARGUMENT

The only part of this appeal over which the Court has jurisdiction concerns Donziger's objections to the costs awarded to Chevron. The district court properly rejected those objections because they were untimely, procedurally deficient, and substantively meritless. Most of Donziger's arguments went to Chevron's entitlement to costs, but he waived those arguments by failing to contest Chevron's entitlement to costs in his appeal to this Court of the original RICO judgment. Donziger's attempt to overcome basic rules of appellate practice by claiming that he did not have enough space in his appellate brief to raise the costs issue is baseless, especially in light of the fact that he was specially permitted to file a 29,000

word principal brief in that appeal.

Donziger's challenges to the amount of costs awarded in connection with the fees and expenses of the special masters is based on an obvious misinterpretation of a prior order issued by the district court. And Donziger's claim that the costs award should have been reduced on account of his indigence is meritless, as he has failed to submit any evidence of his financial hardship, and the evidence in the record shows that Donziger has received tens of millions of dollars in funding, including substantial funds in recent years.

The Court should dismiss the rest of this appeal for lack of jurisdiction because the remaining orders Donziger seeks to challenge were issued as part of ongoing contempt proceedings that have yet to conclude. Donziger's claim that the Court has jurisdiction under 28 U.S.C. § 1292(a)(1) is wrong because the district court has not modified the injunction in the RICO judgment. Donziger is likewise incorrect that the district court's discovery orders fall within the collateral-order doctrine, as none of the criteria for that narrow exception are satisfied.

Even assuming the Court had jurisdiction, there is no basis to reverse the district court's orders denying Donziger's motions to dismiss Chevron's contempt motion, for declaratory relief, and for a protective order, all of which were part of an improper attempt by Donziger to halt ongoing proceedings concerning whether he is in contempt of the RICO judgment. Federal Rule of Civil Procedure 12 does

not authorize a motion to dismiss another motion. Declaratory relief is not available via motion, and even if it were, the district court properly exercised its discretion to deny such relief, which was based on a mischaracterization of the court's RICO judgment and would necessarily be addressed when the district court resolved Chevron's pending contempt motion. And Donziger's protective order motion was procedurally flawed because Donziger never timely objected on First Amendment grounds to Chevron's discovery requests; even if he had, he does not have standing to assert the First Amendment rights of third parties, and he has failed to identify any injury that might result from this discovery that would constitute the good cause necessary to justify a protective order.

STANDARD OF REVIEW

The taxation of costs under Federal Rule of Civil Procedure 54(d) is "le[ft] . . . to the discretion of the district court, with that court's decision to be upset only in the event of an abuse of that discretion." *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 687 F.2d 626, 629 (2d Cir. 1982) (quotation marks and citation omitted).

The abuse of discretion standard also governs a district court's decision as to whether to grant declaratory relief, *New York v. Solvent Chem. Co., Inc.*, 664 F.3d 22, 25 (2d Cir. 2011), "whether an argument has been waived," *Brown v. City of N.Y.*, 862 F.3d 182, 187 (2d Cir. 2017), and whether a party has failed to comply

with the local rules, *see LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995). This Court also "review[s] a district court's discovery rulings for abuse of discretion," *Export-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75, 85 (2d Cir. 2014) (quotation marks and citation omitted), because the "district court has broad latitude to determine the scope of discovery and to manage the discovery process," *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012) (quotation marks and citation omitted).

There is no such thing as a motion-to-dismiss-a-motion under Federal Rule of Civil Procedure 12(b)(6), but the underlying (and as-yet unresolved) contempt motion that was the target of Donziger's motion to dismiss is subject to review for abuse of discretion. *See Perez v. Danbury Hosp.*, 347 F.3d 419, 423 (2d Cir. 2003).

ARGUMENT

I. There Is No Basis to Reverse or Modify the Award of Costs

The only aspect of this appeal over which the Court has jurisdiction—Donziger's challenge to the amended RICO judgment's cost award—is largely an attempt to challenge Chevron's entitlement to any award of costs at all. But Donziger waived any such challenge to Chevron's entitlement to costs because, as he concedes, Donz. Br. at 52, he failed to raise the issue in his prior appeal to this Court, even though the original RICO judgment expressly provided that Chevron

was entitled to an award of costs. *See* SPA4.

Given that clear waiver, Donziger can object only to the *amount* of costs that Chevron was awarded. But in the district court he failed to raise any such objections in either a timely or procedurally proper manner, and for that reason alone the district court's award of costs should be affirmed. Yet, even if Donziger had properly objected to the amount of costs taxed against him, his objections are meritless because, as the district court correctly found, (1) Chevron did not forfeit the right to seek special masters' fees as costs, and (2) Donziger's purported financial hardship was, and remains, unsupported by any evidence.

A. Donziger Waived Any Argument That Chevron Is Not Entitled to Recover Costs by Not Raising It on Direct Appeal to This Court

The district court's original 2014 RICO judgment against Donziger expressly provided that "Chevron shall recover of Donziger and the LAP Representatives, and each of them, jointly and severally, the costs of this action pursuant to Fed. R. Civ. P. 54(d)(l) and 28 U.S.C. § 1920." SPA4. Donziger appealed that judgment, but did not raise any costs-related challenges. *See generally* SA965–1099, SA1105–79. The district court therefore correctly held that Donziger waived any challenge to Chevron's entitlement to costs. SA125–28. As this Court has explained, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived

the right to challenge that decision at a later time." *North River Ins. Co. v. Phila. Reinsurance Corp.*, 63 F.3d 160, 164 (2d Cir. 1995) (quotation marks and citation omitted).

