I. INTRODUCTION

The application of collateral estoppel to deny New York attorney Steven R. Donziger the right to contest the civil RICO findings of the Honorable Lewis A. Kaplan in the context of attorney discipline is wrong as a matter of basic fairness.

It also violates established precedent of the New York Court of Appeals admonishing courts not to apply the doctrine “mechanically,”¹ as the First Department Attorney Grievance Committee (“Committee”) urges here, but rather only where a “practical inquiry into the realities of the [purportedly preclusive]

litigation” leaves no room for doubt that the prior proceeding was fully and fairly litigated in all respects.

In this matter, there is ample – indeed, overwhelming – doubt that the RICO findings that the Committee now relies on to try to impose the draconian punishment of immediate suspension on Mr. Donziger are correct. In fact, there is overwhelming evidence of exactly the opposite: that Judge Kaplan’s core RICO findings – those concerning supposed “judicial bribery” and “ghostwriting” related to the Ecuador judgment -- are the product of fraud and corruption carried out by Chevron’s legal and investigative team via paid-for and false witness testimony presented to a federal court. It is simply wrong that the Grievance Committee (“Committee”) wishes to execute its strategy without as much as providing a hearing to consider indisputable evidence that the district court relied for its findings on demonstrably false testimony from an admittedly corrupt Chevron

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3 Metevier v. CARR Properties, Inc., No. 15 CIV. 3039 (ER), 2016 WL 5793742, at *4 (S.D.N.Y. Sept. 30, 2016) (“Under New York Law, there is no formulaic test for determining whether a litigant had a full and fair opportunity to litigate in a prior proceeding. To the contrary, the analysis is fluid, rooted in fairness, and turns on the specific facts and characteristics of each case. ‘The basic concern is one of fairness,’ and ‘in testing the fairness of the earlier litigation, all circumstances must be evaluated.’”) (quoting Pack v. Artuz, 348 F. Supp. 2d 63, 75 (S.D.N.Y. 2004)).

4 For a comprehensive summary of evidence that Chevron officials and certain of its lawyers conspired to present false evidence in the RICO proceeding to taint both the Ecuador judgment and the reputation of the Respondent Mr. Donziger, see the referral letter and accompanying materials sent to the United States Department of Justice and certain U.S. Attorneys. This is available at http://chevron toxico.com/assets/docs/2017-11-09-ade-doj-letter.pdf.
witness coached at least 53 days by company lawyers before being allowed to take the stand. There also is highly disturbing evidence that throughout the RICO proceeding Judge Kaplan abandoned his own ethical duties to serve as a neutral arbiter and made almost every conceivable effort to assist one of the world’s most powerful oil companies use its massive war chest to turn our nation’s civil justice system into a weapon to attack solo practitioner Donziger, with the ultimate aim of distracting attention from human rights abuses committed by the company against indigenous groups in the rainforest for which Mr. Donziger had played a leading role in holding it legally accountable. This accountability of Chevron earned by Donziger and the indigenous peoples and farmer communities of Ecuador was anything but superficial. It came in the form of a scientifically-justified $9.5 billion judgment based on voluminous evidence that has been affirmed unanimously by the highest court of the sovereign nation (Ecuador) where Chevron had insisted the trial be held and in the jurisdiction where the company had operated -- and won various civil cases in local courts -- for decades. Fairness demands that an attorney with an otherwise impeccable disciplinary record in 25 years of practice be given the opportunity to present new evidence not available to the district court and other critical evidence excluded from the prior litigation before being precluded by findings that he has consistently maintained are erroneous and that emerged from a proceeding with numerous troubling features.
Mr. Donziger is prepared to demonstrate with competent and compelling evidence that in the *Chevron v. Donziger* RICO lawsuit at issue here (“RICO proceeding”), Judge Kaplan not only made serious mistakes with his core findings but that *all of his findings* cited by the Committee are either erroneous, distorted, or so removed from their foreign law context that they do not constitute an appropriate basis for attorney discipline, much less by way of collateral estoppel. Mr. Donziger can and will show that prior determinations on the same and similar issues by courts in Ecuador including the country’s Supreme Court, and subsequent determinations by courts in Canada including by that country’s Supreme Court, each relying on a far fuller evidentiary record, have *unanimously* reached *entirely opposite* conclusions than those put forth by Judge Kaplan. He also can show that the evidentiary scope of the RICO proceeding was severely truncated to serve Chevron’s interests, crippling Mr. Donziger’s ability to fully and fairly defend the allegations. For that reason alone, this matter is also inappropriate for the application of collateral estoppel.

And of course, Mr. Donziger can and must be allowed to litigate the implications of the numerous disturbing features of the RICO proceeding itself. These include Judge Kaplan’s decision to accept evidence from the corrupt witness to whom Chevron paid at least $2 million in cash and benefits. The witness, Alberto Guerra, later admitted that he had repeatedly lied under oath in the RICO
case as part of Chevron’s campaign to (in its own words) “demonize” Mr. Donziger with the taint of mobster-like criminal wrongdoing without affording him a jury of impartial fact finders or any of the other panoply of due process protections our society normally provides in a true criminal case. Guerra’s admittedly false testimony lies at the very heart of the RICO judgment and infects the validity of the entire set of findings that the Committee now tries to cite as a basis for discipline.

The Committee’s petition also is silent regarding the larger context of this case and its horrifying resource disparity. Chevron is a powerful oil company that has grossed more than $1 trillion from operations in over 100 countries since the inception of the RICO matter in 2011. Each member of the Ecuadorian indigenous groups and farmer communities who are the ultimate targets of Chevron’s judgment-evasion campaign live in a small area of Amazon rainforest and are lucky to make $100 per month – and that assumes a good harvest now made all the more difficult by soils and waterways poisoned with oil waste. Some of the Ecuadorian victims – many who have been clients of Mr. Donziger for 24 years -- suffer grievously from cancers, spontaneous miscarriages, and other health impacts due to constant exposure to toxic oil contamination left on their ancestral lands and spewed into the air they breathe and the water they drink. Chevron was found by courts in Ecuador to have deliberately dumped at least 15 billion gallons of oil
waste into rainforest streams and rivers as a cost-saving measure, leading to the
deaths of numerous vulnerable and impoverished indigenous persons and farmers.\textsuperscript{5} Significantly, Mr. Donziger is a solo practitioner of modest means who works out of his apartment in New York City. Chevron has used no fewer than 60 law firms, 2,000 lawyers and other legal personnel, 150 investigators, and six public relations firms to target Mr. Donziger personally as part of its avowed “demonization” campaign. The acute resource disparity between a solo practitioner and a huge oil company which deployed a veritable army of sophisticated lawyers is critical to appreciating the “practical realities” of the RICO proceeding that Committee seeks to rely on for preclusion.

The Committee clearly hopes that all these problems and complications and many more besides can be swept under the rug with the broom of collateral estoppel. The Committee is well aware of the evidence challenging the accuracy of the RICO Judgment findings, in part because this evidence was summarized in a 12-page letter to the Committee from Mr. Donziger sent over a year ago. In that

\textsuperscript{5} Deaths in Ecuador’s Amazon basin in the area where Chevron was found to have discharged billions of gallons of untreated oil waste are not hyperbole. Scientific studies published in peer-reviewed journals have documented high cancer rates in the impacted area. See, e.g., Exposures and cancer incidence near oil fields in the Amazon Basin of Ecuador, Occup. Environ. Med 58:517-522 (2001); Incidence of Childhood Leukemia and Oil Exploitation In the Amazon Basin of Ecuador, Int’l J. of Occupational and Env’il Health (July/Sept 2004); Geographical differences in cancer incidence in the Amazon Basin of Ecuador in relation to residence near oil fields, Int’l J. of Epidemiology (2002). Photos of some of Chevron’s victims have been documented by Lou Dematteis at Chevron Says These People Don’t Matter, Huffington Post, \url{https://www.huffingtonpost.com/lou-dematteis/chevron-ecuador_b_1421407.html}. 
letter, Mr. Donziger offered his full cooperation with the Committee’s inquiry.\(^6\) The Committee never took Mr. Donziger up on his offer to cooperate, never requested to interview him, nor even responded to his letter.\(^7\)

As reflected in the Committee’s own lassitude, Mr. Donziger cannot possibly be regarded as an “immediate threat[en] to the public” as the Committee now claims in what looks like a maneuver to use collateral estoppel to avoid the

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\(^6\) See Ex. 1.

\(^7\) The timing of the Committee’s conduct in this matter raises questions. The RICO Judgment purportedly claiming that Mr. Donziger committed felony predicate acts of extortion, obstruction of justice, money laundering, and more, issued in March 2014 or almost four years ago. The Committee did not contact Mr. Donziger to inquire about his supposed misconduct until well over two years later. The letter of inquiry was sent shortly after the Committee received what appears to be a vigorously partisan, arguably misleading, and even ethically questionable referral letter (for example, entirely ignoring any mention of the issue of the paid “fact” witness testimony and other problems with the RICO proceeding) from the Honorable P. Kevin Castel, a federal trial judge in the Southern District of New York and a close colleague of Judge Kaplan. See Ex. 2. Judge Castel’s referral letter (which also reflects a personal relationship with the Chief Attorney of the Committee, Jorge Dopico) urged the Committee to impose discipline on Mr. Donziger by invoking collateral estoppel. Only after Judge Castel sent his letter did the Committee (almost two months later) send Mr. Donziger a letter of inquiry and ultimately decide to proceed in exactly the manner prescribed by Judge Castel after having sat on its hands for years and after ignoring Mr. Donziger’s offer to cooperate. The Committee also decided to seek the most draconian punishment available and to have it imposed without a hearing.

The Castel letter appears to be part of an effort to try to vindicate the pro-Chevron findings of a colleague in a protean matter where other courts with arguably more evidence and more jurisdiction have ruled contrarily, and where (as described herein) courts in Canada and the Hague continue to litigate the same issues in the judgment enforcement context and the investor-state arbitration context. The ongoing litigations (given the large quantity of highly probative evidence that Judge Kaplan refused to consider) on the same issues run a high risk of producing judgments inconsistent with the one the Committee hopes to use to impose discipline on Mr. Donziger, as already has happened with Ecuador’s National Court of Justice and Canada’s Supreme Court. They also underscore why trying to impose discipline on an attorney during an ongoing litigation where the same facts are being reviewed by various courts with a far fuller evidentiary record poses serious risks and is not appropriate.
hard work of truly understanding the many complex factual and legal issues that must be addressed for a fair adjudication of this matter. Far from a “threat” to the public order, Mr. Donziger is well-regarded by his clients and colleagues around the world, both in and out of the legal profession.8 This court should not allow the Committee – at the behest of Judge Kaplan’s SDNY colleagues, who wrote an intemperate referral letter urging the application of collateral estoppel—to allow its disciplinary machinery to be used as part of Chevron’s unethical demonization and judgment-evasion campaign, with the active encouragement of SDNY judges who have a vested interest in buttressing the credibility of a colleague’s controversial decision and by extension the institutional credibility of their own court.

