Richard J. Sullivan, *Circuit Judge*, dissenting in part:

I join the majority's opinion in all respects except for its conclusion that the district court erred in finding Donziger in contempt for selling interests in the Ecuadorian Judgment. Even under this Court's "more exacting" standard applicable to contempt orders, *Perez v. Danbury Hosp.*, 347 F.3d 419, 423 (2d Cir. 2003), I cannot agree that the district court abused its discretion in determining that Donziger's financing activities violated the court's March 2014 injunction (the "Injunction").

Like the majority, I agree that "[t]he plain language of the Injunction as written is clear and expansive," and that, "[s]tanding alone, the Injunction was unambiguous and would support a contempt finding if Donziger violated the order by selling interests in the Ecuadorian Judgment to pay himself retainer payments and arrears." Majority Op. at 31, 35. I am simply not persuaded that the district court's April 2014 stay order (the "Stay Order") somehow obscured the Injunction's unambiguous language so that it created "doubt in the minds of those to whom it was addressed . . . precisely what acts [were] forbidden." *Drywall Tapers & Pointers of Greater N.Y. v. Loc. 530*, 889 F.2d 389, 395 (2d Cir. 1989); *see* Majority Op. at 42.

As an initial matter, the Stay Order made clear that Donziger's work as a *lawyer* on the Chevron case was permissible, but that any attempts to *profit from* the Ecuadorian Judgment were not. In Donziger's motion for a stay pending appeal, Donziger's counsel claimed that the Injunction "threaten[ed] to destroy Mr. Donziger's law practice and thereby deprive him of his means of earning a livelihood and providing for his family." Dist. Ct. Dkt. 1888 at 16. In response, Chevron argued that "the [I]njunction d[id] not prevent Donziger from practicing law – it preclude[d] him from continuing and profiting from illegal conduct." Dist. Ct. Dkt. 1893 at 17. The district court agreed with Chevron. In the Stay Order, the district court wrote in no uncertain terms:

> The [Injunction], including paragraph 5, in fact would deprive Donziger of the ability to profit from the [Ecuadorian] Judgment that he obtained by fraud. The practical effect of that, however, . . . is not to prevent him from working on the case nor to prevent him from being paid his monthly retainer for his labors. *It is to prevent him from benefitting personally, at Chevron's expense, from property traceable to that fraudulent Judgment.*

Chevron Corp. v. Donziger, 37 F. Supp. 3d 653, 660 (S.D.N.Y. 2014) ("*Stay Opinion*") (emphasis added). The district court therefore acknowledged Donziger's concerns and clarified that he could continue to work as a lawyer and be paid for his services. But the logical inference from the Injunction and the Stay Order is that

such payments could not come from property that is "traceable to" the Ecuadorian Judgment. *Id.*

The majority reasons that the Stay Order interpreted "traceable to" to mean, essentially, only those funds that were actually *collected* on the Ecuadorian Judgment. Majority Op. at 36–37. The majority then concludes that the type of financing at issue here – selling interests in the Ecuadorian Judgment other than Donziger's own contingency fee interest – does not constitute a "collection[] on the Ecuadorian Judgment channeled to Donziger in the form of retainer payments," and that it was therefore reasonable for Donziger to believe he could receive those funds without violating the Injunction. *Id.* at 37–38.

There are two problems with the majority's analysis. First, it is by no means clear that the Stay Order so narrowly interpreted the phrase "traceable to." Certainly, the ordinary meaning of "traceable" is broad enough to cover not only those funds that were actually collected on the Ecuadorian Judgment, but also those funds that were generated by selling interests in that judgment – no matter who owned those interests. *See, e.g.*, *United States v. Gordon*, 710 F.3d 1124, 1135 n.13 (10th Cir. 2013) (explaining that property is "traceable to" a cause when the property's "acquisition is attributable to" that cause (internal quotation marks

omitted)); *see also United States v. Voigt*, 89 F.3d 1050, 1087 (3d Cir. 1996) ("'traceable to' means exactly what it says"). And while the Stay Order does discuss "collections" on the Ecuadorian Judgment, *see Stay Opinion*, 37 F. Supp. 3d at 658, it does not suggest that the phrase "traceable to" is limited *solely* to collections. Indeed, the Stay Order regularly uses broad language that indicates just the opposite, such as when it explains that the Injunction "does not limit efforts to enforce the [Ecuadorian] Judgment outside the United States, even by Donziger," but that "[i]t does, of course, limit the personal ability of Donziger . . . *to profit from such efforts*." *Id.* at 665 & n.51 (emphasis added).

