20-464-op

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN RE STEVEN ROBERT DONZIGER

STEVEN ROBERT DONZIGER,

Petitioner,

v.

CHEVRON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CORRECTED RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

HONORABLE LEWIS A. KAPLAN
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007
(212) 805-0216

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This response is filed pursuant to an order of the Court of Appeals dated February 20, 2020.

Summary of Argument

The petition attempts to portray the district court as having "exceeded his authority, abused his contempt power and violated due process and fundamental fairness by declining to stay or further adjourn a related civil contempt hearing until resolution of [a] criminal [contempt] case and making rulings in the civil case that risked irreparable prejudice to Mr. Donziger in the criminal [contempt] case."[1] It describes the relevant hearing over 30 times as "[a] hearing on a civil contempt charge" or a "civil contempt hearing."[2] On this basis, it seeks a writ ordering the court "to stay or otherwise adjourn the civil contempt hearing against Mr. Donziger until after the resolution of the criminal case."[3]

As an initial matter, the hearing in question is not "[a] hearing on a civil contempt charge." It is a hearing to determine whether Donziger, *after* having been found in civil contempt, had purged himself of one of several separate civil contempt

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1 Petition ("Pet.") 5.

2 *Id.* at 6.

3 *Id.* at 5.

charges. And this is not the only respect in which the reality is quite different from the petition's claims. In brief summary, the background is this.

In 2014, the district court issued a final judgment enjoining Steven Donziger from, among other things, seeking to profit from a multibillion Ecuadorian judgment against Chevron Corporation ("Chevron") that he obtained by fraud, bribery, and other misconduct (the "RICO Judgment"). After this Court affirmed the RICO Judgment, Chevron, as the prevailing party, recovered a costs judgment against Donziger of more than $800,000, enforcement of which never has been stayed. After Donziger failed to satisfy that judgment, Chevron commenced discovery to collect upon it and to obtain evidence that Donziger, as Chevron alleged, was violating the RICO Judgment.

After a year-long saga of Donziger disobeying court orders to comply with some of that discovery, the court issued a Forensic Inspection Protocol (the "Protocol") to obtain the documents that Donziger failed to turn over pursuant to those orders. Paragraph 4 of the Protocol required Donziger, by March 8, 2019, to identify various devices and electronic media that plausibly contain evidence that the court's orders required him to produce. Paragraph 5 required him, by March 19, 2019, to turn these devices and media over to a neutral expert for imaging. Had that occurred, further steps would have been taken to accomplish a technologically

assisted review to identify responsive documents that Donziger had failed to produce as directed.

Donziger did not comply with paragraphs 4 and 5. He declared that the district court's orders were "legally unfounded" and that he therefore would "go into voluntary contempt as a matter of principle," allegedly "in order to obtain appellate review."[4] He stated that he would "defy the [c]ourt's order[s]" unless they were affirmed by this Court on appeal from a contempt adjudication.[5] On May 23, 2019, the district court, as Donziger invited it to do, held him in civil contempt and imposed coercive sanctions to induce compliance with its orders.

On May 29, 2019, Donziger asserted in the first of three declarations on this topic that he had purged himself of his contempt of paragraph 4 on that day. Chevron disagreed. The court therefore scheduled a purge hearing to resolve this dispute, originally for June 10, 2019, but subsequently delayed several times.

In July 2019, in response to Donziger's repeated violations of its orders

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[4] Dkt. 2184 at 4; *see also* Dkt. 2173-1 (similar).

[5] Dkt. 2184; *see* Dkt. 2173-1 ("As I have also made clear to Chevron and the court, if the appellate court ultimately affirms Judge Kaplan's merits ruling on the authorizing motion and his overall handling of the post-judgment proceedings, then I will cooperate with the order of the court as is my obligation as a citizen and resident of New York. Until such time, you should not expect to hear more from me.").

and judgments, the court charged Donziger with six counts of criminal contempt. One count charges him with violating paragraph 4 in all or part of the period ending March 28, 2019. Another charges him with violating paragraph 5. Donziger's criminal contempt trial is set before Judge Preska for June 15, 2020.

The core contention of Donziger's petition is that "compelling"[6] him to testify at the purge hearing would jeopardize his Fifth Amendment rights in light of his forthcoming criminal contempt trial. On that ground, he seeks yet another delay of the purge hearing.

Donziger is not, in fact, required to testify at the purge hearing. And even if chooses to testify, his Fifth Amendment rights would not be imperiled. The purpose of civil contempt is to coerce a party into compliance with a court's orders. Criminal contempt instead serves to vindicate a court's authority by punishing wilful disobedience of its orders. Accordingly, the crime of contempt of paragraph 4, if there was one, was completed at the moment when Donziger first wilfully violated paragraph 4 – in March 2019. Whether he began complying with paragraph 4 on May 29, 2019, as he has asserted in three sworn declarations, is irrelevant to the criminal case. The criminal contempt proceeding and the purge hearing have nothing material

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[6] Pet. 13.

in common, and the lack of overlap – to say nothing of the fact that Donziger concedes that he violated paragraph 4 before May 29 by asking to "voluntarily go into civil contempt" – would avoid any risk to the privilege against self-incrimination, even assuming that Donziger has preserved that privilege.

But in fact, Donziger has not preserved that privilege. As just noted, he submitted three sworn declarations asserting that he had purged himself of his civil contempt of paragraph 4 on May 29, 2019. Because the Fifth Amendment may not be used as both a sword and a shield, Magistrate Judge Robert W. Lehrburger held that Donziger waived the privilege by doing so. Moreover, he independently waived any privilege by failing to object in accordance with Federal Rule of Civil Procedure 72(a) to Judge Lehrburger's order holding that his declarations resulted in a waiver.

The stay of some or all of a civil matter in deference to a related criminal proceeding is an "extraordinary remedy," and its availability lies in the "broad discretion" of the district court.[7] Mandamus too is an extraordinary remedy.[8] The district court did not abuse its discretion by declining to delay the purge hearing after

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[7] *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98-99 (2d Cir. 2012) (citation, quotation marks, and brackets omitted).

[8] *In re United States Dep't of Commerce*, No. 18-2652, 2018 WL 6006904, at *1 (2d Cir. Sept. 25, 2018) (summary order).

what is now nine months, much less do so to a degree that gives Donziger the "clear and indisputable" right that is a prerequisite to issuance of the writ mandamus.[9] As this Court has written, "we do not – indeed may not – issue mandamus with respect to orders resting in the district court's discretion, save in most extraordinary circumstances not remotely presented here."[10] Indeed, Donziger points to no case in which mandamus was issued to overturn a district court's ruling on such a question. The petition should be denied, but one more point is appropriate.

The petition charges the district court with violating the contempt power, due process, and fundamental fairness. This is a distraction, and it is not so.

The proceedings below have conformed to the Constitution, the Rules of Criminal Procedure, the rules of the Southern District, and other applicable law. In particular, the suggestions that the undersigned should not have charged Donziger with criminal contempt, that he "*de facto*" recused himself, that the Southern District's assignment rules were disregarded by the assignment of the criminal contempt charges to Judge Preska for trial, and similar contentions are wrong as a

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[9] *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014).