In sum, the application of collateral estoppel in this matter must be denied for the each of the following reasons:

- **No full and fair opportunity to be heard**: Mr. Donziger did not have a full and fair opportunity to present critical evidence of Chevron’s environmental contamination in Ecuador or otherwise defend himself in the district court, a central pre-requisite for the application of collateral estoppel. This was due to procedural and other restrictions

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8 The reality is that Mr. Donziger is not the lawyer Judge Kaplan tries to claim him to be via the use of the false, distorted, and/or stigmatizing findings that have been recycled by the Committee in its petition. In fact, Mr. Donziger has a wide reputation as a stalwart and effective human rights lawyer who helped to hold Chevron accountable for a large civil liability, thereby inviting the ire of a company which filed the civil RICO case as part of a larger demonization campaign designed to drive Mr. Donziger and others off the case so it could more easily evade paying the Ecuador judgment. For a biography outlining Mr. Donziger’s long history of serving marginalized communities as a human rights and social justice lawyer, see https://www.donzigerlaw.com/full-bio. For testimonials about Mr. Donziger from clients, colleagues, lawyers, and academics, see https://www.donzigerlaw.com/testimonials/.
put in place by Judge Kaplan who, as illustrated by his own words in the quotations set out below, sustained an intense animus and bias toward Mr. Donziger. See, e.g., Section II and III.E.

- **New evidence proves the RICO findings are erroneous**: Judge Kaplan’s core findings of felonious criminal conduct related to “judicial bribery” and “ghostwriting” have been proven false via forensic digital examination. This new evidence never was reviewed by either the district court or the appellate court that affirmed its decision. The appellate court refused to consider the evidence despite its submission by Mr. Donziger’s appellate counsel. All of Judge Kaplan’s findings have been rejected by courts in Ecuador and Canada with a more valid jurisdictional basis and far more evidence than was available in the RICO Proceeding.

- **Use of lesser standard of proof in the context of criminal act allegations**: The findings in the RICO Judgment of claimed felonious criminal conduct were made under a lesser standard of proof than would be required to prove the same conduct in the typical context of a criminal proceeding. This should counsel against the use of collateral estoppel in that it would strip away yet more process from the protection of one of the “interests of immense importance” behind the reasonable doubt standard of proof that is normally required for criminal allegations, namely the avoidance of stigmatization, which Mr. Donziger has suffered immensely here.

- **Contrary prior findings in other courts**: Courts in other jurisdictions, including the highest appellate courts in Ecuador and Canada, have unanimously issued findings that contradict the RICO Judgment findings.

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9 Mr. Donziger always has disputed the “facts” as found by Judge Kaplan both in court and in his public pronouncements, contrary to the Second Circuit’s disingenuous and inaccurate claim (recycled by the Committee) that the Kaplan findings were not disputed. This is illustrated, among countless other sources, by the opening 60 pages of Mr. Donziger’s appellate brief, see Ex. 7, and a detailed Public Rebuttal released several months ago, see Ex. 6. The Second Circuit panel never independently reviewed Judge Kaplan’s findings because Mr. Donziger’s appellate counsel, for valid and customary tactical reasons, sought reversal only on legal grounds. See Declaration of Deepak Gupta, Esq., dated Feb. 15, 2018, at ¶¶ 8-9 (“Gupta Decl.”).
• **Ongoing litigation on same factual issues**: Courts and arbitral bodies in other jurisdictions, including in Canada and the Hague (under the authority of the U.S.-Ecuador Bilateral Investment Treaty) continue (at the behest of Chevron) to litigate the *same issues* that form the core of the RICO Judgment findings, but on a vastly more complete evidentiary record with likely further findings inconsistent with those of Judge Kaplan.

II. **THE RICO PROCEEDING**

The use of collateral estoppel to eliminate nearly all process available to a respondent in an attorney grievance case is a highly controversial maneuver even in a factually simple, cut-and-dried case.\(^{10}\) The case at issue here—a massive, complex civil RICO case prosecuted by one of the world’s most powerful and litigiously “creative” corporations,\(^ {11}\) with the assistance of over 60 law firms,\(^ {12}\) at

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\(^{10}\) *See, e.g.*, Ex. 3, Amicus Curiae Brief of Non-Party the Committee on Professional Discipline of the Association of the Bar of the City of New York; *In re Dunn*, *supra* note 2.


\(^{12}\) Chevron’s outside counsel in the case was a team of over 100 litigators from the Gibson Dunn & Crutcher firm. This team was led by litigation partner Randy Mastro, the former Deputy Mayor of New York City under the administration of Rudolph Giuliani. Gibson Dunn has been dogged in recent years by a series severe ethics problems, with one court finding that Gibson Dunn engaged in “legal thuggery” while another found that it had framed an innocent man with false evidence of criminality. In 2010 and 2012, the American Lawyer magazine in a series of hagiographic articles celebrated Mastro’s team for its aggressive work on the RICO case (relying on detailed award application materials and interviews provided by Gibson Dunn itself). The revealing articles hailed Mastro’s team as “not just a law firm, but a rescue squad,” known for its “innovative” tactics and a “willingness to work beyond the courts.” *See* “The Complete Game,” The American Lawyer (2012), at https://www.gibsondunn.com/wp-content/uploads/documents/publications/GDC-LDOYLitigationWinner.pdf; David Bario, “Game Changers,” The American Lawyer (2010), at https://fortunedotcom.files.wordpress.com/2013/10/gibsondunn-anlawlitdeptoftheyear2010.pdf. In contrast, many courts have reacted sternly to ethical violations resulting from Gibson Dunn’s aggressive advocacy. *See, e.g.*, *Seltzer v. Morton*, 154 P.3d 561, 608-09 (Mont. 2007) (“GDC’s use of the judicial system amounts to legal
an expense estimated at $2 billion\textsuperscript{13}—could not be more unsuitable. It has been widely recognized as “an ingenious strategy to handle the mounting PR fiasco”\textsuperscript{14}: a collateral attack designed to “taint” a multi-billion dollar foreign environmental liability, framed as sensationalized corruption allegations against a solo practitioner and longtime human rights lawyer, and unapologetically seeking a “freestanding” determination of the “true facts” (as seen by a sympathetic New York judge) that the company would use (and has used) to try to hinder or shut down foreign enforcement actions on the environmental liability.\textsuperscript{15}

\begin{itemize}
\item See, e.g., Aaron Marr Page, “‘I Got It From the Beginning’: What Five Years of Vicious Retaliatory Litigation Gets Chevron,” Huffington Post, Oct. 9, 2014, at
\end{itemize}
From the beginning, the strategy has turned on demonizing and framing respondent Donziger as an unethical “plaintiffs’ lawyer,” despite the fact that he has worked on human rights and social justice cases for the bulk of his career. As one of Chevron’s lead outside strategists on the Ecuador case neatly summarized in 2009, in an internal email produced in discovery: “our L-T [long-term] strategy is to demonize Donziger.”\(^{16}\) From the day Chevron’s hyper-aggressive RICO counsel was retained “in the fall of 2009,” the firm “immediately went on the offensive, beginning a tireless campaign to unearth evidence to try to discredit the plaintiffs.”\(^ {17}\)

The federal court system should have blocked, or at least mitigated, Chevron’s historically unprecedented attempt to deploy civil RICO for purely injunctive relief against adversary counsel during an ongoing litigation. One court called RICO “the litigation equivalent of a thermonuclear device”\(^{18}\) expressly for its “stigmatizing” and even “terrorizing” effect, which surely is what it made it attractive for a wealthy disaffected litigant such as Chevron to try to use as a retaliatory weapon against a lawyer who defeated it in court.\(^ {19}\) Yet the U.S. district court in this case repeatedly and aggressively sought not to tamp down the


\(^{17}\) *Game Changers*, supra.


“thermonuclear” effect, but appeared to try to amplify it. At a hearing in the precursor discovery case, four months before the RICO case was filed, Judge Kaplan shared his personal views regarding respondent Donziger:

The imagination of American lawyers is just without parallel in the world. It is our one absolutely overwhelming comparative advantage against the rest of the world, apart from medicine. You know, we used to do a lot of other things. Now we cure people and we kill them with interrogatories. It’s a sad pass. But that’s where we are. And Mr. Donziger is trying to become the next big thing in fixing the balance of payments deficit. I got it from the beginning.20

At the same hearing, Judge Kaplan from the bench suggested to Chevron that it file a RICO case against Mr. Donziger,21 and when Chevron did file the case weeks later he (Judge Kaplan) quickly assigned it to himself as “related,” despite intense controversy about that assignment practice (which has since been reformed22) and the fact that Judge Kaplan’s SDNY colleague (Hon. Jed S. Rakoff) had presided for years over “related” litigation from the same exact case with the same exact plaintiffs several years earlier. At the very first hearing in the RICO case, in which Chevron sought an unprecedented “global injunction” from a Manhattan trial court

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20 Hearing Tr. at 77-78, In re Chevron, 10-MC-002 (LAK) (S.D.N.Y. Sept. 23, 2010).
21 Id. at 24 (“The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it. . . . Now, do the phrases Hobbs Act, extortion, RICO, have any bearing here?”).
purporting to bar any efforts to enforce the Ecuadorian environmental case even in
courts outside the United States, Judge Kaplan added these further insights into his
own thinking:

[W]e are dealing here with a company of considerable
importance to our economy that employs thousands all
over the world, that supplies a group of commodities,
gasoline, heating oil, other fuels and lubricants on which
every one of us depends every single day. I don’t think
there is anybody in this courtroom who wants to pull his
car into a gas station to fill up and finds that there isn’t
any gas there because these folks [the Ecuadorians] have
attached it in Singapore or wherever else [as part of
enforcing their judgment].