Donziger does not deny that he failed to challenge the award of costs to Chevron in the prior appeal, but protests that the district court's waiver finding was "brutally unfair" because, in his view, he only had "limited space available" in his appellate brief. Donz. Br. at 52. Donziger ignores that he sought and received permission to file an oversized principal brief of up to 29,000 words—more than double a standard brief. SA963. If Donziger anticipated needing more space to address the award of costs, he could have requested more than 29,000 words. In any case, Donziger surely could have found room in his oversized principal brief to argue that Chevron was not entitled to costs. Donziger and his appellate counsel chose not to do so, and he must now live with the consequences of that strategic decision.

Even if they were not waived, Donziger's various arguments for why Chevron, as the prevailing party in this action, should not have been awarded costs under Federal Rule of Civil Procedure 54(d)(l) and 28 U.S.C. § 1920 all fail.

First, Donziger claims that awarding costs, in his view, violates his Seventh Amendment right to a jury trial. Donz. Br. at 54. But Donziger never challenged either via mandamus or direct appeal the district court's decision finding he lacked

a jury trial right in this action. In any case, as Donziger himself admits, "the law doesn't typically provide for jury consideration of costs." *Id.* While Donziger asserts that Chevron is now seeking "damages effectively recast as claims for fees and costs," *id.* at 55, those courts that have addressed the issue have held that requests for prevailing-party fees and costs do not give rise to a jury trial right under the Seventh Amendment. *See, e.g.*, *AIA Am., Inc. v. Avid Radiopharmaceuticals*, 866 F.3d 1369, 1373 (Fed. Cir. 2017) (holding that "requests for attorney's fees under [35 U.S.C.] § 285 are equitable and do not invoke the Seventh Amendment right to a jury trial"); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n.3 (5th Cir. 1980) (holding that a request for attorneys' fees and costs "does not raise the right to a jury in an otherwise purely equitable action"). Donziger cites no authority to the contrary.

Second, Donziger argues that Chevron was not entitled to costs because it supposedly made "excessive payments" to Alberto Guerra, who Donziger claims provided "false" testimony at trial. Donz. Br. at 50–51. But, as the district court explained, "although he referred to Chevron's payments to Guerra in his appellate briefs, [Donziger] never made in the Court of Appeals the argument . . . that costs should be denied to Chevron because its actions with respect to Guerra were improper." SA127. Moreover, Donziger makes no effort to establish any error, much less an abuse of discretion, in the district court's extensive explanation for why

Chevron's actions with respect to Guerra were not improper. *See* SA138–45. Instead, Donziger ignores that reasoning entirely, and offers nothing more than unsupported, conclusory assertions of misconduct. *See* Donz. Br. at 50–53. Donziger's failure to address the district court's reasoning waives any contention that the reasoning was erroneous. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant . . . raised them in a reply brief.").

Third, Donziger asserts in a footnote that Chevron must bear its own costs due to what he contends is "epic misconduct in Ecuador," and claims that the district court abused its discretion by "completely ignor[ing] this argument below." Donz. Br. at 53 n.21. The district court, in fact, considered and rejected this argument, finding that "Chevron's alleged pollution of the Ecuadorian rain forest is extraneous to this litigation, therefore has no bearing on taxation of costs, and in any case is unproven." SA150. Donziger cannot establish reversible error by refusing to acknowledge what the district court actually ruled. Moreover, Donziger cites no evidence of any "epic misconduct in Ecuador," and none exists. Indeed, it is the absence of such evidence that led Donziger and his team to embark on their campaign to corrupt the Ecuadorian litigation with manufactured evidence, fraud, and bribery.

B. Donziger Forfeited Any Objections to the Amount of Costs Awarded to Chevron by Failing to Comply With Applicable Rules Concerning Objections to the Clerk's Taxation of Costs

Given that he waived any challenge to the district court's determination that Chevron was entitled to an award of costs, on remand Donziger could only challenge the amount of costs awarded to Chevron. Donziger, however, failed to timely and properly object to the clerk's taxation of costs. As the district court found, "Donziger's application to review the Clerk's taxation of costs fail[ed] in material respects to comply with the Federal Rules of Civil Procedure and the rules of this Court." SA120.

Federal Rule of Civil Procedure 54(d)(1) states that "[o]n motion served within the next 7 days [after the clerk has taxed costs], the court may review the clerk's action." Fed. R. Civ. P. 54(d)(1). On August 8, 2017, the clerk entered a bill of costs granting in part and denying in part Chevron's request for costs, which meant that any motion objecting to the taxation of costs was due on August 15, 2017. SA47. Disregarding that deadline, Donziger filed a letter objecting to the clerk's taxation of costs on August 16, 2017. SA58–62; *see* SA117 (recognizing untimeliness of Donziger's filing). Donziger's letter provided no explanation for his belated objection, and he did not seek leave from the district court to excuse his untimely filing.