[10] *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 187 (2d Cir. 1987) (quoting *Donlon Indus., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968) (Friendly, *C.J.*)).

matter of law.

The petition boils down to this. Donziger asks for a writ of mandamus because of the risk that testimony he is not required to give, at a hearing to determine whether he has purged himself of his admitted civil contempt that he in fact invited, would implicate constitutional rights that he has waived, even though the alleged criminal contempt was completed in early March and the alleged compliance that is the sole topic of the purge hearing began in late May.

The petition should be denied.

Facts

The Court of Appeals affirmed the RICO Judgment in 2016.[11] This petition concerns only post-affirmance proceedings, but there have been over 500 docket entries in that period. It therefore is important to summarize the RICO decision and the ensuing proceedings, the latter of which have centered on enforcement of the RICO Judgment and the subsequent $800,000 costs judgment, which never has been stayed.

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[11] *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2268 (2017).

The Underlying Case and the Merits Judgment

Donziger has engaged in a pattern of racketeering activity including extortion, mail fraud, wire fraud, witness tampering, and violations of the Travel Act and other predicate acts. As the district court found after trial, he and others have engaged for years in a corrupt scheme, an object of which is to extort billions of dollars from Chevron. A linchpin of that scheme was the fraudulent procurement of the multibillion-dollar Ecuadorian judgment coupled with threats and attempts to enforce it wherever Chevron has assets.[12] As summarized in the trial opinion:

> "They submitted fraudulent evidence. They coerced one judge, first to use a court-appointed, supposedly impartial, 'global expert' to make an overall damages assessment and, then, to appoint to that important role a man whom Donziger hand-picked and paid to 'totally play ball' with the LAPs. They then paid a Colorado consulting firm secretly to write all or most of the global expert's report, falsely presented the report as the work of the court-appointed and supposedly impartial expert, and told half-truths or worse to U.S. courts in attempts to prevent exposure of that and other wrongdoing. Ultimately, the LAP team wrote the Lago Agrio court's Judgment themselves and promised $500,000 to the Ecuadorian judge to rule in their favor and sign their judgment."[13]

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12 So far as the district court is aware, all attempts to enforce the Ecuadorian judgment outside of Ecuador have been unsuccessful. *See, e.g.*, *Matter of Chevron Corp. v. Donziger*, No. 11-cv-0691 (LAK), 2019 WL 7972186, at *1 n.2 (S.D.N.Y. Mar. 5, 2019).

13 *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014). An arbitration panel under the auspices of the Permanent Court of Arbitration at the Hague later made substantially the same findings made

The district court enjoined Donziger and the two other defendants who appeared below from, among other things, seeking to enforce the Ecuador judgment in the United States, profiting from it in any way, and "undertaking any acts to monetize or profit from [it]."[14]

This Court affirmed. It noted that Donziger did not challenge *any* of the district court's factual findings on appeal.[15] And it observed that "[t]he record in the present case reveals a parade of corrupt actions by the LAPs' legal team, including coercion, fraud, and bribery, culminating in the promise to [Ecuadorian] Judge Zambrano of $500,000 from a judgment in favor of the LAPs."[16]

Post-Judgment Proceedings

Chevron's Initial Discovery Efforts and Its First Motion to Compel

Following the end of the appellate process, Chevron alleged that Donziger had disobeyed the RICO Judgment by, among other things, selling shares

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below after even lengthier proceedings. A-95 n.2 (quoting findings).

[14] Dkt. 1875.

[15] *Chevron*, 833 F.3d at 86.

[16] *Id.* at 126.

in the Ecuador judgment to numerous investors and personally profiting from that corrupt judgment.[17] On March 19, 2018, it moved, among other things, to hold Donziger in civil contempt for violating the RICO Judgment.[18] It then served him with a document request, an information subpoena,[19] and a subpoena to take his deposition.

Donziger made largely boilerplate objections to discovery.[20] Chevron moved to compel compliance.[21] The district court ruled on certain aspects of that motion on May 17, 2018 (the "May 17, 2018 Order").[22] It narrowed many of the discovery requests and ordered Donziger to comply with certain of them on or before June 15, 2018.

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17 *See generally* Dkt. 1966.

18 *Id.*

19 An information subpoena is New York State discovery process used in connection with enforcement of judgments. N.Y. CPLR 5224(a), subd. 3. It is available here pursuant to FED. R. CIV. P. 69(a)(2).

20 Dkt. 1988-2.

21 Dkt. 1989.

22 Dkt. 2009.

Donziger did not comply.[23] Nor did he comply with the district court's discovery order of July 23, 2018, which resolved the balance of Chevron's motion to compel and directed Donziger to produce additional discovery by August 15, 2018 (the "July 23, 2018 Order").[24]

Chevron's Second Motion to Compel Post-Judgment Discovery

On August 16, 2018, Chevron filed another motion to compel Donziger to comply with his discovery obligations and the district court's orders. It argued that Donziger had disregarded multiple discovery orders, had "concealed bank accounts and assets" that he was required to disclose, and had "failed to conduct even the most

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23 He instead moved for a protective order. But that motion did not stay his obligation to comply with the May 17, 2018 Order. *See, e.g., Landy v. FAA*, 705 F.2d 624, 634 (2d Cir. 1983); Fed. R. Civ. P. 37 advisory committee's note (1993) ("[T]the filing of a motion [for a protective order] under Rule 26(c) is not self-executing – the relief authorized under the rule depends on obtaining the court's order to that effect."). The district court denied his protective order motion on June 17, 2018. Dkt. 2045, at 20-35. While Donziger appealed from the denial of that motion and other relief on August 13, 2018, Dkt. 2049, the district court denied a stay pending appeal, Dkt. 2088, and Donziger sought no stay from this Court.

24 Dkt. 2056.

basic document searches."[25] It asserted also that Donziger had "produced a mere 22 pages worth of documents – relying on previously overruled scope and First Amendment objections, unsubstantiated privilege claims, and a supposed lack of resources."[26] It accused him also of "refus[ing] to answer dozens of questions at [a] June 25 deposition, stall[ing] the deposition with speeches [and excessive breaks], and ma[king] multiple threats to terminate the deposition."[27]

The district court granted Chevron's motion to compel. It noted that Donziger had been ordered to respond to Chevron's discovery requests by August 15, 2018 but failed to do so despite the fact that the orders had not been stayed.[28] Donziger was – and still is – "obliged to comply with it in each and every respect on pain of contempt."[29]

Donziger did not appeal from the October 18, 2018 order or seek either mandamus or a stay from this Court.

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25 Dkt. 2073 at 1 (citations omitted).

26 *Id.*

27 *Id.*

28 Dkt. 2108.

29 *Id.*

The Forensic Inspection Protocol and the Civil Contempt Adjudication

In light of Donziger's persistent disobedience of the district court's orders to comply with outstanding document requests, the court set in motion a process designed to have his electronically stored information searched for responsive documents with the assistance of a Neutral Forensic Expert.[30] That process resulted in the adoption of the Protocol.[31]

Paragraph 4 of the Protocol requires Donziger to provide a list of "all devices he has used to access or store information for communication since March 4, 2012" and "a list of all [web-based or similar] accounts."[32] Paragraph 5 separately requires that Donziger provide those devices and access to those accounts to the Neutral Forensic Expert for the purpose of imaging.[33] Other provisions of the Protocol, not at issue here, contemplate technologically assisted review of Donziger's materials to identify documents responsive to discovery requests with which the district court had ordered Donziger to comply.