Second, and more importantly, even if the Stay Order could be read as narrowing the meaning of "traceable," nothing in that order can reasonably be read to suggest that Donziger *himself* could engage in financing efforts involving the Ecuadorian Judgment. As the district court explained in its 2019 contempt order, "Donziger *raised [the money] himself* by selling interests in [the Ecuadorian Judgment] to investors." *Chevron Corp. v. Donziger*, 384 F. Supp. 3d 465, 500 (S.D.N.Y. 2019) ("*Contempt Opinion*"). "He then controlled the flow of those funds," which he deposited into his own bank and credit card accounts. *Id.*; *see also id.* at 499 ("[Donziger] had substantially unfettered control over the funds . . . ,

including the discretion to pay himself with that money whenever he wished."). So, while the Stay Order made clear that the Injunction did not prevent Donziger "from continuing to work on the Lago Agrio case" as a *lawyer*, *Stay Opinion*, 37 F. Supp. 3d at 658, the Stay Order nowhere suggested that Donziger could act as a *financier*, selling off interests in his clients' eventual recovery for his own benefit. That sort of activity was plainly prohibited by paragraph 5 of the Injunction, which barred Donziger from "undertaking any acts to monetize or profit from the [Ecuadorian] Judgment," including "by selling, assigning, pledging, transferring or encumbering any interest therein." Sp. App'x at 3.

Similarly, while the majority is correct that the Stay Order permitted a certain degree of litigation financing by the non-representative Ecuadorian plaintiffs (the "LAPs"), *see* Majority Op. at 37–38, nothing in that order suggests that the LAPs could outsource such financing efforts to Donziger himself. Indeed, in discussing the litigation financing that had taken place prior to the Injunction, the district court wrote:

> The litigation against Chevron has been funded by investors in exchange for shares of any eventual recovery. In fact, the LAPs have raised at least $15.99 million and perhaps $21 million or more from such sources. At least $7.5 million of that amount has been paid to U.S. counsel, much of it to firms representing the

> LAPs. Nothing in the [Injunction] prevents the LAPs *(other than the two LAP [r]epresentatives who are named in the [Injunction])* and their allies from continuing to raise money in the same fashion.

Stay Opinion, 37 F. Supp. 3d at 660–61 (emphasis added). This passage plainly states that the Injunction prohibited "the two LAP [r]epresentatives" – and, by extension, Donziger, since the Injunction subjected him to all of the same restrictions as the LAP representatives – from inducing "investors [to] exchange [cash] for shares of any eventual recovery." *Id.* at 660.[1] That is precisely the type of financing that Donziger engaged in here, which resulted in the district court's contempt finding. Again, the Injunction was crystal clear on this point, prohibiting Donziger from "undertaking any acts to monetize or profit from the [Ecuadorian] Judgment," Sp. App'x at 3, and the Stay Order in no way contradicted that emphatic language.

At bottom, the district court's 2014 Stay Order is entirely consistent with the broad and unequivocal language of the Injunction – which we all agree prohibited Donziger from selling interests in the Ecuadorian Judgment, no matter who

[1] As the district court explained in its contempt order, this passage applied with equal force to Donziger: "[h]is name did not appear in the quoted passage . . . only because that passage was addressed to an argument made only by the LAP [r]epresentatives." *Contempt Opinion*, 384 F. Supp. 3d at 496.

originally owned those interests. By reading the Stay Order as somehow "mudd[ying] the waters" of that broad and unequivocal Injunction, Majority Op. at 47, the majority's opinion invites future litigants – and Donziger himself – to supply their own mud in order to evade the scope of similarly (and necessarily) restrictive judgments.

It is true that "[t]he judicial contempt power is a potent weapon." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). But it is also a necessary one, which courts must be able to invoke to "protect[] the due and orderly administration of justice and [to] maintain[] the authority and dignity of the court." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (internal quotation marks omitted). Because I cannot agree that the district court abused its discretion by invoking that power here – in response to Donziger's blatant profiting from the Ecuadorian Judgment he obtained through fraud – I respectfully dissent.

A True Copy
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