The form of Donziger's objection was also improper. *See* SA120–21. Rule

54(d)(1) provides that the district court may review the Clerk's taxation of costs upon a "*motion* served within . . . 7 days." Fed. R. Civ. P. 54(d)(1) (emphasis added). Donziger's request was made by letter, not by motion. In addition, S.D.N.Y. Local Civil Rule 7.1 states that "all motions shall include the following motion papers": (1) a notice of motion, (2) a memorandum of law, and (3) supporting affidavits or exhibits. Donziger's letter did not include any of these required papers. The lack of supporting affidavits and exhibits was of particular importance here, given Donziger's pattern of false testimony in this litigation. *See* SA144 (finding that Donziger "deliberately testified falsely at an evidentiary hearing" and "falsely testified that he lacked recollection in response to nearly 300 questions at his deposition in this case and on cross-examination at trial").

As the district court noted, "[t]hese rules serve important purposes" and "cannot be overlooked on the theory that Donziger is representing himself," as Donziger is a graduate of Harvard Law School and was a member of the New York Bar for more than twenty years (until he was suspended last year). SA120–21. "[T]he appropriate degree of special solicitude [due to pro se litigants] is not identical to all pro se litigants," and "a lawyer representing himself ordinarily receives no such solicitude at all." *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010).[4]

[4] Moreover, Donziger is still represented in the district court by two attorneys, Richard Friedman and Zoe Littlepage, who filed appearances on his behalf and

Given these failures, the district court appropriately denied Donziger's application to review the taxation of costs "based on Donziger's failure to comply with the Federal Rules of Civil Procedure and the local rules of this Court." SA121. Yet Donziger's brief does not even mention that ruling, let alone establish that it constituted an abuse of discretion, and thereby Donziger has waived any challenge to the district court's ruling that his application was procedurally defective. *See JP Morgan Chase*, 412 F.3d at 428. That is reason enough for the Court to reject his challenge to the costs award.

C. Donziger's Challenges to the Amount of Costs Awarded to Chevron Also Fail on the Merits

Although the Court need not reach them given Donziger's procedural failures, Donziger's challenges to the amount of the costs awarded to Chevron are without merit, as the district court determined in the alternative.

Donziger claims that Chevron "forfeited its right to . . . special master fees as costs, at least as an equitable and fairness matter, when it failed to timely seek allocation of those fees," which he asserts was required by an order that the district court issued before trial. Donz. Br. at 53. The district court correctly rejected this argument, concluding that it was premised on an interpretation of its prior order that "makes little sense." SA145–49.

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have never sought to withdraw. *See* SA23, SA30, SA891–92.

The district court appointed two special masters to coordinate discovery, to supervise depositions and to monitor the implementation of the district court's discovery orders. SA20–22. The district court directed that the parties each advance half of the cost of the special masters. SA22. After Donziger refused to comply with the district court's order to advance half of the special masters' costs, the court directed Chevron to "advance" 100 percent of the costs on an interim basis, but afforded Chevron the right, but not the obligation, to seek an allocation of any part of the funds advanced. A78. The order also provided that, if Chevron sought such an interim allocation, it had to file a request under Federal Rule of Civil Procedure 53(g)(3) "[w]ithin 14 days after the later of (a) the submission of the special masters' final billings and (b) the determination of any objections thereto by Chevron." *Id.*

Because Chevron did not move for such an allocation of the interim advances, Donziger says it "forfeited its right to certain special master fees as costs." Donz. Br. at 53. But as the district court explained, the order "gave Chevron the option, but not the obligation, to move to recover on an *interim* basis any or all of the funds it advanced to cover Donziger and the LAP Representatives' share without waiting either for the ultimate reallocation of those expenses under Rule 53(g) or the taxation of costs at the conclusion of the case and any appeals." SA149 (emphasis added). In fact, Rule 53(g)(3) specifically contemplates that "[a]n[y]

interim allocation may be amended to reflect a decision on the merits." Fed. R. Civ. P. 53(g)(3). And as the prevailing party following a trial on the merits and exhaustion of all available appeals, Chevron was entitled to an award of costs under Rule 54(d)(1) and 28 U.S.C. § 1920—including fees for special masters, which are expressly recoverable under S.D.N.Y. Local Civil Rule 54.1(c)(8). Chevron was thus properly awarded the fees it paid to the special masters as part of the costs award.

Donziger also argues that the costs award should be reduced because he is "a sole practitioner who works out of the kitchen of his two-bedroom apartment." Donz. Br. at 54. Donziger's claimed lack of resources is without evidentiary support, since Donziger did not "submit[] any affidavits, declarations or other evidence of his own financial circumstances or those of his clients in support of his motion to review the taxation of costs." SA130–31. And given Donziger's pattern of deception, *see* SA144, there is no reason to take him at his word.

The evidence regarding Donziger's financial situation actually indicates that he is far from indigent. As the district court noted, "it came out at trial that Donziger received cash and real estate worth $1.8 to $1.9 million from 'family estate related matters' during the two years prior to trial," and that "[o]ther evidence showed that Donziger personally received somewhere between $958,000 and $1.3 million from litigation funders before trial, and the figure could well have been

higher." SA131–32. Moreover, the evidence at trial indicated that there were tens of millions of dollars that Donziger had raised, but for which Donziger's records did not account. SA26–27; *see also* SA133–34 (noting evidence that Donziger and the LAPs had raised approximately $32 million, and that Donziger had admitted to spending $21.4 million from 2007 to 2013). Donziger also represented to the district court in May 2018 that he was "preparing to post a supersedeas bond" to stay enforcement of the amended RICO judgment, and claimed that he intended to "use a certain inheritance property as collateral for surety payment of the bond" (although he never did). SA232.