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30 *Id.* ¶ 3.

31 A-36-44. A memorandum setting out the details of the Protocol is found at A-20-35.

32 Dkt 2172 ¶ 4.

33 *Id.* ¶ 5.

Donziger did not appeal from the Protocol or seek either mandamus or a stay from this Court. Nor did he seek a stay in the district court. But he promptly announced to the Neutral Forensic Expert that he would not comply with the Protocol and "will voluntarily go into civil contempt."[34] This was ostensibly to obtain "proper appellate review" of discovery against "25 or more people connected to [him] or the Ecuador case."[35]

Chevron moved to hold Donziger in civil contempt for his non-compliance with paragraphs 4 and 5.[36] Donziger's response did not claim that he had complied in any respect. Indeed, he admitted his refusal to comply, calling it a "principled refusal to produce my devices and online account passwords until receiving some measure of appellate review."[37] For that matter, he stated that he was "*seeking* a contempt finding in order to fully appeal" what he claimed was "the

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34 Dkt. 2177-1 at ECF 3; *id.* at 4-5 ("I hope you have not cleared your schedule to work on this matter, because, as Chevron knows, I will not be producing documents until my due process rights are respected.").

35 *Id.*

36 Dkt. 2175.

37 Dkt. 2184 at 8.

[district c]ourt's re-interpretation of its April 2014 Opinion."[38]

On May 23, 2019, the district court held Donziger in civil contempt of paragraph 4.[39] And on May 29, 2019, it held him in civil contempt of paragraph 5.[40] It imposed coercive daily fines to induce his compliance. When those fines appeared to have no effect, the court suspended their further accumulation but directed Donziger to turn his passports over to the Clerk of Court (the "Passport Order") to be held until he complied with the order.[41] Donziger failed to comply with the Passport Order.

Donziger appealed from the May 23 Order.[42] On June 12, 2019, he sought from the district court a stay of the coercive civil contempt remedies pending that appeal and "any forthcoming appeal" of the May 29 Order.[43] However, he never appealed from the May 29 Order. And while he has appealed from the multifaceted

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38 *Id.* at 8 n.3 (emphasis added).

39 Dkt. 2209 (the "May 23 Order")

40 Dkt. 2219 (the "May 29 Order").

41 Dkt. 2232.

42 Dkt. 2211. The appeal is No. 19-1584 (2d Cir. filed May 28, 2019).

43 Dkt. 2234 at 1.

May 23 Order, his briefs do not challenge its conclusions that he contumaciously violated paragraphs 4 and 5 of the Protocol.[44]

The Purge Hearing – Part I

On May 29, 2019, Donziger filed a sworn declaration stating that, on that date, he had provided the Neutral Forensic Expert "with information as required by . . . paragraph 4" of the Protocol and asserting that he was thus "in compliance" with that paragraph.[45] Chevron disputed Donziger's assertion. In light of this disagreement, the court issued an order stating that, unless the parties agreed, one way or the other, on whether Donziger had purged himself of the contempt of paragraph 4, it would hold a hearing on June 10, 2019 "to resolve any remaining disagreement."[46] The order emphasized that "Donziger holds the keys in his pocket,

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44 Brief for Defendant-Appellant *Pro Se*, *passim*, *Chevron Corp. v. Donziger*, No. 19-1584, Dkt. 48 (2d Cir. filed Sept. 9, 2019); Reply Brief for Defendant-Appellant *Pro Se*, *id.*, Dkt. 105 (filed Feb. 6, 2020) ("Reply Br."). Indeed, in his reply brief, he concedes that he "has not, in the present appeal, directly challenged civil contempt findings in the Contempt Opinion other than the main finding that appellant acted in contempt by" violating the RICO Judgment. Reply Br. at 7 n.6.

45 Dkt. 2217 at 1.

46 Dkt. 2218.

figuratively speaking, with respect to any coercive fines imposed by the . . . May 23, 2019 [Order]. If he fully has purged or hereafter purges himself of the contempts to which they apply, the coercive fines will be avoided."[47]

The parties did not resolve the issue. And at the June 10 evidentiary hearing, Donziger declined to take the witness stand.[48] Accordingly, the court referred the task of determining whether Donziger had purged himself of civil contempt of paragraph 4 to Magistrate Judge Lehrburger.[49]

The Criminal Contempt Charges

By July 2019, Donziger remained in violation of the RICO Judgment, the May 23 and July 23, 2018 Orders, the Passport Order, and paragraphs 4 and 5 of the Protocol. The civil contempt sanctions did not induce his compliance, and he repeatedly asserted that he would "defy the [c]ourt's order[s]" unless they were affirmed by this Court.[50] Having exhausted all other options, the district court

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47 *Id.*

48 Dkt. 2352.

49 Dkt. 2257.

50 Dkt. 2184; Dkt. 2173-1.

tendered the prosecution of Donziger for criminal contempt of court to the U.S. Attorney. The U.S. Attorney quickly and "respectfully decline[d] on the ground that the matter would require resources that we do not readily have available."[51]

Accordingly, on July 31, 2019, the court ordered Donziger to show cause why he should not be held in criminal contempt of court, pursuant to 18 U.S.C. §§ 401(2) and (3) and Rule 42, on six counts, only two of which are relevant here:

> "Donziger, in disobedience of paragraph 4 of the Protocol, knowingly and wilfully failed fully to comply with the requirements thereof for all or part of the period commencing on March 8, 2019 to and including May 28, 2019." * * *
>
> "Donziger, in disobedience of paragraph 5 of the Protocol, knowingly and wilfully failed to comply with the requirements thereof commencing on or about March 18, 2019 to at least on or about May 28, 2019."[52]

The remaining four counts charged Donziger with violating the Passport Order and injunctive provisions of RICO Judgment.[53]

The order to show cause was made returnable before Judge Loretta A. Preska.[54] As *required* by Rule 42(a)(2) where the U.S. Attorney declines to prosecute

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51 Dkt. 2277.

52 Dkt. 2276 ¶¶ 3, 6.

53 *See generally* Dkt. 2276.

54 Contrary to Donziger's assertions in the petition, the undersigned did

a criminal contempt, and has been done without fanfare in other cases, the undersigned appointed outside counsel to represent the United States.[55] As the Supreme Court has made clear, "it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt."[56]

Donziger was arraigned and pleaded not guilty. The criminal contempt trial is set for June 15, 2020.

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not recuse himself. *See* Part II, *infra*.

[55] *See, e.g.*, *United States v. Cutler*, 6 F.3d 67, 69 (2d Cir. 1993); *In re Special Proceedings*, 842 F. Supp. 2d 232, 247-48 (D.D.C. 2012); *E-Smart Techs., Inc. v. Drizin*, 06-cv-5528 (MHP), 2011 WL 2837400, at *1 (N.D. Cal. July 18, 2011). In fact, district courts have been reversed for *not* appointing outside counsel in compliance with Rule 42(a)(2). *See, e.g.*, *Clapper v. Clark Dev., Inc.*, 747 F. App'x 317, 324 (6th Cir. 2018) ("[T]he district court procedurally erred *by failing to appoint* a disinterested attorney to prosecute English's case." (emphasis added)); *In re Troutt*, 460 F.3d 887, 893-95 (7th Cir. 2006).

