No. 22-___

IN THE

Supreme Court of the United States

STEVEN DONZIGER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION APPENDIX

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United States Court of Appeals

for the Second Circuit

August Term, 2021

(Argued: November 30, 2021 Decided: June 22, 2022)

Docket No. 21-2486

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN DONZIGER,

Defendant-Appellant.

Before:

PARK, NARDINI, and MENASHI, *Circuit Judges*.

Defendant-Appellant Steven Donziger criminal contempt for repeatedly defying court

was convicted of six counts of orders, for which he was sentenced to six months' imprisonment. He challenges the conviction, arguing that the district court's appointment of special prosecutors under Federal Rule of Criminal 28 Procedure 42(a)(2) violated the Appointments Clause of the United States Constitution because (1) the special prosecutors are inferior officers who were not supervised by a principal officer, and (2) Rule 42 does not satisfy the Appointments Clause requirement that "Congress . . . by Law" vest the appointment of inferior officers in the courts.

Before reaching Donziger's Appointments Clause challenges, we must determine whether special prosecutors are officers under the Appointments Clause. We conclude that they are because they wield federal prosecutorial power and hold a position that is not personal to a specific last individual and may for years. *Cf. Morrison v. Olson*, 487 U.S. 654 24(1988). We turn next to Donziger's Appointments Clause arguments and conclude that they lack merit. First, the special prosecutors are subject to supervision by the Attorney General, who has broad statutory authority to "conduct" and to "supervise" all litigation involving the United States. *See, e.g.*, 28 U.S.C. §§ 518(b), 519. This authority includes supervising —and if necessary, removing—the special prosecutors.

Second, Donziger failed to raise his challenge to Rule 42 below, and we conclude that the district court did not commit plain error by appointing the special prosecutors in light of directly applicable Supreme Court precedent. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Finally, we conclude that the district court did not abuse its discretion by initiating a prosecution against Donziger for repeatedly defying court orders for years. We thus affirm Donziger's conviction.

Judge MENASHI dissents in a separate opinion.

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PARK, *Circuit Judge*:

Defendant-Appellant Steven Donziger was convicted of six counts of criminal contempt for repeatedly defying court orders, for which he was sentenced to six months' imprisonment. He challenges the conviction, arguing that the district court's appointment of special prosecutors under Federal Rule of Criminal Procedure 42(a)(2) violated the Appointments Clause of the United States Constitution because (1) the special prosecutors are inferior officers who were not supervised by a principal officer, and (2) Rule 42 does not satisfy the Appointments Clause requirement that "Congress . . . by Law" vest the appointment of inferior officers in the courts.

Before reaching Donziger's Appointments Clause challenges, we must determine whether special prosecutors are officers under the Appointments Clause. We conclude that they are because they wield federal prosecutorial power and hold a position that is not personal to a specific individual and may last for years. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988). We turn next to Donziger's Appointments Clause arguments and conclude that they lack merit. First, the special prosecutors are subject to supervision by the Attorney General, who has broad statutory authority to "conduct" and to "supervise" all litigation involving the United States. *See, e.g.*, 28 U.S.C. §§ 518(b), 519. This authority includes supervising—and if

necessary, removing—the special prosecutors. Second, Donziger failed to raise his challenge to Rule 42 below, and we conclude that the district court did not commit plain error by appointing the special prosecutors in light of directly applicable Supreme Court precedent. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Finally, we conclude that the district court did not abuse its discretion by initiating a prosecution against Donziger for repeatedly defying court orders for years. We thus affirm Donziger's conviction.

I. BACKGROUND

A. Civil Contempt

In 2014, the United States District Court for the Southern District of New York found that Donziger, a New York lawyer, had engaged in fraud and racketeering activity in order to obtain an $8.646 billion judgment against Chevron Corporation in Ecuador. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 575–603 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016). As part of the judgment, the district court enjoined Donziger from enforcing the Ecuadorian judgment in the United States or undertaking any acts to monetize or profit from it and ordered Donziger to transfer and assign to Chevron any property that Donziger had received or would receive that was traceable to the Ecuadorian judgment (the "permanent injunctions"). In February 2018, the court issued a $813,602.71

judgment against Donziger. A few months later, the court granted Chevron's motion to compel Donziger's compliance with post-judgment discovery requests to identify assets for enforcing the money judgment and to assess his compliance with the permanent injunctions. Donziger refused to comply with the initial motion to compel, a subsequent motion to compel, and finally, a Forensic Protocol Order directing Donziger to surrender his electronic devices to a neutral forensic expert. In May 2019, the court held Donziger in civil contempt for several violations of the permanent injunctions and failure to comply with the Forensic Protocol Order. In an effort to coerce compliance, the court imposed daily escalating fines on Donziger and then ordered him to surrender his passports. Donziger did not pay the fines or surrender his passports, and he continued to disobey the Forensic Protocol Order.

B. Criminal Contempt

On July 31, 2019, after several more months of Donziger's noncompliance with court orders, the district court issued an order to show cause why he should not be held in criminal contempt in violation of 18 U.S.C. § 401(3). Counts 1–3 charged Donziger with failure to comply with the Forensic Protocol Order and the order to surrender his passports, and counts 4–6 charged him with violating the permanent injunctions. The court referred Donziger's prosecution to the U.S. Attorney for the

Southern District of New York, who "respectfully decline[d] on the ground that the matter would require resources that we do not readily have available." App'x at 59 (alteration in original). The court thus appointed private counsel as special prosecutors under Rule 42(a)(2).

On the first day of Donziger's criminal contempt trial, he moved to dismiss, arguing that the prosecution violated the Appointments Clause because the special prosecutors were inferior officers who lacked supervision by the Department of Justice ("DOJ").[1] The court denied the motion in an oral ruling after concluding that Donziger's "moving papers have given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch." App'x at 153.

After trial but before the verdict, Donziger filed another motion to dismiss again arguing that his prosecution violated the arguing that his prosecution violated the Appointments Clause because the special prosecutors were unsupervised inferior officers.

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[1] Donziger included an email from Acting Deputy Attorney General John P. Carlin to Donziger's attorneys stating, "The Department has received your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal-court initiated contempt proceedings." App'x at 156.

On July 26, 2021, the court issued its findings of fact and conclusions of law and found Donziger guilty on all six counts. In the decision, the court also denied Donziger's motion to dismiss, finding that the motion was untimely and that nothing in Rule 42(a) prevented the Attorney General from exercising supervision and review over the special prosecutor. Donziger moved for a new trial based on the same argument, and the court again rejected it.

On October 1, 2021, Donziger was sentenced to six months' imprisonment, and judgment was entered that day. Donziger timely appealed.

II. DISCUSSION

The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. 1 "The Appointments Clause prescribes the exclusive means of appointing 'Officers, '"*Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018), and it "is more than a matter of 'etiquette or protocol'; it is among the

significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)).