The district court therefore properly refused to consider Donziger's unsubstantiated statements about his limited means, as "[t]here is simply no factual basis from which the Court responsibly could conclude that Donziger is unable to pay costs in the full amount taxed by the Clerk or that the amount of any such judgment should be reduced to avoid undue financial hardship." SA132; *see also, e.g.*, *Hogan v. Novartis Pharm. Corp.*, 548 F. App'x 672, 674 (2d Cir. 2013) (affirming denial of request for equitable relief from costs because party "presented no evidence to document her alleged lack of financial resources"); *Perks v. Town of Huntington,* 331 F. App'x 769, 770 (2d Cir. 2009) (similar).

But even if there were evidence that Donziger has limited means, the district court indicated in the alternative that it would have denied Donziger's requested

reduction in costs under the circumstances here, which was well within the court's discretion. SA144–45. The bulk of the costs awarded were incurred only because Donziger was "staggeringly uncooperative" and engaged in "obstructive behavior" during discovery, as the special masters found. SA88, SA95. Among other things, Donziger adopted a "practice of interposing frivolous privilege assertions in an attempt to block testimony," and "repeatedly demonstrated an unwillingness to accept and/or follow" orders. *Id.* at SA91, SA95. As the district court found, "Donziger's behavior in this litigation was outrageous and, in many respects, far beyond the bounds of propriety," and as a result "[h]e has no claim to a favorable exercise of discretion." SA144.

II. The Court Lacks Jurisdiction Over Donziger's Attempted Appeal of Orders Related to the Ongoing Contempt Proceedings

The Court lacks jurisdiction over the remainder of Donziger's appeal, which challenges the district court's denial of various motions he filed that were designed to prematurely end proceedings on Chevron's contempt motions, including discovery related to whether Donziger has violated the RICO judgment. The Court should dismiss this aspect of Donziger's appeal for lack of jurisdiction.

Donziger has appealed the district court's orders that (a) permitted Chevron to engage in certain discovery from Donziger and third parties, and (b) denied Donziger's motions for a declaratory judgment, to dismiss Chevron's contempt motion, for a protective order, and for a stay of discovery. These orders all relate

to the district court's ongoing—and still unfinished—post-judgment proceedings on Chevron's motions to hold Donziger in contempt. The district court has not yet ruled on Chevron's contempt motions and has not held Donziger in contempt. As Donziger concedes, "the contempt proceeding [is] still ongoing" below. Donz. Br. at 43.

In fact, Donziger recently asked the district court to issue a "written opinion" on Chevron's contempt motion so as to "allow [him] to pursue appellate relief." SA894. That Donziger has asked the district court to rule on Chevron's contempt motion despite his filing of this appeal is a tacit admission that this Court lacks jurisdiction over the district court's contempt-related orders. If this Court did have jurisdiction over those orders, Donziger's filing of a notice of appeal would have stripped "the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Donziger, however, apparently agrees with Chevron that the district court continues to have jurisdiction over the ongoing contempt proceedings notwithstanding his improper appeal. *See United States v. Rodgers*, 101 F.3d 247, 251–52 (2d Cir. 1996) ("We fail to see any efficiency in allowing a party to halt district court proceedings arbitrarily by filing a plainly unauthorized notice of appeal which confers on this court the power to do nothing but dismiss the appeal.").

Donziger has thus sought to appeal orders "issued in the context of a pend-

ing contempt motion," even though "there has not been a finding of contempt, much less an assessment of sanctions." *Wilder v. Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995). As this Court has held, given the pendency of Chevron's contempt motions, the district court's orders related to those motions are not appealable as "final" decisions under 28 U.S.C. § 1291. *Id.*; *see also In re Tronox Inc.*, 855 F.3d 84, 96–97 (2d Cir. 2017) (holding that orders related to ongoing contempt proceeding were not appealable under 28 U.S.C. § 1291); *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 68 (2d Cir. 1994).

Donziger concedes that none of the contempt-related orders he seeks to appeal are final, appealable decisions under 28 U.S.C. § 1291, as he argues only that these "interlocutory orders" are appealable under either 28 U.S.C. § 1292(a)(1) or the collateral order doctrine. Donz. Br. at 9–10. Donziger is wrong that the orders are appealable under either of those alternative grounds.

The Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Donziger claims that this provision applies here because, in his view, "[i]n its management of the post-judgment proceedings below, the district court has recently applied a fundamentally modified and broadened version of the injunctive relief that originally issued and was explicated by the district court," which Donziger claims constitutes a "modified injunction." Donz. Br. at 9.

But Donziger cites no order from the district court that modifies in any respect the injunction it issued in 2014. That injunction's requirements, and the restrictions it places on Donziger's conduct, have not been altered in any respect. No order purports to modify the injunction, and the district court has not held Donziger in contempt on any basis, "modified" or otherwise. At most, the district court is considering Chevron's contempt motions and has rejected attempts to shut down discovery into whether Donziger has complied with the RICO judgment. These are not appealable "modifications" of any injunction.

Nor are the district court's contempt-related orders appealable under the collateral order doctrine. For an order to be immediately reviewable under the collateral order doctrine, it must "resolve an important issue completely separate from the merits of the action" and "be effectively unreviewable on appeal from a final judgment." *Fischer v. N.Y. State Dep't of Law*, 812 F.3d 268, 273 (2d Cir. 2016) (quotation marks and citation omitted). All of the orders Donziger seeks to appeal are directly related to the ongoing contempt proceedings.