[56] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987).

The Purge Hearing – Part II

Initial Proceedings Before the Magistrate Judge

The parties initially agreed to hold the purge hearing on August 7, 2019, a date ultimately postponed – at Donziger's repeated requests, and often over Chevron's objection – to December 12, 2019.[57]

Chevron's Motion in Limine and Donziger's Second Motion to Stay the Purge Hearing

On November 19, 2019, Chevron moved *in limine* for a ruling that Donziger had waived his right to assert the privilege by submitting the three declarations asserting his compliance with paragraph 4.[58] Alternatively, it sought to strike Donziger's declarations on the ground that it would be unfair for him to rely on them while invoking the Fifth Amendment to avoid cross-examination.[59]

Donziger did not file papers in opposition to Chevron's motion.[60]

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57 A-63-64; Scheduling Order (Oct. 23, 2019), 11-cv-691 (S.D.N.Y.).

58 Dkt. 2391; Dkt. 2392.

59 Dkt. 2392 at 10.

60 He contended that he need not make "a substantive response to Chevron's motion" because doing so, for reasons unexplained, "would cause precisely the harms . . . that a stay (or further adjournment) would

However, on December 3, the deadline for his response, his counsel made "a renewed request [in the district court] for a stay or, alternatively, for a further adjournment of the hearing, and a stay or adjournment of Chevron's motion *in limine*."[61] He argued, among other things and with virtually no explanation, that "the risk of implicating Mr. Donziger's Fifth Amendment rights at the [purge] hearing" would not be wholly speculative.[62]

The Subject of the Petition – The District Court's Ruling on Donziger's Second Stay Motion

The district court denied Donziger's stay motion on December 9, 2019.[63] In so doing, it relied on two principal findings. The first was that there was no real overlap between the subject of the purge hearing and the criminal contempt case. This was because the "[purge] hearing is directed solely to the very narrow issue whether Donziger – as he has claimed – in fact complied with paragraph 4 of the

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address." A-67.

61 *Id.* at 65-67.

62 *Id.* at 66.

63 *Id.* at 68-77.

Protocol on or after [May] 29, 2019."[64] Insofar as the criminal prosecution relates to the Protocol, on the other hand, it focuses on (1) whether Donziger had complied with *paragraph 5* of the Protocol, and (2) whether Donziger had complied with paragraph 4 *before* May 29, 2019, the significance of May 29 being that Donziger asserted in his three declarations that he came into compliance on that date.[65] The court rested also on a finding that Donziger repeatedly had "stonewalled" Chevron's postjudgment discovery, including the enforcement of the Protocol and scheduling of the purge hearing.[66]

The court concluded by acknowledging – but not deciding – Chevron's motion *in limine*, which it referred to Judge Lehrburger. The court noted that it would be unfair to allow Donziger to use the Fifth Amendment as a sword and a shield by relying on his three declarations asserting his compliance with paragraph 4 and then invoking the privilege to preclude cross-examination.[67] Accordingly, it stated that the appropriate remedy if Donziger declined to testify might be striking his

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64 *Id.* at 75. The opinion inadvertently states "March 29, 2019."

65 *Id.* at 74-75.

66 *Id.* at 70-74.

67 *Id.* at 75.

declarations.[68] It did not, however, decide these issues. Rather, it *denied* Chevron's motion *in limine* without prejudice to its raising the waiver argument before Judge Lehrburger.

The Argument of and the Unappealed Ruling on the In Limine Motion

Early on December 12, 2019, Donziger filed another motion to stay the purge hearing scheduled for that same morning.[69] Nonetheless, counsel for Donziger and Chevron appeared before Judge Lehrburger for the purge hearing.

The magistrate judge began by noting that the district court had "essentially referred [the Fifth Amendment] issue to [him]" and asking Donziger's counsel to address the Fifth Amendment waiver issue.[70] Donziger's counsel argued instead that the purge hearing would overlap with the criminal prosecution.[71] When pressed by Judge Lehrburger to make that argument "concrete" by providing "an example of a couple questions that would be essentially incriminating with respect

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68 *Id.* at 75-76.

69 Dkt. 2419.

70 *Id.* at 3:3-13.

71 *Id.* at 6:2-13.

to the criminal proceeding if they were asked [in the purge hearing]," Donziger's counsel stated that he was too "tired" to do so.[72]

Recognizing that the stay motion and the Fifth Amendment motion were separate issues, Judge Lehrburger asked Donziger's counsel at least four times to respond to the substance of Chevron's waiver argument.[73] Donziger's counsel evaded these questions.[74] After Chevron's counsel advanced its argument that Donziger had waived his Fifth Amendment privilege by submitting the declarations alleging his compliance with paragraph 4,[75] Judge Lehrburger again pressed Donziger's counsel to address the argument.[76] He again declined to do so.[77]

Judge Lehrburger ruled from the bench that Donziger had waived his Fifth Amendment privilege against self-incrimination by submitting his three

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72 *Id.* at 6:14-23; *see also id.* at 6:20-22 ("THE COURT: You are a criminal defense attorney. You ought to be able to theorize on this. MR. FRISCH: I'm a tired criminal defense attorney.").

73 *Id.* at 3:3-12, 5:12-6:1,7:9-12,7:22-8:2.

74 *See id.*

75 *Id.* at 10:10-20:4.

76 *Id.* at 20:9-23:6.

77 *Id.*

declarations.[78] He thus left Donziger with a choice: he could testify at the purge hearing, he could invoke the Fifth Amendment and incur whatever consequences might arise, or he could forgo testifying, in which case his three declarations about his alleged compliance with Protocol paragraph 4 would be stricken.[79] He unambiguously did not require Donziger to testify.

Donziger did not object to Judge Lehrburger's order, in accordance with Federal Rule of Civil Procedure 72 or otherwise.[80]

The Purge Hearing Commences

With the Fifth Amendment issue resolved, the purge hearing began. Magistrate Judge Lehrburger heard direct testimony from a Chevron expert witness whose presence Donziger previously had requested for the hearing.[81] He reserved to

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78 *Id.* at 26:9-17.

79 *Id.* at 26:18-25; *see also* Minute Entry (Dec. 12, 2019), 11-cv-691 (S.D.N.Y.).

80 FED. R. CIV. P. 72(a) (requiring that parties must raise to the district court any objections to a magistrate's order on a nondispositive matter within 14 days).

81 Dkt. 2442 at 27:22-80:8.

Donziger the ability to cross-examine at a later date.[82]

* * *

On February 6, 2020 – nearly two months after the district court denied his stay application, and just twenty days before the resumption of the long delayed purge hearing, Donziger filed this petition for a writ directing the district court to stay the purge hearing until the conclusion of his criminal trial.[83]

Discussion

I. The Petition Lacks Merit

The premise of the mandamus petition is that Donziger's Fifth Amendment rights would be prejudiced if he were required to give testimony at a contempt hearing on matters that "overlap" with those raised by his criminal prosecution. But the hearing before Judge Lehrburger is to determine whether Donziger has *purged* himself of civil contempt. It is not, as the petition misleadingly and repeatedly claims, a "hearing on [a] civil contempt charge" or a "civil contempt hearing." Donziger is not required to testify at the purge hearing. There is no overlap

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82 *Id.*

83 No. 20-264 (2d Cir. filed Feb. 6, 2020), Dkt. 1.

between the subjects of the purge hearing and the criminal prosecution. And even if there were the substantial overlap necessary for a stay, Donziger waived any Fifth Amendment privilege he may have had in two distinct ways.