Only after the Second Circuit vacated (the day after argument) the global
injunction that Judge Kaplan, as requested, issued to Chevron, did Kaplan tamp
down incendiary comments of this sort from the bench and instead proceed to
accomplish in deed what he had already effectively promised by word. In the
proceeding that followed, and as outlined in Part II of this Brief, Judge Kaplan:

- Failed to account for the grave resource disparity between a
  solo practitioner and one of America’s largest corporations, and
  adopted crushingly burdensome discovery protocols that
  overwhelmed the limited resources of Mr. Donziger’s counsel,
  John Keker of Keker & Van Nest;

- refused repeated efforts by Mr. Donziger to moderate discovery
  and motion practice demands, such that Mr. Keker was forced
  to withdraw prior to trial after Judge Kaplan had allowed the
  matter, in Mr. Keker’s words, to “degenerate into a Dickensian

23 Hearing Tr. at 49-50, Chevron v. Donziger et al., 11-CV-0691 (S.D.N.Y. Feb. 8, 2011).
farce” given the court’s “implacable hostility” toward Mr. Donziger and his Ecuadorian clients;

- repeatedly denied Mr. Donziger’s requests for a three-month stay so he could seek new counsel, and required Mr. Donziger to litigate *pro se* against at least 114 lawyers from Gibson Gunn & Crutcher in the critical months ahead of trial, when numerous depositions were held and dozens of motions were filed by Chevron;

- accepted testimony from “John Doe” witnesses put forth by Chevron, whose identities were disclosed to Donziger;

- imposed a rule that anything “related to the existence of pollution and environmental conditions in Ecuador”—the very heart of the Ecuador case -- was “irrelevant”, thereby depriving Donziger of his right to put on a meaningful defense;

- refused to allow the defendants to obtain *any* discovery from Chevron related to its pollution in Ecuador and refused any discovery of Chevron’s massive private investigative operation involving more than 150 personnel used to spy on adversary counsel in the United States and Ecuador and to “generate” allegations of wrongdoing – some patently false -- used for the demonization campaign and the RICO case;

- allowed Chevron, on the eve of trial after its jury consultants had predicted a likely loss for the company based on the evidence, to drop all claims of money damages in order to deprive Donziger of a jury of impartial fact finders;

- accepted the testimony of the admittedly corrupt witness Guerra, who Chevron paid $38,000 in cash out of a suitcase and $2 million in total in exchange for “fact” testimony, much of which was later proven false, which was the *only* direct evidence claiming that there was a corrupt arrangement with the Ecuadorian court;

- denied Donziger the ability to litigate extensive counterclaims against Chevron for engaging in criminality and fraud in Ecuador by refusing to rule on his motion for more than one
year after it was filed, finally dismissing it on the eve of trial after the end of discovery, and even though it related to the same facts and many of the same legal theories that Chevron had put forth in its RICO complaint;

- invented a new legal theory in chambers after trial and then ruled in Chevron’s favor on the theory he invented, after it was never actually litigated by the parties, as a way to insulate his judgment from the extraordinary legal and factual problems related to the paid-for witness testimony and the historically unprecedented use of civil RICO to target adversary counsel for purely injunctive relief.

As set out in more detail below, the use of “collateral estoppel” in a disciplinary case requires a precise identity of issues and that a respondent have had “a fair opportunity to fully litigate” the allegations—an element that requires a “practical inquiry into the realities of [the] litigation.”

Judge Kaplan’s RICO proceeding, with its paid fact-witness testimony, gross resource disparities, prohibitions against raising issues critical to a meaningful defense, restrictions on putting in the voluminous evidence of Chevron’s toxic dumping and fraudulent cover-up in Ecuador, and the strong evidence of judicial bias and prejudgment, did not under any stretch give respondent Donziger this necessary “fair opportunity.” For a period of time early in the RICO litigation, Donziger was represented by Mr. Keker, a former U.S. Marine and one of the most distinguished trial litigators in the country. Mr. Keker stayed in the case long after

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24 In re Dunn, supra note 2.
Mr. Donziger’s resources had been exhausted in what was a clear attempt by Chevron and its 114 lawyers from Gibson Dunn to cripple his ability to mount a defense. When Mr. Keker finally was forced to withdraw, at the time almost $2 million in arrears (an obligation Mr. Donziger still bears), he took the extraordinary step of filing this on the public docket:

It is with regret that undersigned is forced to make this motion to withdraw. This is an extraordinary case which has degenerated into a Dickensian farce. Through scorched-earth litigation, executed by its army of hundreds of lawyers, Chevron is using its limitless resources to crush defendants and win this case through might rather than merit. Instead, it will continue its endless drumbeat of motions – for summary judgment, for attachment, to reinstate long-dismissed claims, for penetration of attorney-client privilege, for contempt and case-ending sanctions, to compel discovery already denied or deemed moot, etc., etc. – to have the case resolved in its favor without a trial. Encouraged by this Court’s implacable hostility toward Donziger, Chevron will file any motion, however meritless, in the hope that the Court will use it to hurt Donziger.25

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Respondent Donziger always has vigorously disputed and continues to dispute the claim that litigation choices by him and others in the context of the Ecuadorian environmental litigation—even when those choices were admittedly

25 Ex. 10, RICO Dkt. 1110 at 1; see also Ex. 11.
difficult and uncertain—amounted to anything close to “fraud” or wrongdoing. Each such allegation has an important context and additional relevant facts, none of which were allowed into evidence or considered in the Kaplan RICO proceeding. It bears emphasis that three layers of Ecuador’s courts, including two appellate courts, considered all of Chevron’s allegations cited in the petition of the Committee on a far fuller evidentiary record than the one before Judge Kaplan and rejected them. In Canada, where Chevron has aggressively sought to use the RICO Judgment to achieve preclusive effect with respect to ongoing proceedings to enforce the Ecuadorian environmental judgment, courts have thus far declined to go along with Judge Kaplan’s findings, such that Chevron’s allegations of “fraud” and misconduct “remain live and contested issues in the Ontario court.”

If the Committee believes that any of the findings in the RICO Judgment amount to actionable misconduct, despite all the rebuttals and explanations that have been and could be provided, the Committee can provide proper proceedings that will respect Mr. Donziger’s due process rights. The Committee should not be

26 See Gupta Decl. at ¶¶ 6-8.

27 See Declaration of John Kingman Phillips, dated Feb. 15, 2018, at ¶ 11 (“Phillips Decl.”). Indeed, Judge Kaplan’s decision is contradicted in whole or in part by the judgments of no fewer than 21 different appellate judges Ecuador and Canada, including the entire Supreme Courts of both countries. In contrast, not a single appellate judge in either country has ruled in favor of Chevron.

28 It should be noted that the U.S. Attorney’s Office for the Southern District of New York, after aggressive lobbying by Chevron, declined to take any steps to address Mr. Donziger’s purported felonious conduct. See Declaration of Gerald B. Lefcourt, dated Feb. 12, 2018, at ¶¶ 8-10 (“Lefcourt Decl.”).
allowed to effectively outsource its independent responsibilities to adjudicate attorney discipline to a controversial proceeding overseen by a fact-finder who has demonstrated the animus toward Mr. Donziger evident in the quotes set out above – and a proceeding that produced a result which is still subject to extensive dispute and litigation in courts around the world.

After the ignored February 2017 letter, Mr. Donziger’s next contact with the Committee was in November 2018, when he was informed that the Committee—after having sat on its hands for almost three years—was suddenly of the opinion that Mr. Donziger constituted an “immediate threat” to the public and should be suspended without a hearing or any additional process on the substance of the allegations against him. Such a result, utterly lacking in due process, would truly be a “gross injustice.” 29 Mr. Donziger is able to establish the propriety of his actions and his good faith as to each allegation in the RICO Judgment if given the opportunity. Fairness, in light of the practical realities and all circumstances, requires that he be given that opportunity.

III. RELEVANT FACTUAL BACKGROUND

The full measure of background information that is absolutely critical to understanding the claims against Mr. Donziger include, at a minimum: (1) the horrific environmental conditions in Ecuador that motivated the original lawsuit

29 Gupta Decl. at ¶ 11; Phillips Decl. at ¶ 12.
against Chevron; (2) Chevron’s subsequent decades-long campaign of spying, harassment, and unethical tactics as part of repeated efforts to “taint” the lawsuit as corrupt (the allegations were not the first instance of this strategy); (3) the extent to which the factual basis of the allegations, most of which ultimately turn on claims of impropriety under Ecuadorian law, have been thoroughly discredited in appellate decisions in Ecuador, in a related international arbitration proceeding, and in other fora; (4) the extent of the financial resources Chevron has committed to its “demonization” campaign against Mr. Donziger, which is relevant and deeply suspect in light of established corrupt features of that campaign, such as massive payments to “fact” witnesses; (5) the technical bases behind the forensic finding that the Ecuadorian trial judgment was gradually developed on the Ecuador trial judge’s courthouse computers and not, as Judge Kaplan found, written by the plaintiffs’ legal team and given to the Ecuador judge shortly before issuance; and (6) the extent of severe due process violations and apparent judicial bias in the RICO proceeding. *Critical among the many flaws of the RICO proceeding is the fact that Judge Kaplan expressly and/or effectively excluded all evidence and argument concerning points (1)-(5) from the discovery process and trial.*

To be clear, this submission does not contain all of the materials that Mr. Donziger would present to a neutral arbiter to contest the committee’s basis for attorney discipline. It does contain sufficient information and legal argument
related to the more narrow issue of whether collateral estoppel should be invoked. Because it would be impossible to elaborate fully in this submission on all the relevant points, Mr. Donziger incorporates herein by way of reference the points and authorities in the following exhibits, all of which are submitted as part of the annexes to this filing:

**Ex. 1** - The letter from Mr. Donziger to Naomi Goldstein of the Attorney Grievance Committee of the First Judicial Department, offering “to fully cooperate with [her] office’s inquiry” in this matter and requesting that the grievance committee “identify which statements or allegations in Judge Kaplan’s decision you wish me to respond to, and what provision of the disciplinary code you believe is implicated.” As further noted in the letter, “[d]ue process requires no less when there is a voluminous 400-page decision, containing innumerable conclusions, allegations, speculations and opinions by Judge Kaplan on issues both great and small. I will then formally dispute each allegation, if any, that your office believes might warrant discipline.” Mr. Donziger never received a response to this letter.

**Ex. 4** - The final publicly available brief prepared by the U.S. law firm Winston & Strawn (W&S), counsel to the Republic of Ecuador (ROE) in the private investor-state Bilateral Investment Treaty (BIT) Arbitration initiated by Chevron in 2009 (still ongoing) in an effort to shift its environmental liability to Ecuador’s government (“W&S Brief”). Chevron made the same allegations in the BIT arbitration that it made in the RICO matter, with the difference being that it directed them at Ecuador’s government rather than at Mr. Donziger and his clients. From 2012-2105, a team of attorneys at W&S dedicated significant resources to investigating and responding to the same allegations. This brief, filed in March 2015, contains detailed rebuttals to each Chevron allegation in the Committee’s petition and illustrates again why the application of collateral estoppel in this matter would not be appropriate. Specifically:
• Pages 80-104 explain how the environmental evidence produced in the Ecuador proceeding was valid and corroborated by its own expert investigation and was not a “sham” as Chevron claims. The W& S team scrutinized all of the evidence in the Ecuador trial record. It was able to scientifically replicate soil and water samples validated by Ecuador’s courts with an extensive field sampling operation conducted by one of the world’s most prestigious environmental firms, The Louis Berger Group.