Donziger argues that his prosecution was unconstitutional because the special prosecutors are inferior officers who were unsupervised by a principal officer and installed in violation of the Appointments Clause. Before reaching these arguments, we begin with the question whether the special prosecutors are Officers of the United States at all. "[W]e review questions of constitutional interpretation *de novo*." *United States v. Hester*, 589 F.3d 86, 90 (2d Cir. 2009).

A. Special Prosecutors Are Officers Under the Appointments Clause

It is not obvious from the text of the Appointments Clause who qualifies as an Officer of the United States, but the Supreme Court has provided sufficient guidance in its Appointments Clause jurisprudence to decide this case. To qualify as an officer, an individual must (1) "exercis[e] significant authority pursuant to the laws of the United States" and (2) "occupy a continuing position established by law." *Lucia*, 138 S. Ct. at 2051 (cleaned up). It is undisputed that special prosecutors meet the "significant authority" requirement because they "represent the United States," *Young*, 481 U.S. at 804, and exercise the "sovereign power of the United States," *United States v. Providence J.*

Co., 485 U.S. 693, 700 (1988). We conclude that special prosecutors also hold a "continuing position" and are thus officers under the Appointments Clause.

1. Temporary Positions Can Be Offices

The Supreme Court has long held that officers occupy a "continuing position" established by law. *See United States v. Germaine*, 99 U.S. 508, 511–12 9 (1878); *Auffmordt v. Hedden*, 137 U.S. 310, 327–28 (1890). The Court's early Appointments Clause cases held that to be an officer, one's duties had to be "continuing and permanent, not occasional or temporary." *Germaine*, 99 U.S. at 12 511–12; *see Auffmordt*, 137 U.S. at 327 (merchant appraiser not an officer because he "acts only occasionally and temporarily").

More recently, the Court has indicated that "continuing position" does not exclusively refer to permanent positions. In *Morrison*, the Court said "[i]t is clear" 16 that an independent counsel is an officer even though the position terminates when the counsel "has completed or substantially completed any investigations or prosecutions undertaken pursuant to the [Ethics in Government] Act." 487 U.S. at 664, 671 n.12; *see also Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 37– 38 (D.C. Cir. 2016) (holding that an arbitrator—appointed only if Amtrak and the Federal Railway Administration have a certain type of dispute

and whose sole duty is to resolve that dispute—is an officer); *In re Grand Jury Investigation*, 916 F.3d 1047, 1052–53 (D.C. Cir. 2019) (holding that a special counsel is an inferior officer). In short, an officer must occupy a position that is "continuing," and the Court has held that a temporary position, like a special prosecutor, can satisfy this requirement.[2]

Although *Morrison* made clear that a temporary position can be an office, it did not directly address the "continuing position" requirement. Nor has the Supreme Court explained how to determine what constitutes a sufficiently "continuing position." *See, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) 13 (acknowledging the "continuing position" requirement without elaborating); *Lucia*, 138 S. Ct. at 2051–53 (same). We thus look to *Germaine* and *Auffmordt*, as well as relevant authorities preceding those cases, for guidance on how to determine whether a particular temporary position is sufficiently "continuing" to constitute an office. These early cases generally discuss three factors that are helpful to consider in determining whether a temporary position is an office: (1) the position is not personal to a

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[2] *See* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 534 (2018) (explaining that although the historical meaning of "officer" included the idea of "*ongoing* duties," "one did not necessarily need to be *continuously* employed or remunerated to qualify as an officer. . . . A number of the individuals receiving fees for services performed or for each day worked were considered officers by the First Congress.")

particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 112–13 (2007). We apply these factors to conclude that the special prosecutors here are officers.

First, to qualify as an office, the position must not depend on *the* identity of the person occupying it, and the duties should "continue, though the person be changed."[3] *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823)*; see United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867) ("Vacating the office of his superior would not have affected the tenure of his place."). By contrast, "[a] man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer" because the duties under the contract are owed by that individual, who cannot simply be replaced by another. *Maurice*, 26 F. Cas. at 1214. Here, the special prosecutor positions are not specific to the attorneys appointed to prosecute Donziger. Indeed, the prosecution was originally referred to

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[3] *See* James A. Heilpern, *Temporary Officers*, 26 Geo. Mason L. Rev. 753, 771 (2019) ("[A]t the time of the Founding, common law had defined the term *office* as 'an *institution* distinct from the person holding it.' An office was said to be continuous whenever it was 'capable of persisting beyond an individual's incumbency.'" (brackets omitted) (quoting Edward S. Corwin, *The President: Office and Powers, 1787-1984*, at 70 (4th ed. 1957))).

the U.S. Attorney for the Southern District of New York, who declined due to unavailability of resources. Moreover, the individuals appointed as special prosecutors could be replaced without the duties of the positions terminating.

Second, the position must not be transient or fleeting. *See Auffmordt*, 137 U.S. at 326–27 (holding that a merchant appraiser is not an officer because he had no "employment which has any duration as to time"); *see also In re Oaths*, 20 Johns. 11 492, 493 (N.Y. 1823) ("Lexicographers generally define 'office' to mean '*public employment*;' and I apprehend its legal meaning to be an employment on behalf of the government, in any station or public trust, not merely *transient*, *occasional* or *incidental*."); *State v. Kennon*, 7 Ohio St. 546, 556 (1857) (contrasting duties that are "transient, occasional, or incidental" with those that are "durable, permanent, and continuous").[4] Here, the special prosecutors were appointed in July 2019 and have already served for nearly three years. Although the special prosecutors' duties terminate upon performance, the positions are not transient or fleeting.

Third, the duties of the position must be more than incidental to the regular operations of

[4] Although *In re Oaths* and *Kennon* were state court cases, they reflect a shared understanding of the characteristics of an office discussed in the few federal cases that addressed the issue. *See also, e.g.*, *In re Hathaway*, 71 N.Y. 238, 243–44 (1877); *Eliason v. Coleman*, 86 N.C. 235, 241 (1882).

of government.[5] *See Sheboygan County v. Parker*, 70 U.S. (3 Wall.) 93, 96 (1865) (stating that the occupant of a position was not an officer because he did not exercise "continuously, and as a part of the regular and permanent administration of the government, any important public powers, trusts, or duties" (quoting *Kennon*, 7 Ohio St. at 562–63)); *see also Kennon*, 7 Ohio St. at 556 (describing an office as a "public duty, charge, and trust, conferred by a public authority, for public purposes of a very weighty and important character" and "not merely transient, occasional, or incidental" (cleaned up)). Here, the special prosecutors' duties are more than incidental to regular government operations because prosecution generally is a core power of government and prosecution of contempt specifically "vindicate[s] the authority of the court." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) (citation omitted).