A. Legal Standard

"Mandamus is 'a drastic and extraordinary remedy reserved for really extraordinary causes.'"[84] This Court will "issue the writ only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'"[85] "To obtain mandamus relief, a petitioner must show that (1) it has 'no other adequate means to attain the relief [it] desires,' (2) 'the writ is appropriate under the circumstances,' and (3) 'the right to issuance of the writ is clear and indisputable.'"[86]

Yet the burden Donziger faces here is substantially higher. He seeks the "extraordinary remedy" of mandamus to obtain what this Court considers also to be

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84 *In re Dep't of Commerce*, No. 18-2652, 2018 WL 6006904, at *1 (quoting *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013)).

85 *Id.* (quoting *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d at 35).

86 *Id.* (quoting *In re Roman Catholic Diocese*, 745 F.3d at 35).

an "extraordinary remedy": a stay of a piece of a civil proceeding pending the resolution of a related criminal prosecution.[87]

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[88] Where a criminal defendant seeks to stay a related civil proceeding, the relevant inquiry is "the extent to which continuing the civil proceeding would unduly burden [the] defendant's exercise of his rights under the Fifth Amendment."[89] This Court has acknowledged a risk that defendants who testify in their defense at a civil hearing may make "admissions of criminal conduct" that harm them in their prosecution.[90] "Despite these factors, such a stay of a civil case to permit conclusion of a related criminal prosecution has been characterized as an extraordinary remedy."[91] "[T]he Constitution rarely, if ever,

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87 *Malletier*, 676 F.3d at 98.

88 *Id.*

89 *Id.* at 97.

90 *Id.* at 98 (citation omitted).

91 *Id.* (citation, quotation marks, and brackets omitted).

requires such a stay."[92] Because "[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege," "[t]he existence of a civil defendant's Fifth Amendment right arising out of a related criminal proceeding . . . does not strip the court in the civil action of its broad discretion to manage its docket."[93]

A district court's decision to grant or deny a stay in this context "must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case."[94] Even on direct appeal – without the substantially higher burden of obtaining mandamus relief – this Court's "role is only to assure that the district court's exercise of discretion was reasonable and in accordance with the law."[95] Thus, a defendant must show that the denial of a stay "vitiates [his or her]

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92 *Id.* (emphasis in original).

93 *Id.* at 98-99 (citation and quotation marks omitted).

94 *Id.* at 99 (citation omitted). The petition suggests that a six-factor balancing test that some district courts in this circuit have applied is the controlling law. But this Court expressly rejected that view in *Malletier*. *Id.* (referring to the factors "as a rough guide" rather than "mechanical devices . . . replacing the district court's studied judgment . . . based on the particular facts before it," and noting that on direct appeal, the factors are "little more than . . . something of a check list").

95 *Id.* at 100.

constitutional rights or otherwise gravely and unnecessarily prejudices [his or her] ability to defend his or her rights."[96] "[T]he more common case," where "the Fifth Amendment privilege is implicated by the denial of the stay, but not abrogated by it," does not warrant reversal even on direct appeal,[97] let alone the issuance of mandamus. "Indeed, so heavy is the defendant's burden in overcoming a district court's decision to refrain from entering a stay that the defendants have pointed to only one case in which a district court's decision to deny a stay was reversed on appeal, and that case was decided more than thirty years ago."[98]

B. The Denial of the Motion to Stay Was Not an Abuse of Discretion, Much Less a "Clear and Indisputable" Abuse

Faced with the burden of persuading the Court to issue an extraordinary writ for what ordinarily is an "extraordinary remedy,"[99] the petition barely advances an argument. Its core claim is that the purge hearing places Donziger's Fifth Amendment privilege in jeopardy because of a wholly unexplained "overlap"

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96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 98 (citation, quotation marks, and brackets omitted).

between "constituent issues"[100] – none of which it identifies – that it assumes will arise both in the criminal contempt trial and the purge hearing.[101] As Donziger bears the burden of persuasion on a mandamus petition, his failure to explain that overlap is fatal to his argument. So too are the facts.

1. The Lack of Overlap Between the Purge Hearing and the Criminal Prosecution

There are twelve paragraphs of the Protocol, of which only paragraphs 4 and 5 are at issue here. The question raised by the purge hearing is whether, after May 28, 2019, Donziger brought himself into compliance with paragraph 4 as he asserted in his three declarations.[102]

How do the issues in the purge hearing, as the petition claims, "overlap" with the criminal contempt charges? The petition does not say.[103] Rather, it simply

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100 Pet. 11.

101 *Id.* at 13.

102 A-72.

103 Moreover, Donziger and his counsel repeatedly declined to answer this question below. Dkt. 2419 at 6:20-22 ("THE COURT: You are a criminal defense attorney. You ought to be able to theorize on this. MR. FRISCH: I'm a tired criminal defense attorney."); A-66.

asserts that "it is hard even to hypothesize how Mr. Donziger's direct and/or cross examination at the civil contempt hearing will not risk irreparable prejudice to [him] in the criminal case."[104]

Far from "hypothesiz[ing]," the district court explained in significant detail why "[t]here is no relevant relationship between the [purge] hearing and [the] two counts" of criminal contempt arising from violations of the Protocol.[105] While the purge hearing involves paragraph 4 in the sense that Donziger went into civil contempt in the first place by deliberately violating it, a *purge* hearing by its very nature concerns compliance or non-compliance *after* the conduct giving rise to the contempt adjudication has concluded. That is not at issue in the criminal contempt proceeding for the simple reason that "the crime of criminal contempt is completed at the first moment the contemnor violated the order in question, and that is so regardless of any subsequent compliance."[106] Accordingly, Donziger's testimony at the purge hearing – if he chooses to testify – would concern only his subsequent

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104 *Id.* at 11-12.

105 A-73; *see id.* at 72-75 (setting out facts and findings in support of this conclusion).

106 *Id.* (citing *United States v. Marquardo*, 149 F.3d 36 (1st Cir. 1998)).

alleged *compliance* with paragraph 4.[107] Even setting aside the fact that Donziger waived his Fifth Amendment privilege, *see infra*, there is no risk that he would make "admissions of criminal conduct" that could affect his prosecution.[108]

This is particularly so because Donziger informed the court and Chevron on several occasions that he was *not* in compliance with paragraph 4 prior to May 29, 2019. In a letter to the forensic expert, he noted: "I clearly have stated that I will voluntarily go into civil contempt of the legally unfounded orders in order to obtain proper appellate review."[109] Elsewhere, in response to the motion to hold him in

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107 Judge Lehrburger made the same finding on several occasions. *See* A-58 ("[T]he only issue to be addressed in the hearing – whether Donziger has purged his contempt for non-compliance with Paragraph 4 since filing of his declaration on May 29, 2019, is a different question than whether Donziger is to be held in criminal contempt for his non-compliance prior to May 29, 2019."); Dkt. 2442 at 5:17-25 ("You are not giving away free stuff, so to speak, if there isn't sufficient overlap in what the issues are. And to be clear, and I think as Judge Kaplan's made clear, the understanding is that what is at issue in the criminal proceeding is conduct on or before May 23, with respect to Paragraph 4 of the forensic protocol, and what is in issue in the civil contempt proceeding is whether Mr. Donziger has come into compliance with Paragraph 4 since that time. And therefore, they are two separate issues.").