• Pages 117-140 review the profound credibility flaws of Chevron’s star witness Guerra and the uselessness of the “documentary evidence” that Chevron has claimed circumstantially supports his false testimony.

• Pages 143-156 review the forensic analysis by leading authority J. Christopher Racich of the hard drives taken from the computers of the Ecuador trial judge. The Racich examination demonstrates unequivocally that Guerra’s “bribe” story relied on by Judge Kaplan for his findings is false in every relevant respect. It also explains the many flaws in Chevron’s attempts to minimize the impact of this groundbreaking evidence which never was considered by Judge Kaplan nor the Second Circuit panel that affirmed his judgment.

• Pages 140-43 and 156-67 provide additional reasons why Chevron’s “bribe” and “ghostwriting” claims are unconvincing.

Ex. 5 - The two publicly-available reports by Mr. Racich, a recognized global authority on digital forensic examination, examining the gradual development of the Ecuador trial court judgment on the judge’s courthouse computers. The document that became the trial judgment was opened as a Word document and saved 484 times in the weeks before its issuance – uncontroverted proof that Judge Kaplan’s finding (based on the false Guerra testimony) that the Ecuador judgment was ghostwritten by the plaintiffs is false.
Ex. 3 to Gupta Decl. - Three motions filed with the Second Circuit by Mr. Donziger’s appellate counsel urging consideration of the critical new evidence, dated as follows:

A. March 19, 2015, Motion for Judicial Notice (regarding the Racich Report and other expert material)

B. April 8, 2015, Reply in Support of Motion for Judicial Notice (with more detail re Racich Report)

C. November 5, 2015, Motion for Judicial Notice (regarding Guerra perjury and evidence of environmental contamination)

Ex. 7 - Mr. Donziger’s opening appellate brief in the Second Circuit appeal that provides a comprehensive history of the case and clearly demonstrates that Judge Kaplan’s “facts” were disputed on appeal, contrary to the Second Circuit’s inaccurate claim that the facts were not disputed.

Ex. 6 – A report from the legal team of the Ecuadorians called *Chevron’s RICO Fraud*, a compilation of background information and specific rebuttals to 12 key findings in the RICO Proceeding and the Second Circuit Opinion, prepared for public explanation and advocacy purposes (“Public Response”).30 This document demonstrates some of the ways that Mr. Donziger would present evidence regarding all of Judge Kaplan’s findings, not just his core findings of “bribery” and “ghostwriting”.

Ex. 8 - An amicus brief dated May 1, 2017, filed on behalf of environmental organizations and prepared by lawyers at EarthRights International, detailing the corrupt nature of Chevron’s multiple

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attempts to “taint” the Ecuadorian environmental judgment as a fraud, including by paying Guerra for false testimony.  

Ex. 9 - An amicus brief dated July 8, 2014, filed on behalf of the Republic of Ecuador, explaining how Judge Kaplan, on the basis of a single “expert” who was in reality a journalist and opposition political figure in Ecuador, improperly “reached far beyond the issues presented to unfairly—and unnecessarily—impugn the integrity of the [ROE] and its courts”; how the RICO Judgment “reflects fundamental misunderstandings regarding how the Republic’s judiciary operates”; and how Chevron strategically “sought, and in Judge Kaplan found, a friendly forum to issue improper findings” for use in collateral litigation against the ROE, just as it is doing with respect to the environmental judgment.

Ex. 10 - Motion to withdraw from the RICO and related declaration of counsel John Keker. This motion provides details of the resource disparity of the RICO proceeding and the animus of Judge Kaplan.

Ex. 11 - Motion to withdraw from the RICO and related declaration of counsel Craig Smyser. This document also provides details of the resource disparity of the RICO proceeding and the animus of Judge Kaplan.

Ex. 12 - Petitions for rehearing en banc in response to the Second Circuit Opinion, explaining, inter alia, how the defendants extensively and powerfully dispute the truth of Judge Kaplan’s findings even though they made the choice for tactical reasons to seek reversal only on legal grounds.

IV. ARGUMENT

“The two elements that must be satisfied to invoke the doctrine of collateral estoppel”—even as between identical parties—“are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue.” Luscher v. Arrua, 21 A.D.3d 1005, 1007. As articulated in the Restatement (Second) of Judgments:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim

Section 27 (emphasis added). Section A below addresses a baseline problem with the identity of any issue that the Committee would have precluded here. Sections B and C address other reasons apart from the character of the RICO proceeding that explain why it would be inappropriate to apply collateral estoppel here, namely the availability of new evidence and the RICO Judgment’s profound inconsistencies with prior determinations by the Ecuadorian appellate court and National Court of Justice. Finally, Section D engages, necessarily but as briefly as possible, some of the profound limitations and fairness problems in the RICO proceeding that ultimately deprived Mr. Donziger of anything close to a full and fair opportunity to defend himself and by extension contest the allegations from the Committee.
A. The RICO Judgment’s Alternative Grounds Mean That It Cannot Be Used For Offensive Collateral Estoppel Regarding Any Ground

As indicated by the Restatement text quoted above, collateral estoppel (especially offensive) is only available where a prior determination is unquestionably “essential to the judgment.” One of the implications of this rule is sketched out in comment i to the Restatement (Second) which provides:

\[i. \text{Alternative determinations by court of first instance. If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.}\]

Critically, the commentary defends this conclusion (which is, of course, supported by the weight of the case law) even presuming that “[t]he matter has presumably been fully litigated and fairly decided; the determination does support, and is in itself sufficient to support, the judgment for the prevailing party; and the losing party is in a position to seek reversal of the determination from an appellate court.” Rest. 2d § 27, cmt. i. The reasoning behind this is critical:

First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the application of the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens.
In other words, “[i]f there are multiple grounds supporting a decision, any of which would have been sufficient, then it is difficult to conclude that a judgment could not have been validly rendered without any one of them.” *Trikona Advisers, Ltd. v. Chugh*, No. 3:11-CV-2015 SRU, 2015 WL 3581216, at *4 (D. Conn. June 5, 2015), *aff’d*, 846 F.3d 22 (2d Cir. 2017) (internal quotations omitted).

Although the New York Court of Appeals does not appear to have had the opportunity to embrace a “pure” version of the alternative-determinations dilemma in a posture identical to this case, it has embraced the approach and underlying rationales. In *Tydings v. Greenfield, Stein & Senior, LLP*, the Court of Appeals held that “collateral estoppel does not prevent relitigation of a ruling that was an alternative basis for a trial-level decision,” at least “an appellate court affirmed the decision without addressing that ruling.” 11 N.Y.3d 195, 197 (2008). In *O’Connor v. G & R Packing Co.*, the Court of Appeals declined to apply collateral estoppel to an alternative ground for decision when it was not “clear that the prior determination squarely addressed and specifically decided the issue.” 53 N.Y.2d 278, 280 (1981). And in *In re Agola*, a discipline case, the appellate division held that factual determination made by a federal district court in support of an award of sanctions against an attorney could not be relied on where the Second Circuit reversed the sanction award on legal grounds, without directly addressing those findings. 128 A.D.3d 78 (N.Y. App. Div.).
Other courts have had occasion to address more “pure” instances of the alternative-determinations hypothesis. For example, in *Trikona Advisers*, a federal court in Connecticut recognized considered the judgment of a foreign court to “wind up” a company:

In the Cayman proceeding, ARC and Haida asserted “a series of related grounds on which the Court should conclude that it is just and equitable to make a winding up order,” including several that directly bear on the issues here. In his decision, Justice Jones analyzed all of those grounds, finding that there was evidence to support each, and concluded that “[t]aken together, the case for making up a winding up order is overwhelming.”

Despite the fact that the Connecticut court fully agreed with the Cayman court on all factual issues, it acknowledged that the language of the foreign judgment did not make clear that “all findings were essential,” but rather “could indicate that the applicability of multiple grounds simply provides a stronger case for a ruling than each ground individually would support.” 2015 WL 3581216 at *5. Because “the absence of one or more of those determinations might not necessarily have precluded the judgment,” the judgment’s individual determinations in favor of the winding-up—none of them—could be given preclusive effect. *Id.*

The RICO Judgment is riven with multiple overlapping determinations, “the absence of one or more of [which might not necessarily have precluded the judgment.]” *Id.* Most broadly, the RICO Judgment relies on two alternative theories—“non-statutory grounds and [] RICO”—which it describes as “entirely
independent of each other although, of course, they rely to a great but not complete extent on the same facts.” RICO Judgment at 547-48 (emphasis added). In articulating the basis for finding for Chevron on the “non-statutory grounds,” the RICO Judgment articulates at least five separate theories, id. at 557-564, at many points emphasizing the alternative nature of the findings as a way to insulate them from other findings that might not be accepted on appeal. See, e.g., id. at 560 (“The LAPs’ Ghostwriting of All or Part of the Judgment and Zambrano’s Adoption of Their Product Was Fraud Warranting Equitable Relief Even Absent Bribery”) (emphasis added). In particular, Judge Kaplan seems to have been keenly aware of the disturbing nature of his choice to credit and rely on the highly suspect testimony from Guerra, the corrupt and disgraced former Ecuadorian judge, and thus at multiple junctures sought to insulate his Guerra-based findings by insisting that this judgment could be affirmed “independently” on evidence unrelated to Guerra. See, e.g., id. at 560-61.32

Here, the Committee asks that Mr. Donziger be precluded from arguing against a host of findings from the Kaplan judgment, from the alleged “coercion” of Ecuadorian Judge Yanez, to the alleged “corruption” of party-nominated expert Cabrera, to the alleged (and now proven false) “ghostwriting” of Cabrera’s report,

32 On the RICO claim, Judge Kaplan similarly piled finding upon finding without making clear which if any of those findings were “necessary” to his determination of the claim. For example, in discussing the basis for the predicate act of wire fraud, Kaplan simply lists seven possible bases, without describing any of them as necessary or essential. Id. at 590.
to alleged misrepresentations regarding Cabrera’s independence, to alleged
obstruction of justice, alleged witness tampering, alleged inappropriate threats of
criminal prosecution, and of course the alleged “bribe” as claimed by the
mendacious Guerra. But the Committee has not, because it cannot, assert that any
of these bases are “essential to the judgment” for Section 27 purposes, i.e. such that
the “judgment could not have been validly rendered without any one of them.”
Trikona Advisers at *5. Accordingly, none of them can be used for collateral
estoppel purposes.