2. Special Prosecutors Are Analogous to Independent Counsel

In light of the foregoing, we conclude that the special prosecutor position here is analogous to the independent counsel position in *Morrison*. First, the duties of the special prosecutor and

[5] Although this factor is not relevant to the duration of the office, its consideration is necessary to ensure against evasion of the Appointments Clause through the creation of temporary positions with the same powers as officers. *See* 31 Op. O.L.C. at 113.

independent counsel extend beyond the person. *See* 28 U.S.C. § 593(e) ("If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work."). Second, both positions last for an indefinite period of time, possibly years, and thus neither position is transient or fleeting. *See id.* § 596(b) (the office of independent counsel terminates when the investigations and prosecutions "within the prosecutorial jurisdiction" of the independent counsel "have been completed" or "substantially completed"). Third, both positions exercise federal prosecutorial power. [6] *See id.* § 594(a) (independent counsel shall have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General"). Although the independent counsel exercised greater authority than a special prosecutor, such as initiating prosecutions and prosecuting a wider range of crimes, *see id.* §§ 593(b)(3), 594(a)(9), these differences go to the degree, not the nature, of the authority.

By contrast, the special prosecutor is less like the civil surgeon in *Germaine* or the merchant appraiser in *Auffmordt*, which

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[6] The appointment order in this case grants the special prosecutors "the same power to investigate, gather evidence and present it to the Court as could any other government prosecutor." App'x at 59.

addressed positions that lacked "any duration as to time" and duties that were narrowly limited, specialized, or insignificant. *Auffmordt*, 137 U.S. at 327. The civil surgeon's sole duty was to make "examination of pensioners" "when called on by the Commissioner of Pensions in some special case." *Germaine*, 99 U.S. at 508, 512 (citation omitted)*; see also id.* at 512 ("If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law . . . he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."). And the merchant appraiser's sole duty was to "examine and appraise" merchandise "upon the request of the importer for a reappraisal." *Auffmordt*, 137 U.S. at 312, 326; *see also id.* at 327 (merchant appraiser is "an expert assistant . . . selected for the particular case . . . [and] for his special knowledge in regard to the character and value of the particular goods in question").

The fact that the special prosecutor is generally appointed for a "particular case" does not negate the differences between special prosecutors, on the one hand, and civil surgeons and merchant appraisers, on the other.[7]

[7] Although in this case the special prosecutors were charged with the prosecution of only a single defendant, special prosecutors could be appointed to investigate and prosecute multiple defendants for contempt arising from the same court

Id. at 327. In contrast to the discrete, short-lived tasks civil surgeons and merchant appraisers undertake for any given case, the special prosecutor investigates and prosecutes a criminal case, which can last for years and a encompass wide array of assignments, such as executing search warrants, issuing, subpoenas granting immunity, entering into plea bargains, and representing the in government court both at trial and on appeal. Also unlike civil surgeons and merchant appraisers, the special prosecutor wields the "power to employ the full machinery of the state" to vindicate the authority of the judiciary, which may include the awesome responsibility of depriving an individual of his liberty. *Young*, 481 U.S. at 814.

In sum, we hold that special prosecutors are officers under the Appointments Clause because they are analogous to independent counsel: The duties of the position extend beyond the person; although not permanent, the position is continuing and may last for years; and the purpose of the position is to exercise federal prosecutorial power.

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orders. For instance, the special prosecutors in Young prosecuted five defendants—two pled guilty, one was convicted of criminal contempt, and two were convicted of aiding and abetting that contempt. 481 U.S. at 790 n.1, 792. Although in Young all defendants were prosecuted under the same case, a different multi-defendant prosecution could involve multiple cases. See Fed. R. Crim. P. 14(a) (allowing the court to sever defendants for trial where joinder "appears to prejudice a defendant or the government").

B. Special Prosecutors Are Subject to Supervision by the Attorney General

Having determined that special prosecutors are officers, we turn to Donziger's first argument that his prosecution violated the Appointments Clause because the special prosecutors were inferior officers who lacked supervision by a principal officer. As an initial matter, it is not clear that Donziger's argument regarding supervision of the special prosecutors was timely under Federal Rule of Criminal Procedure 12(b)(3)(A).[8] But even assuming it was timely, it fails on the merits.

The Appointments Clause differentiates between principal officers—who must be appointed by the President and confirmed by the Senate—and inferior officers, who may be appointed by "the President alone," "the Courts of Law," or "the Heads of Departments," as Congress may provide by law. *Edmond*, 520 U.S.

[8] In its findings of fact and conclusions of law, the district court determined that Donziger forfeited his supervision argument because he did not comply with Federal Rule of Criminal Procedure 12(b)(3)(A), which states that a "defect in instituting the prosecution" "must be raised by pretrial motion if the basis for the motion is then reasonably available." Donziger's supervision argument was apparent as soon as the special prosecutors were appointed in July 2019, but he did not raise it before the February 27, 2020 deadline for filing pre-trial motions, waiting instead until the first day of trial. We note, however, that the government may have itself forfeited the timeliness argument by failing to raise it in response to Donziger's motions to dismiss. *See Eberhart v. United States*, 546 U.S. 12, 18 (2005) ("[F]ailure to object to untimely submissions entails forfeiture of the objection.").

at 660 (quoting U.S. Const. art. II, § 2, cl. 2). 62 Inferior officers "are officers whose work is directed and supervised at some level" by principal officers. *Id.* at 663.

The special prosecutors here are inferior officers appointed by "the Courts of Law" under Rule 42, *see infra* Section II.C, and subject to the supervision of the Attorney General of the United States, a principal officer. The statutory scheme in Chapter 31 of Title 28 gives the Attorney General broad authority to conduct and to supervise all litigation involving the United States. *See* 28 U.S.C. §§ 516, 517, 518, 519. This includes the authority to supervise—and if necessary, to remove—inferior officers.

As relevant here, section 518(b) states that "[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case . . . in which the United States is interested, or he may direct . . . any officer of the Department of Justice to do so." This section gives the Attorney General the authority to replace special prosecutors, which is "a powerful tool for control of an inferior," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010) (cleaned up), and to take control over contempt prosecutions.[9] *See Booth v. Fletcher*, 101 F.2d 676, 681–82 (D.C. Cir. 1938) (explaining that Rev. Stat. § 359, a predecessor to 28 U.S.C. § 518(b), "gives [the Attorney General] broad, general powers intended to safeguard the interests of the United States in any case . . . .

The Attorney General occupies no subordinate position when he elects to enter such a proceeding . . . . On the contrary, the law contemplates that—consistent with the proper interests of private litigants and, so far as concerns the interests of the United States—he shall have full control of the prosecution or defense of the case"). Indeed, at oral argument, both the special prosecutors and the DOJ acknowledged that the Attorney General could replace the special prosecutors. *See* Oral Argument at 36:37–37:03, 47:03–49:47, 55:17–55:33.

In addition, section 519 states that "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States . . . is a party, and shall direct all United States attorneys [and] assistant United States attorneys . . . in the discharge of their respective duties." This section is comprised of two separate grants of authority to the

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[9] This power is reinforced by the Attorney General's authority to conduct and supervise litigation in which the United States is a party, which necessarily encompasses the authority to decide which inferior officer represents the United States in court and the ability to replace or remove inferior officers reporting to him. See 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 519 ("[T]he Attorney General . . . shall direct all United States attorneys [and] assistant United States attorneys . . . in the discharge of their respective duties."); *id.* § 542(b) ("Each assistant United States attorney is subject to removal by the Attorney General.").