Donziger asserts that the denial of his motion to dismiss Chevron's motion for contempt is a collateral order, Donz. Br. at 10, but it obviously goes to "the heart of the merits of" the contempt proceedings and thus is anything but "collateral." *Tronox*, 855 F.3d at 96 n.17. Moreover, the order denying Donziger's motion to dismiss is not otherwise effectively unreviewable: If the "[d]istrict [c]ourt

finds contempt or imposes sanctions, [Donziger] can appeal from that ruling." *Id.*

The district court's discovery rulings are also not appealable under the collateral order doctrine. As both the Supreme Court and this Court have held, discovery orders—even those that implicate important doctrines like the attorney-client privilege—are not appealable under the collateral order doctrine. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009) (holding that the "collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege"); *S.E.C. v. Rajaratnam*, 622 F.3d 159, 168 (2d Cir. 2010) (holding that "discovery orders allegedly adverse to a claim of privilege or privacy" are not appealable under the collateral order doctrine). While Donziger argues that the discovery at issue implicates First Amendment rights (Donz. Br. at 44–49), this Court refused in *Rajaratnam* to permit appeals of discovery orders under the collateral order doctrine even where the rights at issue "carry 'constitutional overtones.'" 622 F.3d at 168; *see also In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 482–83 (10th Cir. 2011) (holding that "discovery orders adverse to a claimed First Amendment privilege are not immediately appealable" under the collateral order doctrine).[5]

[5] Unlike the appellants in *Rajaratnam*, Donziger has not sought a writ of mandamus, which is an "extraordinary remedy" used only where there are "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." 622 F.3d at 169 (quotation marks and citation omitted). Even if he had,

Finally, even if the district court's order denying Donziger's contempt-related motions were appealable, the Court would still lack jurisdiction because Donziger failed to file a timely notice of appeal within thirty days of the district court's order denying those motions. The district court denied Donziger's motions on June 25, 2018, stating that "[a]n opinion will be filed promptly." SA313. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the last day for Donziger to appeal that ruling was July 25, 2018, but Donziger filed his notice of appeal one day late, on July 26. A257–58. Because Donziger's "appeal [was] taken beyond the time set out in the Rule," the Court lacks jurisdiction also for that reason. *Napoli v. Town of New Windsor*, 600 F.3d 168, 170 (2d Cir. 2010) (quotation marks and citation omitted).

That the district court issued an opinion explaining the basis for the denial of Donziger's motion on June 27, 2018 is of no moment. As this Court has held in analogous circumstances, "[t]he fact that the district court reserved the right to explain [its decision] later, and gave that explanation [later], does nothing to prevent the clock from running." *United States v. Bradley*, 882 F.3d 390, 394 (2d Cir. 2018). That is because the district court's June 27, 2018 opinion in no respect

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Donziger could not show he has "no adequate alternative remedies," that "the issue involved is novel and significant," and he has a "'clear and indisputable right' to the writ." *Id.* There is nothing novel or erroneous about the routine discovery orders here, which Donziger can appeal after the contempt proceedings conclude.

"change[d] matters of substance, or resolve[d] a genuine ambiguity" in the June 25, 2018 order. *Id.* (quotation marks and citation omitted). Instead, it just provided the reasons for why the court had denied Donziger's motions. Thus, even if the district court's order denying his contempt-related motions were appealable, Donziger's appeal would be untimely.

III. The District Court Properly Denied Donziger's Various Motions Seeking to Halt the Ongoing Contempt Proceedings

Even if the Court had jurisdiction, the Court should affirm the district court's denial of Donziger's motions to dismiss Chevron's contempt motion, for declaratory relief, and for a protective order from the contempt-related discovery because they were procedurally and substantively without merit. Donziger has not come close to establishing that the district court committed any reversible error.

A. Donziger's Motion to "Dismiss" Chevron's Contempt Motion Under Rule 12(b)(6) Was Frivolous

Invoking Federal Rule of Civil Procedure 12(b)(6), Donziger filed a motion asking the district court to "dismiss" the contempt "claims in plaintiff Chevron's Motion for Contempt." SA296. But as the district court correctly held, "Rule 12(b)(6) does not apply . . . at all" to a motion. SA129. Donziger's nonsensical motion-to-dismiss-a-motion was properly denied.

The plain text of Rule 12 foreclosed Donziger's attempt to short-circuit the contempt proceedings via a motion to dismiss. Rule 12(b) provides that a defend-

ant may only move to dismiss "a claim for relief in [a] *pleading*." Fed. R. Civ. P. 12(b) (emphasis added). Chevron's contempt motion was not a "pleading" and, therefore, it cannot be dismissed under Rule 12(b)(6). *See* Fed. R. Civ. P. 7(a) (defining "pleadings"); *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 112 (2d Cir. 2012) ("Rule 7(a) exhaustively enumerates the different 'pleadings' available under the civil rules; motions, not appearing in that enumeration, are discussed in Rule 7(b)."); *Granger v. Gill Abstract Corp.*, 566 F. Supp. 2d 323, 335 (S.D.N.Y. 2008) ("Motions . . . are not pleadings.").