B. Collateral Estoppel Is Inappropriate In Light Of The Critical New Evidence
On The Falsity Of The Central Testimony Behind The Allegedly Preclusive
Judgment

“[T]he availability of new evidence” is one of the central factors the Court of
Appeal has long directed courts to consider before considering any application of
collateral estoppel. Schwartz v. Public Administrator, 24 N.Y.2d 65, 70 (N.Y.
1969). The new evidence that has come to light since the issuance of the RICO
Judgment could not be more significant. The testimony of disgraced former judge
Guerra—Chevron’s star witness—lies at the heart of that judgment. Guerra
provided the only direct testimony that a corrupt arrangement—a “bribe”—was
supposedly agreed to with the final presiding judge, Nicolas Zambrano, in the late
stages of the Ecuador trial. Guerra’s admittedly long history of corruption, his repeated prior attempts to offer corrupt testimony in this case (documented by both parties), the profoundly corrupt circumstances in which he cravenly bargained the content of his testimony with Chevron to receive more than $2 million in cash and other valuable consideration, and the fact that his testimony shifted dramatically shortly before and even during the trial as he was confronted with new facts, all point to the obvious conclusion that his paid-for testimony is false and was concocted for sale to Chevron. Judge Kaplan nonetheless credited Guerra’s story, a fact made explicable only by Kaplan’s well-established animosity towards the defense from before the RICO proceeding even began. Supra at Section II. Kaplan was careful to protect his disturbing acceptance of Guerra’s testimony by emphasizing his reliance on “intangible factors such as [Guerra’s] courtroom demeanor, tone, and manner,” findings that are virtually impervious to meaningful appellate review.

The new evidence, however, shreds any remaining possibility of Guerra’s truthfulness. It does this on two fronts. First, testifying in a related international

33 All other evidence supposedly in support of the bribe allegation, such as the so-called “ghostwriting” evidence, is deeply circumstantial and in fact consistent with range of other perfectly legitimate expectations of the documented facts. See Public Rebuttal at 15-17.
34 See RICO Dkts. 1422 (Motion for Terminating Sanctions), 1640 (Motion to Strike), 1850 (Donziger post-trial brief) at 30-41; Ex. 10 at 52-61.
35 See, e.g., RICO Judgment at 221 (citing authority that such findings “must not be set aside” because “only the trial judge can be aware of [them]”); id. at 250 (“From the standpoint of demeanor, Guerra was an impressive witness.”).
arbitration proceeding held one year after the RICO judgment issued, Guerra blithely admitted that he knowingly and intentionally lied on the stand in at least one respect, and that his testimony was false in several other key respects.\textsuperscript{36} Chevron has desperately tried to downplay the significance of these stunning revelations that utterly destroy its defense narrative. But it is \textit{undeniable} that Judge Kaplan relied heavily for his findings and credibility determinations on several of the exact pieces of Guerra’s story that Guerra now admits were false.\textsuperscript{37} Independently, the fact that Guerra had the capacity to knowingly lie and yet come across as “impressive” to Kaplan is inherently significant. That type of flawed judgement by the district court is a powerful additional reason why this Court and the Committee should be deeply skeptical when reviewing all of Judge Kaplan’s determinations in the RICO matter.

\textsuperscript{36} \textit{See} Public Rebuttal at 14-16; Gupta Decl., Ex. 3-C at 6-8. 
\textsuperscript{37} For example, the fact that Judge Kaplan expressly cited Guerra’s testimony that he traveled repeatedly to the Amazon town of Lago Agrio (the location of the Ecuador trial court) in August 2010 to meet with Judge Zambrano (the Ecuador trial judge) is no accident, because it supports the notion that it was not unusual for Guerra to make the trip and adds legitimacy to his claim that he simply forgot that it was on such a trip, rather than at home, that he saw and edited the draft trial judgment. Guerra has now admitted that his testimony regarding the August trips was false. Similarly, Guerra’s testimony that Judge Zambrano promised him a portion of the bribe money—an assertion that Guerra acknowledges making on the stand during the RICO trial with full awareness of its falsity—was neither accidental nor incidental, but rather designed to shore up a key problem with his testimony, namely that it appeared dubious that he would have had such personal exposure in so many parts of the alleged “bribery” scheme when he could not claim to have actually performed any necessary role or received any benefit. Judge Kaplan heavily relied on this aspect of Guerra’s false testimony.
Second, in the same investor-state arbitration initiated by Chevron (in which the Republic of Ecuador is the defendant), the arbitral panel after the close of evidence in the RICO proceeding ordered the production and forensic evaluation of the hard drives of the courthouse computers of the Ecuadorian judge who issued the trial judgment. Guerra’s story as told under oath to Judge Kaplan was that in connection with the alleged “bribe,” the plaintiffs’ legal team gave a draft of the trial judgment to Judge Zambrano (the Ecuador trial judge) “approximately two weeks before the trial court in the Chevron case issued the judgment,” and further that the plaintiffs “made changes to the judgment up to the very last minute before it was signed and issued by Mr. Zambrano.”38 This became the center of Judge Kaplan’s bribe finding: though he had to acknowledge the numerous other shifting aspects of Guerra’s testimony, Kaplan emphasized that Guerra “never wavered” from the claim that the corrupt arrangement was for the plaintiffs’ team to “bring the judgment” so that Zambrano and Guerra could “dress it up” and “issue it.”39

38 RICO Judgment at 245-46. Even this story—which Guerra told at trial and which the Court relied on in its final decision—only appeared after an earlier and strikingly different version of the story was disproven by the facts. Earlier, Guerra detailed a story of being given the judgment on a flash drive and then working on it for several days over the course of a specific weekend at his house in Quito. When Chevron’s forensic team could find no trace that the judgment ever existed on his computer, Guerra was forced to dramatically change his story: he suddenly remembered that “in fact” he took an eight-hour bus ride (providing no travel record) from his home in Quito to Lago Agrio, where he claims he was personally handed a laptop with the draft judgment on it, and that the laptop was later taken from him. Thus, he could now claim to having seen the draft judgment and worked on it without any digital trace.

39 RICO Judgment at 280.
The courthouse hard drives, however, revealed that a file containing substantial parts of the judgment in rough draft form was on the courthouse computers several months before the judgment issued, and that that file gradually grew and developed into the final judgment, being saved along the way several hundred times. Public Rebuttal at 15-16. While Chevron’s experts have strained to find inconsistencies between the results and various minor details of Zambrano’s own RICO testimony, the basic and indisputable fact that the draft judgment was found on courthouse computers in late 2010 destroys any possibility that Guerra’s story is true. Chevron literally has had years of opportunity to provide a cogent explanation about how Guerra’s testimony can be reconciled with the results of the forensic examination. Chevron’s response has been to bury its head in the sand. It has offered no credible explanation in the thousands of pages of briefing submitted in the arbitration proceeding or the Canadian enforcement proceeding.

C. Collateral Estoppel Is Inappropriate Because The RICO Judgment Is Profoundly Inconsistent With Far More Competent Determinations On the Same Issues By The Ecuadorian Trial Court, Appellate Court, And National Court of Justice

Restatement (Second) of Judgments § 29 addresses the offensive use of collateral judgment in subsequent litigation by a non-party such as the Committee. It requires consideration of whether there are circumstances which justify affording the party against whom collateral estoppel is sought an opportunity to relitigate the issue:
A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether: . . .

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue; . . .

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Restatement (Second) of Judgments § 29 (emphasis added).

Comment f to Section 29 is directly on point in explaining why inconsistent prior verdicts justify not giving preclusive effect to a judgment:

f. Inconsistent prior determination. Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary.

There could not be a stronger case for withholding preclusive effect under this authority: here, not only do the decisions of the Ecuadorian trial court, appellate court, and National Court of Justice reach conclusions flatly
contradictory to Judge Kaplan’s conclusions on the same allegations, they do so on the basis of a far more competent and legitimate juridical foundation than the RICO proceeding. Chevron tried to claim that the first-level Ecuadorian appellate court to review the trial court judgment only cursorily addressed its allegations of fraud and due process violations. After Chevron celebrated this minimal treatment in the press as “evidence” that it wasn’t receiving due process, the same court explained its approach in a “clarification” decision:

In relation to the seventh request for clarification, regarding whether or not the defendant’s accusations with respect to irregularities in the preparation of the trial court judgment have been considered, it is clarified that yes such allegations have been considered, but no reliable evidence of any crime have been found. The Division concluded that the evidence provided by Chevron Corporation, does not lead anywhere without a good dose of imaginative representation, therefore it has not been given any merit, nor has more space been dedicated to it. But it is appropriate to say that the Division rejects in this point, and definitively, as unfounded, the defendant’s affirmation in chapter “C” of its legal brief that the judgment has been based on information foreign to the record, or with secret assistance, because [on appeal] the Division [has] reviewed and explained in the January 3, 2012 judgment, all the valid evidence that has been considered, that is to say, all of the samples, documents, reports, testimonies, interviews, transcripts and minutes, referred to in the judgment, are found in the record . . . [Chevron’s] motions simply show disagreement with the reasoning, the interpretation and the value given to the evidence, but they do not identify correctly legal evidence that is in the
The National Court of Justice responded similarly: “[Chevron has] never demonstrated fraud, which it has been claiming without any legal support. We reiterate that it has not proven any omission or violation of procedure that would give rise to the nullity sought. The appellant’s incessant harping in this regard departs from procedural good faith.”

Even though Judge Kaplan necessarily tried to ground his RICO Judgment findings in violations of U.S.-based laws or expectations, most if not all of the findings turn on express or implied assumptions about Ecuadorian law, procedural rules, or appropriate litigation conduct in Ecuador. For example, the finding that a former presiding judge in the environmental case was “coerced” to cancel certain inspections through *ex parte* meetings and the preparation (but not filing) of a non-performance complaint is deeply inter-linked with Ecuadorian legal practice across numerous dimensions, including:

- at the time, *ex parte* contact with judges was permitted under Ecuadorian law and was routine practice by Chevron’s local legal team;

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the complaint for non-performance of judicial duties was both entirely independent from a sexual harassment by unrelated third-parties and legally well-founded;

the pending request for the cancellation of certain inspections that had been preliminarily scheduled by the plaintiffs, not by Chevron, was so clearly a matter of right for the plaintiffs that the judge’s delayed response to the request was legitimately seen as a source of concern over possible corruption by Chevron and merited a strong public, accountability-focused reaction by plaintiffs’ counsel.