Attorney General: (1) to "supervise all litigation to which the United States . . . is a party" and (2) to "direct all United States attorneys [and] assistant United States attorneys." *Id*. The first grant of authority is independent of the second, and thus the Attorney General's authority to supervise "all litigation to which the United States . . . is a party" does not depend on whether the attorney representing the United States is a United States attorney or an assistant United States attorney—indeed, it does not depend on the identity of the attorney at all. *Id*. This section thus gives the Attorney General the authority to supervise all criminal contempt prosecutions.[10] *See Young*, 481 U.S. at 804 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States.").

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[10] The dissent asserts that *Providence Journal* held that "*Young* is incompatible with direction of the contempt proceeding by the Attorney General." Dissent at 15. That is incorrect. *Providence Journal* instead reconciled the requirement in 28 U.S.C. § 516 and § 547 that litigation involving the United States must be conducted by a "Government attorney" with *Young*'s holding that a "private attorney" could prosecute a criminal contempt charge. *Providence J. Co.*, 485 U.S. at 704–05. In doing so, it relied on the "[e]xcept as otherwise authorized by law" proviso in both sections. *Id.* Even assuming section 516 does not apply to judicially initiated contempt proceedings, sections 518(b) and 519 are not implicated by *Providence Journal*. As *Providence Journal* noted, "by way of vivid contrast" to sections 516 and 547, section 518 does not contain the "[e]xcept as otherwise authorized by law" proviso. *Id.* at 705. And although section 519 does contain the proviso, contempt proceedings fall within that proviso only to

In light of the Attorney General's broad statutory authority to supervise all litigation involving the United States, it is clear that the special prosecutors are subject to the supervision of the Attorney General. Whether they were in fact supervised is beside the point. A principal officer "need not review every decision of the [inferior officer]. What matters is that the [principal officer] have the discretion to review decisions rendered by [the inferior officer]." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021). The Constitution does not mandate a minimum level of supervisory activity over the work of inferior officers; rather, it requires as a matter of structural authority that inferior officers be subject to the supervision and direction of principal officers.

We thus reject Donziger's argument that the special prosecutors were unsupervised as a matter of fact.[11] He points to (1) an email from

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the limited extent that the Attorney General does not initiate the contempt prosecution or choose the special prosecutor. In all other respects, they do not conflict with or require an exception to the Attorney General's authority to supervise contempt prosecutions.

[11] Donziger concedes that the Attorney General has statutory authority to exercise direction over this case. Reply Br. 24.

the DOJ before trial declining to intervene in the prosecution and (2) the DOJ's filing of a separate amicus brief in this appeal rather than directing the special prosecutors to take the DOJ's position.[12] Neither changes the fact that the Attorney General had statutory authority to supervise the special prosecutors, bringing them under the supervision of a principal officer.

Nor does the Attorney General's statutory authority to supervise special prosecutors abrogate the judicial power described in *Young* to punish contempt. The only judicial powers described in *Young* are the court's authority to *initiate* prosecution and to appoint a special prosecutor if the executive declines to prosecute—it does not extend the judicial power beyond that point. *See, e.g.*, *Young*, 481 U.S. at 795 ("[T]he *initiation* of contempt proceedings to punish disobedience to court orders is a part of the judicial function." (emphasis added)); *id.* at 800–01 ("[C]ourts have long had, and must

[12] Donziger also argues that the special prosecutors denied that they were subject to supervision in their opposition to Donziger's post-trial motion to dismiss. As the district court correctly noted, although the special prosecutors made a misguided legal argument, it was "in no way whatsoever" "a dispositive admission that [the special prosecutors] were not subject to supervision and direction prior to trial." Sp. App'x at 259 n.12 (cleaned up). In any event, even if the special prosecutors had denied that they were subject to supervision, that would still not vitiate the Attorney General's statutory authority to supervise special prosecutors.

continue to have, the authority to appoint private attorneys to *initiate* such proceedings when the need arises." (emphasis added)). Indeed, *Young* recognized that once the prosecution commenced, the special prosecutor would make critical decisions "outside the supervision of the court," such as who should be targets of investigation, who should be granted immunity, and whether to enter into plea bargains. [13] *Id.* at 807.

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[13] The dissent asserts based on certain language in *Young* that courts must have "an independent means to prosecute criminal contempt" that cannot be interfered with by the executive. Dissent at 13. But *Young* did not expand the judicial power beyond initiation and appointment. For example, although the Court observed that "the attributes which inhere in [the contempt] power and are inseparable from it can neither be abrogated nor rendered practically inoperative," *Young*, 481 U.S. at 799 (citation omitted), the Court concluded in the very next sentence that prosecutions of contempt both in and out of court "proceed at the *instigation* of the court." *Id.* (emphasis added). Similarly, after saying "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution," the Court explains in the following sentence that "[t]he logic of this rationale" is that a court should appoint a special prosecutor only if the appropriate executive agency declines to prosecute. *Id.* at 801. The Court also cabined the scope of its broad statement about inter-branch dependency in an earlier portion of the opinion: "Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be *initiated*. The *ability to appoint* a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection." *Id.* at 796 (emphases added).

The dissent states that the judicial power described by *Young* is "ineffectual" and "strange" because it is useful only "when the executive branch actually *wants* to prosecute the

The Attorney General cannot prevent a court from initiating a contempt prosecution or appointing a special prosecutor—his authority to supervise special prosecutors starts only after the court has exercised these powers. The fact that the Attorney General has the power to direct and even remove special prosecutors does not negate the court's power to appoint them, authority to take control of and even to terminate the contempt prosecution does not negate the court's authority to initiate one.

We thus reject Donziger's first Appointments Clause argument because the Attorney General has the statutory authority to supervise the special prosecutors.