Thus, under the Federal Rules of Civil Procedure "[t]here is no procedure for 'dismissing' a motion filed by an opposing party." *Skinner v. Unknown Grandson*, No. 05-70556, 2006 WL 1997392, at *4 (E.D. Mich. July 14, 2006). Instead, as with any motion with which a party disagrees, the proper response is to file an opposition to the motion. And, in fact, Donziger *did* file an opposition to Chevron's motion before attempting to "dismiss" it. *See* SA191–99. Donziger's subsequent motion to dismiss was unnecessary and procedurally improper. Rule 12(b)(6) does not permit a party to bring to a halt proceedings on a motion by seeking to "dismiss" the motion, and Donziger cites no authority suggesting otherwise. Instead, Donziger cites only cases that involved dismissal of complaints, such as *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Donz. Br. at 41–43.

B. Donziger's Motion Seeking Declaratory Relief Was Procedurally and Substantively Groundless

In addition to moving to "dismiss" Chevron's contempt motion, Donziger also filed a motion seeking "declaratory relief" on a disputed issue in the contempt proceeding—specifically, whether Donziger's interpretation of the RICO judgment's restrictions on monetizing and profiting from the Ecuadorian judgment was correct. *See* SA296. As with his motion to dismiss, this was a procedurally improper attempt to obtain resolution of issues that will be decided when the district court rules on the pending contempt motions.

The district court properly denied Donziger's request for declaratory relief because a party seeking declaratory relief must do so through the filing of a complaint or other pleading. *See, e.g.*, *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 830 (11th Cir. 2010) ("'[T]he requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions,' including the requirement that 'the action is commenced by filing a complaint.'" (citation omitted)). As the district court correctly explained, "a declaratory judgment must be sought in a plenary civil action by the filing of a complaint," not "as it was here, by motion, least of all a motion in an action that already has been tried to judgment and remains before the Court only with respect to judgment enforcement proceedings." SA128.

Even Donziger admits that a party seeking declaratory relief must do so through "'the filing of an appropriate pleading.'" Donz. Br. at 36 n.17 (quoting 28 U.S.C. § 2201). But a motion is not a pleading, *see* Fed. R. Civ. P. 7(a), and Donziger cites no authority that declaratory relief can be sought via motion. To the contrary, Donziger cites *International Brotherhood of Teamsters v. Eastern Conference of Teamsters*, 160 F.R.D. 452 (S.D.N.Y. 1995), which explained that "[b]ecause an action for a declaratory judgment is an ordinary civil action, a party may not make a *motion* for declaratory relief, but rather, the party must bring an *action* for a declaratory judgment." *Id.* at 456 ("Insofar as plaintiffs seek a motion for a declaratory judgment, plaintiffs' motion is denied because such a motion is inconsistent with the Federal Rules."); *see* Donz. Br. at 36 n.17.

Even if Donziger's motion were not procedurally deficient, the district court appropriately exercised its discretion not to issue declaratory relief. This Court has explained that several factors should be considered in determining whether to grant declaratory relief:

> [i] [W]hether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; [ii] whether a judgment would finalize the controversy and offer relief from uncertainty . . . [iii] whether the proposed remedy is being used merely for "procedural fencing" or a "race to res judicata"; [iv] whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and [v] whether there is a better or more effective remedy.

Dow Jones & Co. v. Harrod's, Ltd., 346 F.3d 357, 359–60 (2d Cir. 2003) (citations omitted). The district court properly exercised its discretion to deny declaratory relief on the ground that Donziger's motion was (a) a tool "for procedural fencing" to avoid an evidentiary hearing on Chevron's contempt motion, and (b) that "[r]esolution of that contempt application would be a better or more effective remedy, particularly as it will give the Court the benefit of a factual record with respect to what actually happened, which may prove important with respect to determining the contempt issue." SA128–29. Donziger's brief does not even address this discretionary ruling, or the *Dow Jones* factors considered by the district court, which is yet another reason his challenge to the district court's denial of his motion for declaratory relief fails. *See JP Morgan Chase*, 412 F.3d at 428.

Instead of addressing the basis of the district court's ruling, Donziger dwells on his self-serving interpretation of the RICO judgment, and appears to ask this Court—in the first instance—to resolve this disputed issue, which is still pending before the district court. *See* Donz. Br. at 32–41. This Court should not wade into this issue, which the district court has yet to decide. *See, e.g.*, *Cayuga Nation v. Tanner*, 824 F.3d 321, 333 n.10 (2d Cir. 2016) ("[W]e decline to address in the first instance the merits of . . . [arguments] which were not addressed by the district court.").

In any event, Donziger's claim that the district court has modified the RICO judgment is premised on an erroneous interpretation of the district court's April 2014 order refusing to stay the RICO judgment pending appeal. SPA6–38. According to Donziger, this order clarified that "there was no threat to [Donziger's] ability to be paid non-contingency fees" or to "[t]he ability to raise funds from any interest in the [Ecuadorian] Judgment other than the interests of the three defendants" named in the RICO judgment. *See* Donz. Br. at 41–42. It did no such thing.