Indeed, is important to emphasize that aside from central and wholly erroneous “bribery” and “ghostwriting” findings that are the primary focus of this opposition, Mr. Donziger is prepared to respond, if given a full and fair opportunity, to all of the other inculpating findings in the RICO Judgment, showing that they are either false, decontextualized, lack proper evidentiary support, and otherwise do not constitute an appropriate basis to impose attorney discipline or to invoke the doctrine of collateral estoppel. Prima facie responses to these findings, albeit drafted for more public consumption, can be found in the Public Rebuttal. Public Rebuttal at 17-30 (addressing twelve specific false “fraud” findings and the purported largely derivative findings of liability for witness tampering, obstruction of justice, money laundering, and Travel Act violations).42

42 To illustrate just one way Mr. Donziger can powerfully contest all of Judge Kaplan’s findings, as regards the Cabrera expert report (cited extensively in the Committee’s petition at pp. 9-12) Mr. Donziger was denied a full and fair opportunity to defend himself because of the district court’s refusal to allow into the record the voluminous chemical sampling results relied on by the Ecuador court to find Chevron liable, as well as other critically relevant and competent evidence. The sampling results can show, inter alia, that the information in the Cabrera report was valid as a matter of science and that the Cabrera report was not the product of fraud either in substance or
D. It Would Be Inappropriate and Constitutionally Problematic Collateral Estoppel To Prevent A Respondent From Challenging Findings Of Alleged Wrongdoing For Criminal Acts Made Under A Lesser Standard Of Proof

The Committee seeks to preclude Mr. Donziger from contesting any of the RICO Judgment findings using the traditional tenets of the doctrine of collateral estoppel in general, and offensive collateral estoppel in particular. But unique circumstances here of findings of criminal wrongdoing in the civil adjudicatory context of RICO—a situation unaddressed in the collateral estoppel doctrine, to the

in the process that produced it. Mr. Donziger would also show that Chevron lawyers wrote drafts of reports for its experts the same way the plaintiffs did with their expert, Dr. Cabrera. The evidence includes more than 64,000 chemical sampling results, third-party sampling by independent parties relied on by the court, new sampling evidence from the Louis Berger Group adduced in the aforementioned international arbitration proceeding, and 105 technical evidentiary reports -- all not considered by Judge Kaplan. Mr. Donziger also can present evidence that Chevron officials drafted reports for its paid experts in exactly the same way as the plaintiffs did with Cabrera – including touting them as “independent” in legal filings and public press releases. He also can prove that it was perfectly acceptable under Ecuadorian law (as is true in Brazil and many other civil law countries in Latin America) to meet ex parte with judges and experts, and that both parties regularly engaged in the practice; and, that calling one’s own paid experts “independent” is part of accepted practice in Ecuador, as proven by Chevron’s use of the same term to describe its experts appointed under exactly the same system as was Cabrera. He also can prove that Cabrera was paid openly and not “under the table” in exactly the same way Chevron paid its court-appointed and so-called “independent” experts. Judge Kaplan refused to allow any evidence related to these critical issues. To mention one other example -- the issue of Mr. Donziger publicly claiming that certain Chevron officials should be criminally prosecuted (cited by the Committee in its Petition at 14-15) -- Mr. Donziger would present evidence that he was well within his rights to press this issue given his good faith belief in the overwhelming scientific evidence that those officials had lied to Ecuadorian government officials to induce them to sign a release after a wholly inadequate and sham environmental remediation by Texaco that took place in the mid 1990s. Mr. Donziger would present scientific evidence of chemical sampling results from the supposed “remediation” supporting his good faith belief that these officials committed fraud. Much (but not all) of this information is described in detail in the Public Rebuttal (Chevron’s RICO Fraud), incorporated herein by reference.
undersigned’s knowledge—weigh heavily against the discretionary option of preclusion, for practical and constitutional reasons.

The reasons go beyond the requirement of confidence as to fair opportunity to fully litigate, as addressed in the following section, even though the protections afforded defendants in a criminal proceeding are properly the benchmark of what a court considering offensive preclusion should be looking for in a full and fair prior litigation. The reasons lie at the heart of the constitutional requirement of the “beyond a reasonable doubt” standard itself—the constitutional necessity of which was first recognized by the U.S. Supreme Court in the civil case of In re Winship. See generally W. David Ball, The Civil Case at the Heart of Criminal Procedure: In Re Winship, Stigma, and the Civil-Criminal Distinction, 38 Am. J. Crim. L. 117 (2011). As the aforementioned article and countless other sources have observed, the requirement of using the standard as an “an instrument for reducing the risk of convictions resting on factual error,” despite the acknowledged costs, was driven by the need to protect, for constitutional due process purposes, two “interests of immense importance”: the risk that a defendant “may lose his liberty upon conviction and [] the certainty that he would be stigmatized by the conviction.” Winship at 363. While consideration of the standard has typically focused on the deprivation of liberty risk, Winship and other sources are clear that the risk of erroneous stigma is of significant if not equal concern. As the majority wrote, “a
society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.” Id.

The constitutional dimensions at issues in Winfield and its progeny are critical to the assessment of whether it is fair and appropriate to invoke collateral estoppel in the context of civil RICO findings arising from supposedly “proven” allegations of predicate criminal misconduct. The allegations only were “proven” (and there only subject to all the flaws and issues outlined herein) to meet the preponderance of the evidence or (purportedly, in some aspects) the clear and convincing standards. Whether or not initial judgment on predicate criminal allegations under such lesser standards comports with constitutional due process, the question here is much more preliminary: whether the high bar of overall fairness required for invocation of collateral estoppel is met where such invocation will amplify and enhance what one court has called the “inevitable stigmatizing effect” of RICO claims. In matter of fact, Chevron’s multiple public relations firms have weaponized the RICO allegations to further the company’s long-standing strategy to “demonize” Mr. Donziger in the media.

43 Katzman, supra; see also Gross, supra (“The terrorizing aspect of a RICO charge conjures dreadful images of the defendant's involvement in the racketeering schemes of the prototypical colorful mobsters and violent thugs who ordinarily fill the plots of organized crime. For plaintiffs seeking to score a tactical edge or to deal the heaviest possible vengeful blow to the defendant's personal reputation, shocking RICO accusations may serve to strengthen their hand . . . ”).
E. The RICO Proceeding Did Not Provide Donziger With A Fair Opportunity To Fully Litigate The Allegations Against Him

The Court of Appeals has made clear that a court considering application of collateral estoppel, especially in an offensive posture, must be assured that the litigant who will suffer the elimination of process otherwise due was able to fully litigate the relevant identical issue in the prior litigation in a fundamentally fair environment. Critically, the Court and other authorities have repeatedly admonished that this assurance cannot be provided simply by looking at the type of forum or proceeding to see if it usually provides litigants with sufficiently fair process, or any other level of abstraction, but rather must investigate the specific proceeding at bar, its nature and character, and its “practical realities.”

The best witness as to the character of Judge Kaplan’s RICO trial is Judge Kaplan himself, revealed in the unguarded comments quoted above. See Section II. Judge Kaplan “got it from the beginning.” Having framed Donziger in his mind as a certain type of “American lawyer,” and the Ecuadorian environmental case as no more than a product of Donziger’s “imagination,” he apparently unloaded all of his personal grievances about the fate and moral character of the entire country, and certainly the legal profession, on Donziger. Equally striking are the words filed on the public docket by Mr. Keker, a highly distinguished “name” partner at a sizeable firm with an active practice in New York and other federal courts—i.e., with

44 See, e.g., In re Dunn, supra note 2.
significant reputational interests at stake—\textsuperscript{45}—who described, with extensive citations to the record, how the proceeding had “degenerated into a Dickensian farce,” driven by Judge Kaplan’s transparent “implacable hostility to Donziger.”\textsuperscript{46}

Mr. Keker moved to withdraw five months prior to trial in the RICO case.\textsuperscript{47} During the vast majority of that time, Mr. Donziger was left to defend himself \textit{pro se}, including:

- taking and defending of almost all depositions;
- attempting to diagnose Chevron’s document dump of nearly six million pages for all the missing (and actually relevant) documents and move to compel those documents;
- attempting to address a raft of other abusive discovery tactics by Chevron;
- attempting to preserve his interests regarding a range of collateral litigation in a half-dozen related discovery cases initiated by Chevron;
- resisting Chevron’s multiple attempts to hold Mr. Donziger in contempt for various alleged violations of discovery orders, and other collateral litigation pressure;
- opposing Chevron’s \textit{fourth} motion for partial summary judgment, filed a just two months before trial;

\textsuperscript{45} Of course, Mr. Keker was retained by Mr. Donziger, but at the time of the relevant writing he was already facing significant unpaid arrears without prospect of compensation. Ex. 12.

\textsuperscript{46} Ex. 12 at 1.

\textsuperscript{47} The motion followed a significant stretch of time during which the Keker firm, deeply in arrears, was unable to commit resources to properly litigating the case except to take the minimal steps necessary to avoid violating court orders or missing absolutely critical deadlines. Indeed, because the funds to support Mr. Keker’s representation only trickled in over time and usually after the fees had been incurred, at no time during Mr. Keker’s representation was the firm financially empowered to do the kind of investigation and case preparation necessary to meet the constant, massive filings that so clearly characterized Chevron’s scorched-earth litigation approach. Ex. 12.
• attempting to adequately brief a range of critical pre-trial legal issues, from motions in limine, to the legality of Chevron’s move to drop all money damages just prior to trial to avoid jury scrutiny, to the reinstatement of Chevron’s unjust enrichment claim, to the application of foreign law, to technical issues such as bifurcation, redaction issues, the format of witness testimony at trial, and more;

• preparation of pre-trial materials such as a draft order, designations and stipulations, witness list, exhibit list with thousands of items, jury questionnaire, proposed jury instructions,

• trial preparation generally.

Even this list is vastly incomplete. Shortly before trial, attorneys Richard Friedman and Zoe Littlepage (and Ms. Littlepage’s partner, attorney Rainey Booth) joined the defense team in their personal capacities to litigate the case at trial. They did so with no experience as to the massive factual and legal history and record of the case—stretching over 20 years—and minimal ability to contribute to the preparation and pre-trial litigation efforts noted above, given their need to get up to speed on the facts in advance of their appearances.

The problematic and often deeply disturbing aspects of both the pre-trial and trial phases of the RICO litigation are legion. They cannot possibly be recounted here, even in summary form, in anything approaching completeness. The following observations are sufficient to establish that the RICO Proceeding fails the “practical reality” fairness requirement for collateral estoppel without in any way exhausting (or waiving any rights regarding) my objections to the flaws and failures of that proceeding. Because, as noted, Mr. Donziger continues to labor
under the lack of proper resources and support which has thoroughly impeded his response to Chevron’s U.S.-based attacks from the beginning, he makes these observations as much as possible by reference to existing sources, including the Public Rebuttal document cited above. If the court would find is useful to have additional record citations or support for any particular issue, Mr. Donziger would be happy to work to provide the same in a supplementary filing.