108 *Malletier*, 676 F.3d at 98 (citation omitted).

109 Dkt. 2173-1 (Donziger letter to Neutral Forensic Expert dated Mar. 11, 2019).

contempt for his violations of the Protocol, Donziger stated: "it is my intention to go into voluntary contempt as a matter of principle."[110] In light of his own admissions – and indeed, his invitation for a contempt finding – Donziger cannot seriously dispute that he violated paragraphs 4 and 5 of the Protocol.

2. Donziger's Repeated Delays

Although the complete lack of overlap between the civil and criminal issues is dispositive, it was not the only factor the district court relied on in denying the stay. The court considered also that Donziger repeatedly has delayed the proceedings below by "refus[ing] to discharge his obligations" under discovery orders dating back to April 2018 and the Protocol, which was issued in March 2019.[111] The purge hearing, originally scheduled for June 10, 2019, has been delayed numerous times and by over nine months.[112] As this Court has explained, a district court appropriately may weigh a party's "insistence that the civil proceedings be stayed as part of a larger pattern of overall delay and obfuscation" in its decision to deny a

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110 Dkt. 2184.

111 A-74.

112 This count does not include this Court's most recent stay.

stay.[113] That is exactly what happened here, and the extensive record detailed above makes that delay tactic plain.

* * *

The petition fails to confront the district court's denial of the stay motion with factual or legal arguments. And far from explaining why the denial of a stay "amount[s] to a judicial usurpation of power or a clear abuse of discretion,"[114] it does not make even a cursory case that Donziger was entitled to a stay in the first instance. He is not entitled to a writ of mandamus.

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113 *Malletier*, 676 F.3d at 102.

This is only the tip of the iceberg. The underlying judgment in this case was issued in 2014 and affirmed by this Court in 2016. Donziger repeatedly has disobeyed it and "largely has stonewalled Chevron's efforts" to enforce it. A-70. His delay tactics and refusals to comply with the judgment and court orders led in part to the underlying civil and criminal contempt charges. *Id.* Moreover, his obstructions in the pretrial proceedings and related matters were extraordinary. *See, e.g.*, *Chevron Corp. v. Donziger*, 296 F.R.D. 168 (S.D.N.Y. 2013); Special Masters' Final Report and Recommendation 6-12, Dkt. 1942; Memorandum re Forensic Inspection Protocol, *passim*, Dkt. 2171.

114 *Id.*

C. *There Is No Risk of Any Cognizable Injury if the Purge Hearing Goes Ahead Because Donziger Surrendered Any Fifth Amendment Privilege*

There is another, equally fatal defect in the petition. If there is no risk to Donziger's Fifth Amendment privilege, there is no basis for a stay. The petition presumes that Donziger has preserved the privilege and, thus, could assert it at the purge hearing. That is wrong for two reasons.

1. Donziger Waived Review of the Magistrate Judge's Order

Under Federal Rule of Civil Procedure 72(a), "[w]hen a pretrial matter not disputative of a party's claim or defense is referred to a magistrate judge" and the magistrate rules on that issue, the party has 14 days within which to file any objections to the magistrate's order.[115] "A party may not assign as error a defect in the order not timely objected to."[116] Even where "a *pro se* litigant fails to object timely to a magistrate's order on a non-dispositive matter," the litigant "waives the right to appellate review of that order, even absent express notice from the magistrate judge that failure to object within ten [now fourteen[117]] days will preclude appellate

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115 FED. R. CIV. P. 72(a).

116 *Id.*

117 *See id.*, 2009 Adv. Comm. Note.

review."[118]

As detailed above, Judge Lehrburger ruled on December 12, 2019, at the conclusion of oral argument, that Donziger "waived his right to invoke the Fifth Amendment as it pertains to his compliance with [p]aragraph 4"[119] "because he already has relied on his testimony to demonstrate his compliance with [p]aragraph 4 . . . at least three times" in his sworn declarations.[120] Donziger did not object to Judge Lehrburger's order,[121] and the 14 day deadline has long since passed. The petition in fact concedes that "on December 12, 2019, . . . Magistrate Judge Lehrburger granted Chevron's motion *in limine* to preclude Mr. Donziger from asserting his Fifth Amendment rights."[122] Donziger therefore is precluded from arguing that his Fifth Amendment rights would be implicated by the purge hearing.

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118 *Caidor*, 517 F.3d at 605.

119 Dkt. 2442 at 26:4-6.

120 *Id.* at 26:15-17.

121 Although Judge Lehrburger ruled from the bench before docketing a minute entry, Rule 72 applies to oral orders. *See, e.g.*, *Samad Bros. v. Bokara Rug Co.*, No. 09-cv-5843 (JFK), 2011 WL 4357188, at *3 (S.D.N.Y. Sept. 19, 2011).

122 Pet. 8.

There accordingly is no risk that the purge hearing will implicate rights that he has waived.

Donziger cannot seriously dispute that Rule 72 forecloses his Fifth Amendment claim. Nor can he argue that his tactical decision not to address the substance of Chevron's motion *in limine* somehow makes this outcome unfair. He had a full and fair opportunity to file a response to Chevron's motion and chose not to.[123] Although the stay motion he filed instead requested as alternative relief "an opportunity . . . to address the substance of Chevron's motion,"[124] Donziger already had had that opportunity – the same two weeks that every other litigant has to respond to a motion. He did not ask for an extension of time or claim that he had been unable to file a timely response to Chevron's motion.[125]

Moreover, the court *did* give Donziger more time to respond in that it referred the *in limine* motion to Judge Lehrburger. Nine days later, at the December 12, 2019 hearing, Judge Lehrburger pressed Donziger's counsel *five times* to respond

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123 Dkt. 2405 at 3 (noting that the December 3, 2019 stay motion, filed on the deadline for his response, was not "a substantive response to Chevron's motion").

124 *Id.* at 3.

125 *See id.*; *see also* A-76 n.16 (so concluding).

to Chevron's argument that Donziger had waived his Fifth Amendment privilege by submitting the three declarations. Each time, he declined to do so.

2. The Magistrate Correctly Held that Donziger Waived His Fifth Amendment Privilege

In any case, Judge Lehrburger was correct, and certainly did not abuse his discretion, in holding that Donziger waived his Fifth Amendment privilege by his submission of three declarations asserting that he was in compliance with paragraph 4 of the Protocol – the sole topic of the purge hearing.

On May 29, 2019, Donziger declared under penalty of perjury that he complied with paragraph 4 on that date.[126] Then, on June 3, 2019, Donziger submitted to Chevron a sworn declaration in which he purported to disclose, in compliance with paragraph 4, a list of his computers, phones, hard drives, flash drives, email accounts, and online accounts.[127] Finally, on June 25, 2019, Donziger filed another declaration in which he described what he called his "attempt in good faith to comply with Paragraph 4."[128]

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126 Dkt. 2217.