A "principal focus" of the April 2014 order was to determine whether Donziger would be, as he then claimed, "harmed irreparably if the [RICO] Judgment remain[ed] in effect" pending appeal and whether a stay pending appeal was appropriate. SPA9. The order did not purport to establish what would or would not constitute a violation of the RICO judgment's prohibition on attempts to monetize or profit from the Ecuadorian judgment, let alone authorize Donziger to engage in such conduct. To the extent the order discussed the scope of the RICO judgment, it confirmed the opposite—that Donziger was prohibited from "benefitting personally, at Chevron's expense, from property traceable to [the] fraudulent [Ecuadorian] Judgment." SPA17. And money raised in exchange for pieces of a potential recovery is certainly "traceable" to the Ecuadorian judgment.

Indeed, the RICO judgment has always meant what it has said on its face—a constructive trust exists over any of Donziger's property "traceable to the [Ecuado-

rian] judgment," and Donziger cannot "undertak[e] any acts to monetize or profit from the [Ecuadorian] Judgment." SPA1, SPA3. Nothing in the April 2014 order modified that clear language, which debunks Donziger's claims that the district court has now shifted course merely because it has decided to consider Chevron's contempt motion. In short, Donziger is not entitled to a declaration that the RICO judgment means something different from what it says.[6]

C. The District Court Properly Rejected Donziger's Attempt to Stop Discovery Into Whether He Has Violated the RICO Judgment

Donziger also challenges the district court's denial of his motion for a protective order. *See* Donz. Br. at 44–49. The district court acted well within its discretion when it denied that motion and permitted Chevron to conduct essential contempt-related discovery.

Donziger waived, by failing to timely assert, the First Amendment objections to Chevron's discovery that were the basis for his protective order motion and are the focus of his briefing before this Court. Donziger responded to Chevron's

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[6] Donziger also ignores that Chevron has argued in the ongoing contempt proceedings that, even if Donziger's interpretation of the RICO judgment were correct, he has still violated the judgment. *See* SA207–08; SA877–80. Moreover, Donziger's interpretation of the RICO judgment has no ongoing relevance because in April 2018 the district court entered a default judgment that expressly extended the prohibitions of the RICO judgment to all the other individuals and entities with a stake in the Ecuadorian judgment. *See* SA188–90; SPA110–11, SPA123. Thus, even if Donziger were entitled to the declaratory relief he seeks, the contempt proceedings and discovery concerning Donziger's compliance with both the RICO judgment and the default judgment would still continue.

post-judgment discovery requests with eight pages of objections (SA222–31) and had further opportunity to elaborate on his objections in his opposition to Chevron's first motion to compel (SA232–34), but Donziger did not mention the First Amendment in either response. Instead, Donziger waited until June 15, 2018—a month after Chevron's motion to compel responses to its post-judgment discovery requests was fully briefed and *decided*—to raise his First Amendment objections. *See* SPA125. The district court therefore correctly found that Donziger had waived those objections. SPA125–26; *see Yakus v. United States*, 321 U.S. 414, 444 (1944) (holding that a "constitutional right may be forfeited").

The objections are in all events meritless. Donziger lacks standing to vindicate the supposed First Amendment rights of third parties. *See* SPA126–27. Donziger claims a protective order was necessary to prevent Chevron from obtaining discovery that would violate the "associational rights" of "funders, supporters, and allies of the affected Ecuadorian communities." Donz. Br. at 45, 47. Donziger further claims that "current and future allies and supporters of the *Aguinda* case" are protected from discovery by the "qualified privilege which applies to compelled disclosure of the identity of an association's members or sympathizers." *Id.* at 48 (quotation marks and citation omitted). But Donziger cannot assert the First Amendment rights of third parties. *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975) ("In the absence of a claim of privilege a party usually

does not have standing to object to a subpoena directed to a non-party witness."); *see also, e.g.*, *United States v. Llanez-Garcia*, 735 F.3d 483, 498 (6th Cir. 2013) (holding that parties "lack standing to file a motion to quash a subpoena to a third party"). As the district court explained, a "'general desire to thwart disclosure of information by a non-party is simply not an interest sufficient to create standing.'" SPA127 (quotation marks and citation omitted).

Donziger argues that the "associational rights at stake" are the same as those in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), where the Supreme Court held that the NAACP could assert its members' rights to freedom of association. Donz. Br. at 45. But in *NAACP*, the Supreme Court based its holding on the fact that the NAACP and its members were "in every practical sense identical" such that the NAACP could act as a representative of its members. 357 U.S. at 458–60. Here, as the district court found, "the situation is markedly different." SPA136. Donziger is not an organization asserting the rights of a discrete group of members. Rather, he is an individual who is attempting to assert the rights of an undefined, unconnected group of people, including people who are not even currently known to Donziger, such as the rights of "*future* allies and supporters of the *Aguinda* case," Donz. Br. at 48 (emphasis added), and even people who have disavowed any association with him. *See* SA97–104 (declaration of certain Ecuadorians formerly represented by Donziger deeming him to be "persona[] non grata[]" because he

sought "to advance [his] own private and personal interests" by, among other things, selling interests in the Ecuadorian judgment without authorization).

Further, Donziger has not shown that any of these individuals has a material connection to the United States that affords them protection under the First Amendment. Individuals outside the "borders, jurisdiction, and control of the United States" have no First Amendment rights to assert. *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 283 (D.C. Cir. 1989) ("[T]he interests in free speech and freedom of association of foreign nationals acting outside the borders, jurisdiction, and control of the United States do not fall within the interests protected by the First Amendment."); *Veiga v. World Meteorological Org.*, 568 F. Supp. 2d 367, 375 (S.D.N.Y. 2008). Donziger has not identified *any* individual for whom he seeks to assert First Amendment protections, much less alleged that they are subject to the protections of the First Amendment.