C. Donziger's Rule 42(a) Challenge Does Not Satisfy Plain-Error Review

For the first time on appeal, Donziger argues that his prosecution was

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contempt but declines to do so solely for lack of resources." Dissent at 13. But this understates the power blessed by the Court in *Young*. The ability to initiate the process and to appoint a prosecutor gives the judiciary some ability to protect its interests. Although the executive could terminate a contempt prosecution initiated by the judiciary, that would entail greater political accountability than a decision not to prosecute in the first place, and the judiciary could further respond by initiating a new prosecution and appointing another special prosecutor. *See* Oral Argument at 49:30–49:50, 57:00–58:20. Although this would not necessarily ensure prosecution of a contemnor, it would provide a level of political accountability sufficient to fulfill the rationale of *Young*.

unconstitutional because the special prosecutors were appointed under Federal Rule of Criminal Procedure 42(a), which did not satisfy the Appointments Clause requirement that "Congress . . . by Law vest the Appointment." U.S. Const. art. II, § 2, cl. 2. We review for plain error because Donziger did not make this argument below.[14] *See United States v. Eldridge*, 2 F.4th 27, 36 (2d Cir. 2021); *see also Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar . . . than that a constitutional right may be

[14] The dissent asserts that Donziger's related, but distinct, Appointments Clause argument that the special prosecutors were unsupervised inferior officers in his motions to dismiss sufficiently raised the Rule 42(a) issue for review. *See* Dissent at 4–5. But that is a stretch. Donziger never argued below that Rule 42(a) is unconstitutional. In fact, he conceded this failure at oral argument. *See* Oral Argument at 19:37–43 ("We did not raise [the Rule 42 argument] specifically."); *see also In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132–33 (2d Cir. 2008) (concluding that an argument made below merely "resembling" the one presented on appeal was not sufficient to preserve the issue). The dissent also suggests that Donziger had no reason to raise the Rule 42(a) argument below until the district court rejected his supervision argument. *See* Dissent at 5–6. We disagree. First, Donziger never argued that the special prosecutors were principal officers who should have been appointed by the President and confirmed by the Senate—his position throughout the case has been that they are inferior officers. We thus see no reason why he couldn't have argued below that the special prosecutors were inferior officers who were not only inadequately supervised, but also improperly appointed under Rule 42(a). Second, after the district court rejected Donziger's supervision argument, he could have—but didn't— raise this Rule 42(a) argument in his motion for a new trial.

forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."); *Freytag*, 501 U.S. at 893–94 (Scalia, *J.*, concurring) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial.").

"[T]he defendant has the burden of establishing each of the four requirements for plain-error relief," one of which is that the "error must be plain." *Greer v. United States*, 141 S. Ct. 2090, 2096–97 (2021). An error is plain if it is "clear" or "obvious," *United States v. Olano*, 507 U.S. 725, 734 (1993) (citation omitted), or "if the ruling was contrary to law that was clearly established by the time of the appeal," *United States v. Polouizzi*, 564 F.3d 142, 156 (2d Cir. 2009) (citation omitted).

There is no plain error here. First, it is not clear that the phrase "Congress . . . by Law" requires bicameral approval and presentment, and that it does not encompass Rule 42, which was enacted under the Rules Enabling Act, which gives Congress an opportunity to modify or

reject rules before their enactment. *See* 28 U.S.C. § 2074.

Second, even if we might ultimately conclude that the appointment of a special prosecutor under Rule 42 violates the Appointments Clause, any error by the district court would not be "clear" or "obvious" in light of Supreme Court precedent. *Young* held that "courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." 481 U.S. at 793. Even if we were to agree that *Young* is in some tension with the Court's more recent Appointments Clause and separation-of-powers jurisprudence, the district court did not plainly err by following directly applicable Supreme Court precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citation omitted)).

The dissent contends that the district court plainly erred because prosecution is solely an executive function, and "the 'executive Power'—all of it— is 'vested in a President.'" *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (citation omitted). But the dissent

never seriously argues, nor could it, that the judicial appointment of a prosecutor would violate the separation of powers. *See* U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers . . . in the Courts of Law."); *see also* 28 U.S.C. § 546(d) (allowing the district court to appoint an interim United States attorney in certain circumstances). And in Donziger's appeal, it is precisely the appointment of special prosecutors that is at issue.

Instead, the dissent focuses almost exclusively on the initiation of the prosecution by the district court. But Donziger does not argue on appeal that his conviction should be overturned because the district court's initiation of his prosecution violated separation of powers. That argument would conflict not only with *Young*, but also with well-established precedent recognizing the judiciary's ability to punish contempts. *See Michaelson v. United States*, 266 U.S. 42, 65 (1924) ("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law.").

The dissent would hold that Rule 42 is unconstitutional, as are all judicially-initiated contempt prosecutions because they violate

separation-of-powers principles.[15] *See* Dissent at 16–18. Supreme Court precedent does not support that extraordinary conclusion. The dissent accuses us of not "faithfully apply[ing] *Young*," Dissent at 16, but what is clear from that case is that the Supreme Court explicitly rejected the dissent's position. *See Young*, 481 U.S. at 797–801 (rejecting petitioners' argument that out-of-court contempt prosecutions may be initiated only by the executive branch).

The district court reasonably relied on *Young*, and we conclude that it was not plain error to appoint the special prosecutors under

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[15] The dissent distinguishes between in-court contempts that interfere with the judicial process and can be punished summarily because they occur in the presence of the judge and out-of-court contempts involving violations of judicial orders and judgments that require adversarial proceedings. *See* Dissent at 17 n.10. *Young* concluded that "while the prosecution of in-court and out-of-court contempts must proceed in a different manner, they both proceed at the instigation of the court" and both are inherently part of the judicial power. *Young*, 481 U.S. at 799; *see also id.* at 797–801; *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, *and* to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." (emphasis added)); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 333 (1904) (judicial power to punish contempt "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, *and* to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors" (emphasis added)).

Rule 42(a).

D. The District Court Did Not Abuse Its Discretion by Initiating the Prosecution

Finally, Donziger argues that by initiating a criminal contempt prosecution against him, the district court failed to adhere to the "principle that only the least possible power adequate to the end proposed should be used in contempt cases," and he appeals to our "supervisory authority" to overturn the conviction on that basis.[16] *Young*, 481 U.S. at 801, 808–09 (cleaned up). We review the district court's decision to initiate contempt proceedings under a heightened abuse-of-discretion standard. *See Doral Produce Corp. v. Paul Steinberg Assoc., Inc.*, 347 F.3d 36, 38 (2d Cir. 2003) (holding that a judge's decision to issue summary criminal contempt orders are "reviewed on appeal for abuse of discretion, but because of the formidable and potentially harmful nature of the contempt power, this review is more rigorous than in other contexts" (cleaned up)); *see also* 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, *at its discretion*, such contempt of its authority." (emphasis added)).

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[16] We note the Supreme Court's recent observation that "[s]ome jurists have questioned [the Supreme Court's] supervisory authority over lower courts." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1035 n.1 (2022); *see also id.* at 1041 (Barrett, *J.*, concurring) (expressing "skepticism that the courts of appeals possess such supervisory power").

First, Donziger does not deny that he repeatedly refused to obey court orders over a period of years. The district court's findings of fact and conclusions of law describe Donziger's behavior as an "extensive and continuous laundry list of past violations of [the district court's] orders" and as "years of noncompliance." Sp. App'x at 243–44 (emphasis omitted).

Second, the district court did not abuse its discretion by punishing Donziger for his past disobedience of court orders, even if it had since been cured. Criminal contempt punishes "retrospectively for a completed act of disobedience, such that the contemnor cannot avoid or abbreviate the confinement through later compliance." *Bagwell*, 512 U.S. at 828–29 (cleaned up). Unlike civil contempt, which is aimed at "compel[ling] future compliance with a court order" and is "remedial[] and for the benefit of the complainant," criminal contempt is "punitive" and meant to "vindicate the authority of the court." *Id.* at 827–28. Here, "the end proposed" was not compliance with court orders but punishment for past disobedience and vindication of the court's authority. It is therefore beside the point that Donziger eventually complied with most of the court orders underlying his criminal contempt conviction.