127 Dkt. 2230-2.

128 Dkt. 2250-2.

Donziger has no right to invoke the privilege against self-incrimination to avoid cross-examination on subjects as to which he already has given extensive testimony under oath by way of declarations. And as noted above, Donziger is *not* required to testify. Judge Lehrburger held simply that if Donziger does not take the stand, he will not be permitted to rely on his declarations because permitting him to do so without being subject to cross-examination would amount to using the Fifth Amendment as a sword and a shield.

Moreover, it is important to bear in mind that this is a *purge* hearing, not a hearing to determine whether Donziger violated paragraph 4.[129] Hence, a ruling adverse to Donziger with respect to his compliance with paragraph 4 would not foreclose him from later seeking to prove by new and fuller evidence of compliance that he had purged this contempt. Were he to prevail in doing so, any coercive civil contempt sanctions then in effect, to the extent any were uniquely referable to contempt of paragraph 4, would end.

The petition makes no attempt to meet its burden of persuading this Court that the magistrate judge abused his discretion by finding that Donziger waived his Fifth Amendment rights. In fact, aside from a passing mention (and concession)

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[129] *See also Chevron Corp. v. Donziger*, 384 F. Supp. 3d 465, 506 (S.D.N.Y. 2019).

that Judge Lehrburger resolved this issue,[130] the petition does not discuss or take issue with Judge Lehrburger's decision at all.[131] Thus, the denial of the motion to stay the hearing proves to be harmless even if it were incorrect.

In sum, and for two independent reasons, Donziger has no Fifth Amendment privilege to assert at the purge hearing. There is thus no risk to his constitutional rights, regardless of any claimed overlap between the civil and criminal proceedings. The petition should be denied.

II. The Contempt Power Was Employed Properly

Donziger accuses the undersigned, who invoked his authority under Rule 42 to charge Donziger with criminal contempt, of "*de facto* disqualif[ying] himself in the criminal case by arranging for Judge Preska to preside over it, exceed[ing] his authority, abus[ing] his contempt power and violat[ing] due process and fundamental fairness by declining to stay or further adjourn a related civil contempt hearing until

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130 Pet. 8 ("Magistrate Judge Lehrburger granted Chevron's motion *in limine* to preclude Mr. Donziger from asserting his Fifth Amendment rights.").

131 This is a separate ground for finding that any challenge to Judge Lehrburger's decision is waived. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

resolution of the criminal case and making rulings in the civil case that risked irreparable prejudice to Mr. Donziger in the criminal case."[132] The petition elsewhere claims that "Judge Kaplan is making rulings in Mr. Donziger's criminal case ,"[133] that "Judge Kaplan served as the *de facto* United States Attorney and grand jury in the criminal case,"[134] and that the district court somehow wrongfully "appointed Mr. Donziger's trial prosecutor and arranged for his trial judge," thus supposedly bypassing "the Southern District's protocols for random assignment."[135]

None of that hyperbolic rhetoric has any proper bearing on whether mandamus should issue to delay the purge hearing even further. Moreover, these assertions presuppose serious misunderstandings of the law governing contempt proceedings and, in at least one significant respect, misrepresent the facts.

A. The Commencement of the Criminal Contempt Proceeding

As noted, the petition presupposes that criminal contempt proceedings

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[132] Pet. 5.

[133] *Id.*

[134] *Id.*

[135] *Id*. at 4-6.

must be commenced by indictment and prosecuted by the U.S. Attorney. It is flatly wrong in both respects.

There are two kinds of criminal contempt. Those committed in the presence of the court may be punished summarily by the presiding judge. Others, such as those relevant here, involve principally disobedience of court orders outside the court's presence. As the Supreme Court repeatedly has made clear, "courts possess inherent authority to initiate contempt proceedings for disobedience to their orders."[136]

"Rule 42," which governs contempt proceedings, "does not call for an indictment or information."[137] The relevant portion of Rule 42 provides:

> "(a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution *on notice*.
>
> > "(1) Notice. *The court must give the person notice* in open court, *in an order to show cause*, or in an arrest order. * * *
> >
> > "(2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. *If the government declines the request, the court must appoint another attorney to prosecute the contempt.*

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136 *Young*, 481 U.S. at 793; *see, e.g.*, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

137 *E.g.*, *United States v. De Simone*, 267 F.2d 741, 743 (2d Cir. 1959).

> "(3) Trial and Disposition. * * * If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment."[138]

The district court followed Rule 42(a) to the letter. It tendered the prosecution to the U.S. Attorney.[139] It gave the notice required by Rule 42(a)(1) by issuing an order to show cause.[140] When the government "respectfully decline[d] [prosecution] on the ground that the matter would require resources that we do not readily have available," the court appointed outside attorneys to prosecute the case, as Rule 42(a)(2) *required*. The suggestions that the district court usurped the functions of the prosecutor or the grand jury or erred in appointing outside counsel to prosecute once the U.S. Attorney declined are frivolous.

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138 FED. R. CRIM. P. 42(a) (emphasis added).

139 A-56.

140 *Id.* at 46-55.

B. The Assignment of the Criminal Contempt Charges

1. The Southern District Rules

Meritless too is the claim that the district court bypassed what the petition describes as "the Southern District's protocols for random assignment" in directing that the trial of the criminal contempt charges proceed before another judge.

As an initial matter, there is no "Southern District protocol[] for random assignment of criminal contempt cases" like this one. The assignment provision of Southern District Rules for the Division of Business Among District Judges ("RDB") applies only to criminal cases initiated by indictment or information,[141] a fact ignored by the petition, which does not even cite it. As these criminal contempt charges were initiated by notice, the RDB did not apply.

This is not an unintended consequence of the RDB. In fact, the RDB track Rule 42. They specifically permit commencement of criminal contempt prosecutions by any appropriate form of notice and contemplate that those prosecutions ordinarily will proceed in front of the judge before whom the allegedly

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[141] RDB 6(b) ("In a criminal case, after *an indictment* has been returned by the Grand Jury or a notice has been filed by the United States Attorney's Office of an intention to file *an information* upon the defendant's waiver of indictment, the magistrate judge on duty will randomly draw from the criminal wheel, in open court, the name of a judge to whom the case should be assigned for all purposes." (emphases added)).

contumacious behavior occurred.[142]

All this aside, the RDB vest no rights in litigants – they are for internal management only.[143] As this Court has held, that fact alone dooms this aspect of the petition. Arguments "premised on violations of the [RDB], which expressly state that they 'shall not be deemed to vest any rights in litigants or their attorneys,'" are legally baseless.[144]

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142 *See* FED. R. CIV. P. 42(a)(1).

143 S.D.N.Y. LOC. R. at 101 ("[The RDB] are adopted for the internal management of the case load of the court and shall not be deemed to vest any rights in litigants or their attorneys . . . .").