Even setting these issues aside, the district court still properly denied Donziger's motion for a protective order on the ground there was no good cause for issuing such an order, as required under Federal Rule of Civil Procedure 26(c)(1)(A). "[T]he party seeking a protective order has the burden of showing that good cause exists for issuance of that order." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004) (quotation marks and citation omitted). Further, "[t]he grant and nature of protection is singularly within the discretion of the

district court and may be reversed only on a clear showing of abuse of discretion." *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (quoting *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973)).

Donziger has not shown that the district court abused its discretion in denying his motion for a protective order because he has not even established any injury that would result from the discovery Chevron seeks. Donziger asserts, without evidentiary support, that allowing discovery would "'dry[] up' support for the *Aguinda* case from specific funders, potential future funders, and other types of supporters." Donz. Br. at 48. That alleged injury is entirely speculative, as the district court found. *See* SPA128–29. Moreover, the actions that Donziger claims are injurious are "all merely instances [of] Chevron engaging in legitimate litigation activity." SPA133. Alleged "injuries" that may result "from the proper functioning of the justice system are not circumstances that warrant a protective order." SPA129–30.

Although Donziger complains of the costs incurred by his former associate Katie Sullivan in responding to Chevron's discovery requests, Donz. Br. at 29–30, this discovery has been fruitful, as Chevron was able to obtain from Ms. Sullivan evidence revealing further acts of contempt by Donziger. *See* SA851–67. And while Donziger feigns concern for Ms. Sullivan, the only reason that she is even involved in this matter is because Donziger convinced her to assist him in his ef-

forts to monetize the Ecuadorian judgment despite the prohibitions of the RICO judgment, and because he has refused to comply with Chevron's discovery requests, necessitating Chevron's pursuit of third-party discovery.

As the district court concluded, "Chevron has a constitutional right" to exercise its rights under the law and "Donziger has offered no competent or persuasive evidence that Chevron has or is likely to pursue those rights in any but a lawful and proper manner." SPA129. The United States also has an "extremely substantial interest[]" in ensuring that the "equitable remedies contained in [the RICO] judgment" are "complied with," which would outweigh any countervailing First Amendment concerns. SPA138–39. Determining whether Donziger is complying with the RICO judgment is thus a proper and legitimate use of the discovery process, and the district court's refusal to stop that discovery was worlds away from a clear abuse of discretion.

IV. Donziger's Claims of Environmental Harm Are Irrelevant and False

Donziger's brief includes a two-page footnote devoted to his environmental allegations, all of which are entirely unsupported. *See* Donz. Br. at 13–14 n.7. Although Chevron disputes all of Donziger's environmental claims, the alleged environmental conditions in Ecuador are not relevant to this appeal.

Donziger's approach is nothing new: Donziger has repeatedly attempted to justify his misconduct with claims of environmental harm in Ecuador. He tried

this tactic in the district court and again before this Court when he appealed the RICO judgment, and it was firmly rejected:

> The issue here is not what happened in the Oriente more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. It instead is whether a court decision was procured by corrupt means, regardless of whether the cause was just. 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. So even if Donziger and his clients had a just cause—and the Court expresses no opinion on that—they were not entitled to corrupt the process to achieve their goal.
>
> Justice is not served by inflicting injustice. The ends do not justify the means. There is no "Robin Hood" defense to illegal and wrongful conduct. And the defendants' "this-is-just-the-way-it-is-done-in-Ecuador" excuses—actually a remarkable insult to the people of Ecuador—do not help them. The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador—and they knew it.

Donziger, 833 F.3d at 85 (citation and emphasis omitted).

Moreover, many of Donziger's assertions are rebutted by evidence in the record. Donziger claims that the Ecuadorian judgment is based on "voluminous objective scientific evidence and extensive testimonial evidence"; that 99% of the oil sites inspected had total petroleum hydrocarbon ("TPH") levels above 1000ppm; that Chevron's evidence corroborated this; and that a report by Daniel Rourke corroborates increased rates of cancer in the Oriente. Donz. Br. at 13–14 n.7. Of the 221 water samples taken during the Lago Agrio litigation, "99% . . . , including 100% of the public drinking water supplies, meet the most stringent

drinking water criteria [for hydrocarbons] . . . established by Ecuador, the U.S. Environmental Protection Agency . . . , and the World Health Organization . . . during the period in which TexPet operated the Concession." SA1103–04. The Ecuadorian plaintiffs actually *stopped* testing for drinking water contamination because they found no evidence to support their claims. *See* SA5 (clip and transcript); SA16–17. And Rourke himself testified that his conclusion about elevated cancer rates was an extrapolation based on a report authored by an associate of Donziger's and that his report is "not making any statement about causation." SA13–14.

"Truth needs no disguise," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944), yet Donziger resorted to "a parade of corrupt actions" to procure the Ecuadorian judgment. *Donziger*, 833 F.3d at 126. And it is those actions—"not the environmental issues in" Ecuador—that are relevant. *Id.* at 85.

CONCLUSION

The Court should affirm the award of costs to Chevron and dismiss the remainder of this appeal for lack of jurisdiction.

Dated: March 11, 2019

Respectfully submitted,

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Dated: March 11, 2019

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