Third, it is not an abuse of discretion for a court to punish a contemnor who disobeys court orders to obtain appellate review. *See Del Carmen Montan v. Am. Airlines, Inc.*, 490 F.3d 99, 104 (2d Cir. 2007) ("[T]he remedy of the party witness wishing to appeal [a court's decision to compel compliance with a subpoena or deny a motion to quash a subpoena] is to refuse to answer and subject himself to criminal contempt." (citation omitted)).

In any event, Donziger's assertion that he disobeyed the court's discovery orders to appeal them is dubious. When he appealed the civil contempt orders and had the opportunity to challenge two of the three discovery orders that were the basis for his criminal contempt conviction, he failed to do so—he challenged only one contempt finding, which was not part of his criminal conviction. *See Chevron Corp. v. Donziger*, 990 F.3d 191, 206 (2d Cir. 2021).

We thus conclude that the district court did not abuse its discretion by initiating a contempt proceeding against Donziger.[17]

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[17] Donziger mentions in passing various other objections to his prosecution—namely, he was denied his right to a grand jury and a petit jury, Judge Kaplan picked Judge Preska to preside over the criminal case without recusing himself, and the private prosecutor had ties to Chevron. These arguments were waived because they were "not sufficiently argued in the briefs," and we decline to address them. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

III. CONCLUSION

For the reasons set forth above, the district court's judgment is AFFIRMED.

21-2486
United States v. Donziger

MENASHI, *Circuit Judge*, dissenting:

When the U.S. District Court for the Southern District of New York requested that the U.S. Attorney prosecute Steven Donziger for contempt, the U.S. Attorney "respectfully decline[d]." App'x 59. In response to that exercise of prosecutorial discretion, the district court appointed three private attorneys "to prosecute Steven Donziger on the charges of criminal contempt." *Id.* These judicially appointed prosecutors eventually secured a conviction against Donziger and a sentence of six months' imprisonment.

This is not how defendants are prosecuted in a system of separated powers. In our constitutional framework, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). In this case, however, the district court made that decision by appointing its own prosecutors. Moreover, any officer exercising the executive power—as all parties now acknowledge the special prosecutors to be—must be appointed consistent with the Appointments Clause. That clause requires appointment by the President and confirmation by the Senate unless "Congress ... by Law" vests the appointment of certain inferior officers in the courts, the heads of the departments, or the President alone. U.S. CONST. art. II, § 2, cl. 2. In this case, the district court appointed the special prosecutors, but Congress never authorized it to do so.

Thirty-five years ago, the Supreme Court suggested that Article III created an exception to normal separation-of-powers principles when a district court appoints private lawyers as special prosecutors for criminal contempt proceedings. In *Young v.* United *States ex rel. Vuitton et Fils S.A.*, the Court said that the power to initiate a prosecution followed from the judiciary's "inherent power of self-protection," so that a court would not be "completely dependent on the Executive Branch to redress direct affronts to its authority." 481 U.S. 787, 801 (1987). For that reason, *Young* said, the power to initiate "contempt proceedings to punish disobedience to court orders" was "a part of the judicial function." *Id.* at 795.

No one involved in this case has treated the prosecution of Donziger as an exercise of inherent judicial authority. Every court and every party in these proceedings agrees that the special prosecutors exercised executive power. The court acknowledges that special prosecutors are officers of the United States and "exercise the sovereign power of the United States." *Ante* at 8-9 (internal quotation marks omitted). The special prosecutors themselves admit that they exercise a "form of executive power."[1] And Donziger, the special prosecutors, and the court all conclude that the prosecution could have been ended by the Attorney General. *See ante* at 23-24; Reply Br. 24; Appellee's Br. 38.

Despite this agreement that, as the court understatedly puts it, "*Young* is in some tension with the Court's more recent Appointments Clause and

[1] Oral Argument Audio Recording at 38:00.

separation-of-powers jurisprudence," *ante* at 26, the court attempts to reconcile that jurisprudence with *Young*. According to the court, *Young* held that the judiciary has the inherent power only to *initiate* a prosecution and left to the executive branch the power to terminate that prosecution at any time. *Id.* at 22-24. In other words, although *Young* purported to provide the judiciary a "means to vindicate its own authority without complete dependence on other Branches," all it did was authorize a district court to appoint a prosecutor who could be immediately fired by the executive branch. *Young*, 481 U.S. at 796. That is not the "power of self-protection" the *Young* Court had in mind. *Id.* at 801.

I agree with the part of the court's opinion holding that even a judicially appointed special prosecutor is an executive officer performing an executive function. For that reason, I would acknowledge that the appointment of such a prosecutor cannot be justified by inherent judicial authority but must be consistent with the Appointments Clause. Because the appointments in this case were not made in compliance with the Appointments Clause, I would hold that the appointments of the special prosecutors—and the subsequent prosecution, conviction, and sentencing of Donziger—are void. I would reverse the judgment of the district court and vacate Donziger's conviction.

Prosecution is an aspect of the executive power, and the executive *power*, "all of it," belongs to the executive branch. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). The district court exercised that

power in this case, and therefore its judgment cannot stand. Accordingly, I dissent.

I

The court relies on the plain error doctrine to avoid squarely addressing whether the prosecution of Donziger was unconstitutional. According to the court, Donziger failed to argue before the district court that the appointments of the prosecutors were unconstitutional, and therefore plain error review applies. Thus, even though the prosecution *might* have been unconstitutional, because it was not *plainly* so, the court holds that we must affirm Donziger's conviction. I disagree.

A

First, plain error review does not apply because Donziger raised his challenge to the appointments of the special prosecutors repeatedly before the district court. In his pretrial motion to dismiss the contempt charge, Donziger argued that "judges invoking criminal contempt must exercise utmost restraint," that Justice Scalia "strenuously argued that federal judges themselves have no ... power to appoint an attorney to conduct contempt prosecutions," and that "[t]he circumstances of Steven Donziger's criminal case validate ... Justice Scalia's[] ... concerns about abuse of the contempt power." Pretrial Motion to Dismiss at 6-7, *United States v. Donziger*, No. 19-CR-561, 2021 WL 3141893 (S.D.N.Y. July 26, 2021), ECF No. 60. During the trial, Donziger filed another motion to dismiss challenging the appointments of the special prosecutors because the prosecutors were "acting

without any acknowledged [e]xecutive branch supervisory authority" and yet "have not been appointed by the President with the advice and consent of the Senate." Motion to Dismiss at 3, *Donziger*, 2021 WL 3141893, ECF No. 302. After the trial, Donziger again sought dismissal of the case because "the appointment of Ms. Glavin," the lead special prosecutor, "was unconstitutional." Motion to Dismiss at 1, *Donziger*, 2021 WL 3141893, ECF No. 330. The district court responded to Donziger's arguments by holding that the appointments of the special prosecutors pursuant to Federal Rule of Criminal Procedure 42 was consistent with the Appointments Clause.[2]