The fact that there is nothing to Donziger's claim regarding the Southern District assignment procedures is confirmed by *United States v. Brennerman*, No. 17-cr-155, 15-cv-0070, 2017 WL 3421397 (S.D.N.Y. Aug. 8, 2017). That defendant was charged – by the government's filing of a petition and notice in a civil case in which the defendant allegedly disobeyed orders to produce discovery in post-judgment proceedings – with criminal contempt. The defendant sought to avoid trial of the criminal contempt before the judge whose orders had been violated. He asked the Assignment Committee of the Southern District to reassign the case at random under RDB 6(b) on the theory that the case should have been instituted by the filing of an independent criminal case. The Assignment Committee denied the application. *Id.* at *5.

144 *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 634 (2d Cir. 2016).

2. Assignment of the Trial Judge

Nor is there any mystery regarding the assignment of Judge Preska to try the contempt charges. Rule 14 of the RDB provides, with an exception not relevant here, that "[a]ny judge, upon written advice to the assignment committee, may transfer directly any case or any part of any case on that judge's docket to any consenting judge." That is exactly what transpired here when Judge Preska graciously agreed to relieve the undersigned of his duty to try the contempt charges.

C. The Remaining Claims Are Baseless

Finally, the petition claims that the undersigned's invocation of Rule 42 resulted in his "*de facto* recusal" in the criminal contempt case but that he nevertheless has been making "rulings" in the criminal case. The suggestion is that he should not have done so because of that supposed "*de facto*" recusal. The short answer is that the argument is entirely academic because the petition cites to no rulings by the undersigned in the criminal contempt case beyond the issuance of the charging order to show cause and his required appointment of prosecuting counsel – and there have been none. And the *de facto* recusal argument in any case is wrong.

As an initial matter, Rule 42, which governs trial of criminal contempt cases, disqualifies an initiating judge in only one circumstance – at the contempt trial

or hearing for a defendant whose alleged "criminal contempt involves disrespect toward or criticism of [that] judge."[145] Alleged failure to comply with a court order – whether an order requiring a party to testify or comply with discovery requests or an injunction, the bases for this criminal contempt proceeding – does not involve the disrespect or criticism of a judge contemplated by Rule 42(a)(3). District judges "routine[ly]" oversee criminal contempt trials disobedience of their own orders.[146] None of the contempts charged in this case comes within the disqualification provision of Rule 42(a)(3). There are two counts of disobedience of the Protocol, one of disobedience of the Passport Order, and three of disobedience of provisions of the RICO judgment. None involves disrespect toward or criticism of the judge. And this is confirmed by the case law.

In *Nilva v. United States*,[147] the petitioner was convicted of criminal contempt for wilfully disobeying a court order to produce certain subpoenaed

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145 Fed. R. Crim. P. 42(a)(3). The petition does not rely on 28 U.S.C. § 455. The district court nevertheless has concluded in a memorandum and order of even date that nothing in Donziger's petition warrants recusal under that statute.

146 *Goldfine v. United States*, 268 F.2d 941, 947 (1st Cir. 1959). On occasion, some judges opt to have such trials handled by colleagues, as occurred here.

147 352 U.S. 385 (1957).

corporate records. The petitioner argued on appeal that the "contempt proceeding should have been heard by a judge other than the one who initiated the proceeding."[148] The Supreme Court disagreed. It held that the contempt at issue "was not of th[e] kind" requiring disqualification per Rule 42 and that the petitioner had not shown that the trial judge abused his discretion in presiding over the case.[149]

In *United States v. Berardelli*,[150] the defendant disobeyed a trial judge's order to testify pursuant to a grant of immunity. The trial judge initiated a criminal contempt prosecution by order to show cause and tried the case himself. The defendant challenged the resulting contempt conviction on appeal, arguing, among other things, that the trial judge should have recused himself under Rule 42. But this Court affirmed, holding that "[t]he contempt charged did not involve 'disrespect to or criticism of a judge,' calling for disqualification under Fed. R. Crim. P. 42."[151]

Similarly, in *Goldfine v. United States*,[152] the defendants were convicted

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148 *Id.* at 395.

149 *Id.* at 395-96.

150 565 F.2d 24 (2d Cir. 1977).

151 *Id.* at 30.

152 268 F.2d 941 (1st Cir. 1959).

of criminal contempt for wilfully disobeying a court order requiring them to produce certain records to their litigation adversary, the Internal Revenue Service. They argued that the district judge should have been disqualified from presiding over the contempt hearing because he "issued the . . . order alleged to have been disregarded."[153] The First Circuit rejected the notion that violation of a court order to produce documents to an adversary – much the same alleged contumacious conduct with which Donziger is charged – fell within Rule 42's mandatory disqualification provision.[154] As noted above, the court wrote also that district judges "routine[ly]" oversee criminal contempt trials involving their own orders.[155]

Finally, it is worth noting that the presiding judge in *People of State of New York by Abrams v. Operation Rescue National*,[156] the late Robert J. Ward, initiated criminal contempt proceedings against an individual for disobeying a preliminary injunction that Judge Ward had issued. The defendant moved to recuse

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153 *Id.* at 947.

154 *See id.*

155 *Id.*

156 No. 92-cv-4884 (RJW) (S.D.N.Y.).

Judge Ward, but the judge denied the motion.[157] The defendant sought mandamus, evidently unsuccessfully.[158] He then was convicted in a bench trial before Judge Ward, and the conviction was affirmed by the this Court.[159] There was no recusal, *de jure* or *de facto*.[160]

Conclusion

Steven Donziger appropriately was served with post-judgment discovery requests in April 2018. He has stonewalled that discovery for nearly two years by disobeying court orders. Not even a civil contempt adjudication and the imposition

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157 *United States v. Terry*, 802 F. Supp. 1094, 1097-1100 (S.D.N.Y. 1992).

158 Order, *United States v. Terry*, No. 92 Cr. Misc. #1 Pg. 46, Dkt. 19 (S.D.N.Y. filed Oct. 14, 1992). Although the undersigned has been unable to locate any record of the Circuit's disposition of the petition, the fact that Judge Ward tried the case indicates that the petition either was withdrawn or denied.

159 *Id.*, 17 F.3d 575 (2d Cir.), *cert. denied*, 513 U.S. 946 (1994).

160 The only case cited by Donziger in support of his *de facto* recusal argument is *In re Cutler*, 58 F.3d 825 (2d Cir. 1995). But that case does not support his contention that a judge who initiates a criminal contempt proceeding is disqualified from trying or, indeed, acting further in that proceeding. There, Judge Glasser initiated the criminal contempt proceeding and elected, without explanation, not to try it. The case then was tried by another Eastern District judge. Joint Appendix, *United States v. Cutler*, No. 94-1382, A-170 (2d Cir. filed Sept. 13, 1994).

of coercive remedies secured his compliance.

In July 2019 – after over a year of exhausting virtually all alternatives – the district court finally charged Donziger with criminal contempt. It did so understanding that Donziger claimed in various ways and at various times that some of his contempts were intended to obtain appellate review of certain rulings. But disputing the correctness of a district court order compelling discovery does not excuse compliance absent a stay, even when an appeal is noticed. The reason is simple: disobeying court orders is impermissible in a society that aspires to live by the rule of law.

The petition is entirely without merit. It should be denied.

Dated: March 11, 2020

Corrected: March 12, 2020

HONORABLE LEWIS A. KAPLAN
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007
(212) 805-0216