1. The RICO Proceeding turned on the testimony of a manifestly corrupt witness, Alberto Guerra, to whom Chevron paid large sums of cash in exchange for “fact” testimony, which was the only direct testimony on the allegation of a “bribe”

The false testimony of Alberto Guerra stands at the heart of the RICO Judgment. Guerra provided the only direct testimony that a corrupt arrangement—a “bribe”—was supposedly agreed to in the late stages of the Ecuador trial. Even before the new evidence that forensically proves Guerra’s story to be false emerged, supra Section IV.B, the admission of Guerra’s testimony in the RICO Proceeding was a judicial disgrace that rendered the RICO Judgment a practical nullity in terms of its persuasiveness outside of the United States and it certainly made a mockery of the notion that the RICO Proceeding in any way could be considered “fair” or afforded Mr. Donziger a “full and fair opportunity” to mount a meaningful defense as required to invoke collateral estoppel. Chevron recruited Guerra at a time when its earlier allegations in the RICO case were falling apart after an Ecuadorian appellate court affirmed the trial level judgment and found no
wrongdoing. Chevron operatives purchased Guerra’s testimony for an initial cash payment of $18,000, followed by repeated cash payments, and finally a contract that provided Guerra and his large extended family with immigration (and asylum counsel) in the United States, a monthly salary no less than twenty times his then prevailing salary, housing, a car, health insurance, and more, all available to continue indefinitely so long as Guerra remained “cooperative.”

Such payments to a fact witness are obviously not just unethical, but arguably illegal. Judge Kaplan’s decision to nonetheless accept the Guerra testimony ranks among the most ugly and egregious features of the RICO decision. The idea that Chevron could be allowed to purchase bespoke false

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48 Supra note 34.

49 See, e.g., Aaron Marr Page, “Chevron’s Payments to RICO Witness Are Not Just Ugly—They’re Criminal,” Huffington Post, June 2, 2017, at https://www.huffingtonpost.com/entry/chevrons-payments-to-rico-witness-are-not-just-ugly_us_5931c879e4b0649f5f2118e9 (noting that “[w]hen famed legal ethics and constitutional law scholar Dean Erwin Chemerinsky heard that Chevron and Gibson Dunn were making the claim [that the payments to Guerra were appropriate], he was so outraged he offered the Ecuadorian a free legal opinion to try to convince the court not to accept the testimony”). See Ex. 14, RICO Dkt. 1423-2, Declaration of Erwin Chemerinsky, dated July 26, 2013.

50 See Public Rebuttal at 11-17 (including links to additional sources). Kaplan ultimately accepted Chevron’s claim that the payments were necessary to achieve Guerra’s safety, even though he could cite no physical threat to Guerra’s safety, because there never was one. The only “threat” to Guerra was a legitimate one: that public authorities in Ecuador might properly look into his claim of involvement in a bribery scheme, because it was effectively an admission of criminal wrongdoing, were it true. Additionally, were Guerra’s testimony invented, there was the “threat”—again perfectly legitimate—that his public statements causing harm to the Ecuadorian plaintiffs would be actionable by them in a civil action for defamation. The bitter irony is that in the 25-year history of the Ecuadorian plaintiffs’ struggle for environmental justice, there is not even a single alleged incident of any sort of physical “reprisal” on anyone associated with Chevron (or opposed to the Ecuadorian case), whereas supporters of the Ecuadorian cause have routinely suffered mysterious attacks, death
testimony and turn it into a strategically valuable civil judgment in federal court is bad enough. The idea that Chevron and its counsel, having done this knowingly and in flagrant violation of multiple laws and ethical rules, could further leverage the civil judgment into an ethics complaint by the Committee against Mr. Donziger, the victim of the illegal and unethical Guerra scheme, no doubt has the lawyers, executives, and investigators who conceived and implemented it rolling on the floor laughing.

2. *Judge Kaplan adopted crushingly burdensome discovery protocols in service of Chevron’s legal strategy of trying to win by “overwhelming force” rather than via the evidence and a fair proceeding.*

As has been widely reported, Chevron deployed a legal and “investigations” team of more than 2,000 individuals to prosecute its coordinated demonization attack against Mr. Donziger. The Gibson Dunn firm relied on a team of over 100 experienced trial lawyers to manage the RICO phase of the attack. As already noted, while Mr. Donziger had counsel during some phases of the RICO proceeding, that counsel never was sufficiently well-funded to meet the crushing demands of Chevron’s litigation strategy. Mr. Donziger was forced to represent himself *pro se* during the most critical pre-trial phases, and was represented at trial threats, and other intimidation, all of which Chevron has of course denied any involvement in but which nonetheless has neatly corresponded with Chevron’s interests. See, e.g. “Amnesty International ‘Urgent Action’ Prompts 600 Letters From 22 Countries To Ecuador’s Government,” Oct. 30, 2006, at [http://chevrontoxico.com/news-and-multimedia/2006/1030-trial-team-in-chevron-s-ecuador-suit-faces-new-threats](http://chevrontoxico.com/news-and-multimedia/2006/1030-trial-team-in-chevron-s-ecuador-suit-faces-new-threats).
by counsel utterly unfamiliar with the facts adduced over the long history of the case.

This crushing resource disparity is by itself sufficient to question the fairness and fullness of Mr. Donziger’s opportunity to face the claims against him in the RICO proceeding. Nonetheless, the fairness problem is compounded with evidence that the resource disparity was not inevitable but rather was engineered by Chevron’s gamesmanship with the active assistance of Judge Kaplan.51

51 There are countless illustrations of how the district court applied supposedly neutral rules to game the RICO trial to favor Chevron and to help the company exhaust Mr. Donziger’s limited resources. One example stems from Chevron’s abuse of the federal Rule 56 partial summary judgment tactic throughout the proceeding. While such summary judgment motions are allowed by the Rule, they are understood to have the capacity to add significant burden, requiring parties to brief complex merits questions in the middle of the pretrial process. Accordingly, the Rule includes a provision that expressly allows the court to defer consideration of the motion until trial or some more amenable date. Fed. R. Civ. P. 56(d). Chevron filed four lengthy motions for partial summary judgment in the pre-trial phases of the case, accompanied by Statements of Material Facts containing hundreds of paragraphs of asserted “facts” that were thoroughly disputed and thus had to be responded to with specific evidence. The burden on the defense was immense. In each case (or at least until it became clearly futile), the defense moved under Rule 56(d) for relief so that Mr. Donziger and his clients could focus on getting through discovery and conserve their limited legal resources. In each case, Judge Kaplan denied the request. In reality, however, the issues were better left to trial, and thus in each case Judge Kaplan denied the motions without explanation—but without prejudice to Chevron litigating the relevant issues at trial. In other words, Judge Kaplan agreed with the substance of the Rule 56(d) request, but only after the defense had severely depleted its limited resources to produce responses sufficient to survive the motions. See Ex. 18, RICO Dkts. 878; RICO Dkt. 1063. In one case, Kaplan denied a Chevron motion in this way in a single, hand-written word (“Denied”), despite having forced Mr. Donziger’s counsel to incur hundreds of thousands in fees to oppose the motion. Ex. 18.
3. Judge Kaplan conducted the RICO trial under the rule that anything “related to the existence of pollution and environmental conditions in Ecuador” was “irrelevant,” even suggesting that defense attorneys would be sanctioned if they made an utterance about environmental conditions in open court.

Incredibly, even though Judge Kaplan would ultimately “set aside” an environmental judgment that had been litigated at trial in a sovereign nation for ten years, and affirmed on appeal up to that nation’s highest appellate court, and even though that judgment was supported by a 220,000-page evidentiary record and tens of thousands of chemical sampling results, he flatly refused to allow the defense to discover or put in any evidence “related to the existence of pollution and environmental conditions in Ecuador” that justified the bringing of the lawsuit in the first place.52 Marshaling and presenting this voluminous evidence of contamination was absolutely central to the ability of Mr. Donziger and his clients to properly defend against the extortion and fraud charges, as well as the equitable basis for injunctive relief.

But in reality, the ban on discovery, testimony, and argument linked to the entire basis of Mr. Donziger’s work in Ecuador meant that, in practice, he was denied a full and fair opportunity to contextualize Chevron’s claims and defend

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52 See, e.g., RICO Dkt. 864 (“the Court several times has ruled that subject [environmental conditions] out of bounds”); Trial Tr. dated Oct. 9, 2013, at 27-28 (“The next item on my list is this . . . is evidence relating to what I am just very loosely going to refer to as evidence relating to the existence of pollution and environmental conditions in Ecuador . . . for purposes of this trial no one is to open on that subject at all and unless I rule otherwise nobody is to offer or seek to elicit evidence on that subject . . . ”).
against them. At a minimum, evidence of the environmental conditions and client circumstances that motivated Mr. Donziger’s work (and, at times, created its intensity and urgency) was needed to corroborate his mental state, i.e. that he had no intent to defraud but rather believed passionately and justifiably in the environmental merits of the lawsuit that Chevron so breezily dismissed as a “sham.” Environmental evidence absolutely was necessary to corroborate the analyses and conclusions of the evidence submitted to the Ecuadorian court that Chevron claimed was fraudulent, but in fact was comprehensively supported by the facts.

Even more specifically, the presentation of environmental evidence was necessary for Mr. Donziger and his clients to establish the lack of causation of damages (because Chevron was demonstrably liable and would have been found liable in any non-corrupt proceeding in Ecuador), to defeat Chevron’s claims for equitable relief (the only relief it requested at trial, in order to avoid a jury), and to sustain my counterclaims, which rested on precisely the same legal foundations that Judge Kaplan accepted with respect to Chevron’s claim, but denied with respect to Mr. Donziger’s. Finally, evidence of environmental conditions would have been critical to testing and cross-examining many of the witnesses the Chevron presented at trial who sought to bolster the claim that my actions were
motivated by fraud because there was no merit, much less pressing urgency, to the environmental cause Mr. Donziger was working on.

Notably, Judge Kaplan went so far as to strike from evidence Mr. Donziger’s own testimony in his defense not only as to the motivation of his work in relation to environmental conditions but additionally on a shocking range of issues. Exhibit 16 shows in highlighting the portions of Mr. Donziger’s direct testimony that was, at Chevron’s request, struck by the court. Almost the entirety of the contextual evidence that Mr. Donziger sought to offer as critical explanatory background information was barred from consideration.

4. Judge Kaplan refused to allow the defense to obtain any discovery into Chevron’s long history of abusive tactics in the Ecuadorian litigation, and into its elaborate private investigative operation which “generated” false allegations of wrongdoing for use in the RICO case and fed information for Chevron’s broader public demonization campaign.