Donziger was so persistent in raising his Appointments Clause challenge that he exasperated the district court. *See, e.g.*, *Donziger*, 2021 WL 3141893, at *53 ("Undeterred, Mr. Donziger filed a second post-trial letter motion to dismiss the contempt charges on Appointments Clause grounds."). Nevertheless, the court determines that he "did not make this argument below." *Ante* at 24. According to the court, it was not enough for Donziger to preserve the issue to contend that the appointments of the special prosecutors violated the Appointments Clause. Instead, Donziger needed specifically to argue that

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[2] *See Donziger*, 2021 WL 3141893, at *54 ("Unlike principal officers, inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. That is precisely what happened in this case. Federal Rule of Criminal Procedure 42 ('Rule 42') authorized— in fact, mandated—Judge Kaplan to appoint an attorney to prosecute the criminal contempt charges against Mr. Donziger.") (internal quotation marks, alteration, and footnote omitted).

Rule 42 "did not satisfy the Appointments Clause requirement that 'Congress ... by law vest the Appointment.'" *Id.* at 24 (quoting U.S. CONST. art. II, § 2, cl. 2). But Donziger had no reason to frame his Appointments Clause challenge in this way before the district court. Donziger argued to the district court that the special prosecutor was unsupervised and therefore was *not* acting as an inferior officer who could assume office without appointment by the President and confirmation by the Senate. Only after the district court rejected that argument—and held that the special prosecutor was an inferior officer and could properly be appointed by a district court pursuant to Rule 42, *see supra* note 2—did it make sense for Donziger to present the argument that Rule 42 does not authorize a district court to appoint an inferior officer under the Appointments Clause.[3]

The court recognizes that the district court's holding with respect to Rule 42 is questionable. *See ante* at 26 (noting that "we might ultimately conclude that the appointment of a special prosecutor under Rule 42 violates the Appointments Clause"). But the court refuses to consider Donziger's challenge to that holding on the merits because Donziger failed to make

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[3] The court insists that "Donziger never argued that the special prosecutors were principal officers who should have been appointed by the President and confirmed by the Senate." *Ante* at 24-25 n.14. But Donziger's argument that the special prosecutors' appointments were unconstitutional because they lacked "supervision by the Department of Justice" *was* an argument that the special prosecutors were acting as principal officers despite not having "been appointed by the President with the advice and consent of the Senate." Motion to Dismiss at 3, *Donziger*, 2021 WL 3141893, ECF No. 302.

a specific argument against that holding before the holding was ever issued.

That does not make sense. The "well-established general rule" is that "an appellate court will not consider an issue raised for the first time on appeal." *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). In this case, Donziger repeatedly raised the issue of the Appointments Clause before the district court, and the district court addressed it. I would hold that Donziger thereby preserved the issue and that we should consider his appeal on the merits. Because "this appeal turns on a pure question of law," the standard of review is *de novo* rather than plain error. *Am. Int'l Grp. v. Bank of Am. Corp.*, 712 F.3d 775, 778 (2d Cir. 2013).

B

Second, even if Donziger had to show plain error, I would conclude that he satisfies that standard. We find plain error when "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Nouri*, 711 F.3d 129, 138 (2d Cir. 2013) (internal quotation marks and alterations omitted). I do not understand the court to argue that the constitutional violation Donziger alleges did not affect his "substantial rights" or seriously affect the "fairness, integrity or public reputation of judicial proceedings." *Id.* It clearly did both. Donziger was sentenced to six

months' imprisonment following a prosecution he claims should not have been permitted at all.

To avoid deciding whether the appointments of the special prosecutors were unconstitutional, the court holds that any error by the district court is not "plain." *Ante* at 25-26. An error is plain if it is "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). We do not determine the plainness of an error according to how understandable it was for the district court to have erred. Plain error is assessed "at the time of appellate consideration," *Johnson v. United States*, 520 U.S. 461, 468 (1997), and we find plain error even when the error would not have been "clear" or "obvious" before the district court at the time of its decision. *See, e.g.*, *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019) (holding that the district court committed plain error based on a Supreme Court decision published after the district court's judgment).

The court maintains that the district court's alleged error is not clear enough because the district court was following *Young* when it held that the appointments were valid. In particular, the court refers to the principle that if "a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Ante* at 26 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). The court's application of this principle suggests not merely that the district court did not *plainly* err but that the district court did not err *at all*. If the court thinks that the *Agostini* principle requires continued

adherence to *Young*, it should say so. But the court avoids saying that directly because it would contradict what the court holds in the first part of its opinion.

No court that believes what the majority says about the authority of the special prosecutors in this case could conclude that *Young* justifies their appointments. Until this case, no court of appeals had ever held that a special prosecutor was an executive officer who could nevertheless be judicially appointed consistent with the Appointments Clause. *Young* does not stand for that proposition. As Justice Scalia noted, "the power to appoint inferior federal officers" under the Appointments Clause was "irrelevant" to the Court's decision in *Young*, 481 U.S. at 815 (Scalia, J., concurring in the judgment), which rested instead on the courts' "inherent authority" under Article III, *id.* at 793 (majority opinion). Today, the court does not follow the "inherent authority" rationale of *Young* because it recognizes that doing so would be inconsistent with the Supreme Court's subsequent cases. Given that everyone in this case agrees that the rationale of *Young* is untenable, reliance on that decision to excuse a violation of the Appointments Clause is plainly erroneous.

II

According to the court, however, it was not plainly erroneous for the district court to appoint special prosecutors and initiate this prosecution following the U.S. Attorney's refusal to prosecute. Where did the district court get that power to appoint prosecutorial officers? Our government "is acknowledged by all to be one of enumerated powers,"

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819), and the only enumerated powers that could justify the appointments in this case are the appointment power under the Appointments Clause or the "judicial Power" under Article III. *See* U.S. CONST. art. II, § 2; *id.* art. III, § 1. Neither of these provisions authorizes the appointments in this case.

A

The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, ... in the Courts of Law." *Id.* art II, § 2. The district court relied on Rule 42 to authorize the appointments of the special prosecutors. *Donziger*, 2021 WL 3141893, at *54. The Supreme Court amended Rule 42 in 2002 pursuant to its authority under the Rules Enabling Act "to prescribe general rules of practice and procedure and rules of evidence for cases" in the federal courts. 28 U.S.C. § 2072(a); *see Bank of N.S. v. United States*, 487 U.S. 250, 255 (1988). In accordance with the Act, the Court transmitted the amended Rule to Congress before it became effective. 28 U.S.C. § 2074. Because Congress did not pass a law to prevent the Rule from taking effect, the current version of Rule 42 became operative on December 1, 2002.