In addition to precluding reference to the environmental and social justice context behind Chevron’s allegations, Judge Kaplan blocked any meaningful opportunity to litigate the means by which Chevron “generated” the various allegations against Mr. Donziger to serve the “long-term strategy [of] demoniz[ation]” that it had formulated as early as 2009.\(^{53}\) Much of the

\(^{53}\) See Ex. 4 at 2 (quoting a recording of Chevron’s star witness, Alberto Guerra, describing Chevron’s practice of “generating incidents”); id. at 53 (“As part of its effort to “generate incidents,” as Mr. Guerra aptly put it, Chevron challenged every conceivable aspect of the Lago Agrio Litigation with unmeritorious and, at times, even frivolous claims. The Republic
“generating” was done by a vast team of private investigators and corporate “solutions” firms in the United States, Ecuador, Mexico, and elsewhere, including Kroll, Inc., Investigative Research, Inc., Custom Information Services, Inc., and many others. Some of this work was known: most notably, Chevron was forced to produce materials showing how its investigators met repeatedly with Guerra, crudely bargaining over the value of his “fact” testimony to Chevron and ultimately settling on a cash price to be followed by an unending dole of luxury benefits. Another key Chevron tactic was “flipping” Mr. Donziger’s former associates and acquaintances to offer negative testimony, a tactic that Chevron’s media team deployed with particular relish and that figures prominently in the RICO Judgment. One particularly strong-willed target of this tactic resisted and described the early stages of the “flipping” process in a disturbing affidavit.54 It also was established in the pre-trial phase that Chevron’s massive investigative apparatus was engaged in near-constant surveillance of (1) opposition counsel in the RICO case as they performed their work, in violation of ethical rules and attorney-client privilege; and (2) many of the key players in Chevron’s allegations

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54 Ex. 15, RICO Dkt. 1218-5, Declaration of Harry E. Dunkelberger III, dated July 6, 2013 (describing, inter alia, investigators repeatedly coming to his house and telling him that cooperation “would be far easier than the ‘alternative’ I would face”).
(such as Judge Zambrano and Ecuadorian attorney Pablo Fajardo) at the time the alleged conspiratorial acts took place.

Based on multiple theories of compelling need, the defense requested depositions and discovery concerning this kind of activity by both Chevron’s lawyers and investigators. Chevron categorically refused to produce any documents regarding work—even investigative work—undertaken by its lawyers. On privilege grounds, Chevron refused to produce virtually every document having to do with its private investigators on relevance and work product grounds, and opposed all depositions of them. While Judge Kaplan allowed a single relevant deposition (of a Kroll executive) to go forward, Chevron used an elaborate array of bad faith tactics to prevent any meaningful discovery. This included producing a log of 20,000 responsive documents just days before the deposition (despite months of assurances by Chevron that all responsive documents already had been logged) such that there was not time to even review the log, much less compel the

55 In addition to the theory that Chevron’s unprivileged surveillance may have captured (or not captured) evidence useful to disproving its own allegations, RICO Dkt. 1193 (“[a]ny fact-finder assessing the plausibility of Chevron’s ‘ghostwriting’ allegations must be made fully aware of the magnitude of Chevron’s surveillance efforts” given that “it is virtually inconceivable that Chevron would not have observed at least some of the [alleged conspiratorial] activities occurring, had they actually occurred”), and the theory that aggressive and coercive tactics were applied to many “flipped” witnesses, the defense sought the material as relevant to corroborating Donziger’s testimony that the occasional use of “code names” in emails was a result of the plaintiffs’ team’s knowledge that they were under constant surveillance by Chevron. See RICO Dkt. 1252. The defense also sought production of nearly 4,000 documents concerning the investigation of unspecified “persons of interest,” the identity of whom remain unknown to Mr. Donziger even to this day. Judge Kaplan denied almost all discovery related to these issues.
documents prior to the deposition. When the defense did move to compel some of the documents, Judge Kaplan denied the bulk of the motion by categorizing wholesale the requests for the materials as “largely baseless” without any explanation. Judge Kaplan then engaged in a fig-leaf process of requiring Chevron to produce documents that it could select “sufficient to show” the extent of surveillance of a few individuals for two specific periods of time, id. at 7-8, and upon reviewing the material pronounced that because the surveillance “occurred over no more than a handful of days” and tracked only one of the specified individuals (he declined to say who), it had “no probative value” and need not be produced. The defense had no opportunity to test the adequacy of the documents allegedly “sufficient to show” the extent of the surveillance nor their probative value.

5. Judge Kaplan accepted testimony from numerous anonymous “John Doe” witnesses presented by Chevron whose identities were never disclosed to Mr. Donziger

The RICO Proceeding also was tainted by Judge Kaplan’s decision to repeatedly endorse Chevron’s efforts to introduce secrete testimonial evidence from “John Doe” witnesses. No less than four such witnesses were introduced by

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56 RICO Dkt. 1276 at 5.
57 RICO Dkt. 1311.
way of statements, and at least one secret deposition, at various points in the proceeding.\textsuperscript{58}

It must be restated at the outset that in the 25-year history of the Ecuadorian plaintiffs’ struggle for environmental justice, there is not even a single alleged incident of any sort of physical “reprisal” on anyone associated with Chevron in any way, whereas supporters of the Ecuadorian cause have routinely suffered mysterious attacks, death threats, and other intimidation. \textit{Supra} note 50. What Judge Kaplan sought to characterize as “retaliation” was at most very occasional and wholly legitimate efforts to hold individuals working for Chevron accountable for their actions, when those actions were corrupt or in bad faith, such as with Guerra’s invented testimony or with Mr. Donziger’s recommendation that Chevron officials responsible for what he to believed to be fraudulent criminal acts in Ecuador be prosecuted.\textsuperscript{59} In practice, the repeated acceptance by Judge Kaplan of secret witnesses, over the vociferous objections of the defense,\textsuperscript{60} means that \textit{even }

\textsuperscript{58} \textit{See} RICO Dkts. 802, 1227; RICO Dkt. 1358 (Chevron filing noting that “[t]his Court has granted similar protection to that sought here with respect to the confidential ‘Doe 1,’ ‘Doe 2,’ and ‘Doe 3’ declarations”).

\textsuperscript{59} \textit{See, e.g.}, Ex. 17 (RICO Dkt. 1154) (“The factual predicate for the motion—that the witness faces ‘great personal risk’—is unsupported. No ‘risk’ is described, other than potential prosecution for lies and loss of reputation, which would be deserved. If the witness faces calumny or indeed prosecution for lies or other violations of Ecuadorian law, that is the risk persons face when they lie under oath about and defame individuals. It is the risk a person would face in the United States under similar circumstances, and a U.S. Court should blush at protecting from disclosure the identity of a person making these accusations.”)

\textsuperscript{60} \textit{Id.} at 2 (“The motion is offensive to basic principles of U.S. law—which this Court and Chevron purport to trumpet in attacking the Ecuadorian judicial system—that permit an
Mr. Donziger does not fully know the scope of the “evidence” against him, much less had an opportunity to probe and challenge it—and much less still, had anything even close to a “full and fair” opportunity to litigate the issues that the Committee wishes to use as a basis for discipline.

6. On the eve of trial, Judge Kaplan allowed Chevron to drop all claims of money damages (yet continue with the case) in order to deprive Mr. Donziger of a jury trial as a surprise tactic.

As already noted earlier, one of the more disturbing features of the RICO proceeding was that Judge Kaplan allowed a Chevron maneuver whereby the company, after demanding a jury trial on its claims for two-and-a-half years, suddenly dropped all of its money damages claims by asserting that because it was only seeking equitable relief, the defense no longer had any right to a jury and Judge Kaplan alone would act as fact-finder. The maneuver acknowledged the reality that Chevron had no confidence that it could convince a jury of truly impartial fact-finders to accept its distorted, corrupted, and manufactured version of the accused to confront his accuser. Only totalitarian and repressive regimes permit, especially in a civil context such as this, an accuser to hide his or her name from the accused.”

The function of a jury of ordinary individuals as a “vital check against the wrongful exercise of power,” Powers v. Ohio, 499 U.S. 400, 411-12 (1991), applies not only in the context of a government prosecution but in those rare civil cases like this one where a civilian entity is given latitude by official authority to effect a private quasi-criminal prosecution, employing not only equal but in fact far greater resources to the task than would any government prosecutor. See 4 THE COMPLETE ANTI-FEDERALIST 149 (H. Storing ed. 1981) (the jury trial “preserves in the hands of the people that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.”) (citing 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379-80).
of events. However, the maneuver directly violated Mr. Donziger’s Seventh Amendment rights, and further caused severe prejudice as a practical matter because the defense had been dedicating its extremely limited resources to the uniquely important preparatory work for a jury trial, such as researching and writing jury instructions. Indeed, Mr. Donziger had invested essentially all funds he had available for counsel that specialized in slow-moving jury trials, not breakneck-paced corporate bench trials.

V. CONCLUSION

The “practical reality” of the RICO Proceeding is abundantly clear: it was, and remains, a deeply self-interested effort by a deep-pocketed oil company to

62 Tellingly, the office that would not have been able to so breezily discharge the obligation to present the facts to a jury, the U.S. Attorneys Office for the Southern District of New York, declined to pursue any action on Chevron’s allegations. See Lefcourt Decl.

63 The Seventh Amendment guarantees the right to a jury in civil cases for “suits at common law,” and further guarantees the jury trial right for new and statutory causes of actions that are “similar to cases that were tried in courts of law.” Tull v. United States, 481 U.S. 412, 417-18, 107 S. Ct. 1831, 1835 (1987). In determining whether the Seventh Amendment extends to these new causes of action, courts consider “both the nature of the action and the remedy sought.” Id. With respect to the “nature” of civil RICO, “there can be no dispute that [it gives defendants] a Seventh Amendment right to a jury trial.” Maersk, Inc. v. Neewra, Inc., 697 F. Supp. 2d 300, 340-41 (S.D.N.Y. 2009) aff’d sub nom. Maersk, Inc. v. Sahni, 450 F. App’x 3 (2d Cir. 2011).

64 As just one example, Chevron moved all of its 2,000-plus exhibits into evidence in a single motion on the first day of trial, rather than introducing them for individual consideration (and defense challenge) as would be customary in a jury context. Chevron then demanded that the defense produce any and all objections to its exhibits within a few days, or waive any opportunity to do so. Rather than make accommodation for the practical reality that the defense had no realistic ability to accomplish this task, Judge Kaplan implemented Chevron’s demand by order and repeatedly throughout the trial used the defense’s lack of detailed objections to events it had no practical ability to respond to in order to further prejudice the defense on evidentiary matters.
retaliate and strategically “taint” a significant environmental liability owed by the company as it faces enforcement actions on that liability in courts around the world. To allow Chevron to now leverage this court’s attorney discipline system in service of this strategy would sharply undermine public confidence both in the discipline system and in the U.S. legal system generally—an unfortunate and ironic result for a system designed specifically to bolster that public confidence through judicious and disinterested exercises of disciplinary authority. This court should deny the Committee’s motion and further make clear that the Committee’s powers and duties must be exercised independently and scrupulously in furtherance of due process.

Respectfully submitted,

Dated: February 16, 2018

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