Today's opinion suggests that Rule 42 might be sufficient under the Appointments Clause to vest authority to appoint special prosecutors in the courts. *See ante* at 25-26. It is not. The Appointments Clause provides not only that the appointment power must be vested "by Law"; it also tells us *who* must vest that

power: "Congress." U.S. CONST. art. II, § 2.[4] As Justice Scalia observed in *Young*, Rule 42 "could not confer Article II appointment authority, since it is a Rule of court rather than an enactment of Congress." *Young*, 481 U.S. at 816 n.1 (Scalia, J., concurring in the judgment). To be sure, by operation of the Rules Enabling Act, Rule 42 is "as binding as any statute duly enacted by Congress." *Bank of N.S.*, 487 U.S. at 255. But that does not mean Rule 42 *is* a statute duly enacted by Congress. The Rules Enabling Act provides only that a rule must be submitted to Congress at least seven months before it takes effect. *See* 28 U.S.C. § 2074(a). That notification provision—under which Congress normally does nothing at all—cannot transform the courts' adoption of Rule 42 into an instance of "Congress ... by Law" vesting the appointment power in the courts.

Given the court's purported adherence to *Young*, it is odd that the court argues the district court might have appointed the special prosecutors pursuant to the

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[4] The same clause refers to federal offices that "shall be established by Law." U.S. CONST. art. II, § 2, cl. 2. Some justices have suggested that "Law" as used there might include sources of law other than statutes. *See United States v. Mouat*, 124 U.S. 303, 308 (1888) ("[N]either by the regulations, nor by the statutes, nor by any constitutional provision, is the present claimant an officer of the navy."); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 539 (2010) (Breyer, J., dissenting) (arguing that the Supreme Court has defined inferior officers as "those who can be said to hold an office that has been created either by regulations or by statute") (internal quotation marks and citation omitted). But when the Constitution authorizes the vesting of the appointment power, it specifies that "*Congress* may by Law" do so. U.S. CONST. art. II, § 2, cl. 2 (emphasis added). Regardless of the scope of the term "Law," it is Congress that must do the vesting.

Appointments Clause. In *Young*, the Supreme Court did not rely on Rule 42 or any statute to conclude that the appointment was authorized. According to *Young*, the version of Rule 42 in effect at that time "d[id] not provide authorization for the appointment of a private attorney." 481 U.S. at 793. Rather, the Rule "sp[oke] only to the procedure for *providing notice* of criminal contempt." *Id.* at 794. Instead of relying on Rule 42 for authorization, the Supreme Court held that the authority to appoint a special prosecutor was inherent in the judicial power under Article III. *Id.* at 793. Thus, "[t]he Court in *Young* made clear that Rule 42 is rooted in an inherent judicial power that exists independently of the Rule." *United States v. Arpaio*, 906 F.3d 800, 803 (9th Cir. 2018) (W. Fletcher, J., concurring in the denial of rehearing en banc). If the court believes that *Young* justifies the district court's decision in this case, then its discussion of the Appointments Clause is beside the point.

B

If the judicial appointment of a special prosecutor can be justified at all, it must be an exercise of inherent judicial authority. In *Young*, the Supreme Court held that the "inherent authority to initiate contempt proceedings for disobedience to their orders ... necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." 481 U.S. at 793. The Court did more than simply assert that a court may appoint a special prosecutor. It provided the rationale for that authority and limited its exercise based on that rationale.

The Court emphasized that "the rationale for the appointment authority is necessity." *Id.* at 801. In particular, "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution." *Id.* According to *Young*, "[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated," and "[t]he ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection." *Id.* at 796.

That rationale for the appointment authority informed the limits *Young* put on its exercise. According to *Young*, "[w]hile a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that only the least possible power adequate to the end proposed should be used in contempt cases." *Id.* at 801 (internal quotation marks and alteration omitted). Based on that principle, the Court declared that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." *Id.* This instruction aimed to "ensure[] that the court will exercise its inherent power of self-protection only as a last resort." *Id.*

The rationale of *Young* shows why it cannot justify today's decision. The court purports to apply *Young* in upholding the appointment of the special prosecutor, but at the same time the court holds that the Attorney General may, in his discretion, remove

the special prosecutor and end the prosecution. If the Attorney General has that authority, it would mean—despite the *Young* Court's repeated statements that the judiciary must have "a means to vindicate its own authority without complete dependence on other Branches," *id.* at 796—that the Executive Branch can terminate a contempt proceeding at will. That ability would leave the courts "at the mercy of another Branch," *id.*, and the necessity of providing the courts an independent means to prosecute criminal contempt could not justify the appointment power.

The court's conception of the district court's appointment power renders that power not only ineffectual but strange. According to *Young* and Rule 42, the district court must request that the executive branch prosecute the contempt, and only after the executive branch declines may the district court appoint its own prosecutor. But today, the court holds that if the executive branch opposes the prosecution, it can end the prosecution immediately. In other words, the district court's "means to vindicate its own authority" is completely ineffective when the executive branch does not want the contempt prosecution to proceed. *Id.* at 796. The only circumstance in which the district court's appointment power will be useful, then, is when the executive branch actually *wants* to prosecute the contempt but declines to do so solely for lack of resources.[5]

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[5] According to the court, the district court's appointment power is a meaningful independent power even if the executive branch can immediately remove the special prosecutor because "the judiciary could ... respond by initiating a new prosecution and appointing another special prosecutor." *Ante* at 23 n.13. The new special prosecutor could then be fired by the executive branch, and the

It seems to me that if the inherent judicial authority to prosecute contempt is meant to protect the independence of the courts from the other branches, it should be strongest when the executive branch opposes the contempt prosecution. *Young* said the power to appoint would "vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience" and ensure that the judicial power does not become a "mere mockery." *Id.* (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). Today's decision transforms that ostensible "power of self-protection," *id.* at 801, into a subsidy for the executive branch. It allows the judicial appointment of additional executive branch prosecutors—paid out of the judiciary's budget[6]—when the U.S. Attorney's office does not want to devote its own resources to a case.[7]

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judiciary could respond by appointing yet another special prosecutor, who also could be fired, and around and around we would go. It is difficult to see how such a spectacle would empower a court to "vindicate its own authority without complete dependence on other Branches." *Young*, 481 U.S. at 796.

[6] *See Donziger*, 2021 WL 3141893, at *51 ("[T]he Special Prosecutors are paid for their work by the federal judiciary.").

[7] Providing judiciary-funded prosecutors to the executive branch creates tension with Congress's power of the purse. Congress has sought to protect its budgetary authority over executive agencies though the Antideficiency Act, which "is designed to keep governmental agencies operating within the limits of their appropriated funds." *Nat'l Fed'n of Fed. Emps. v. Devine*, 679 F.2d 907, 913 n.11 (D.C. Cir. 1981); *see* 31 U.S.C. § 1341(a)(1)(A). According to the court, however, the special prosecutors in this case could work for the Attorney General without drawing on the funds Congress appropriated to the Department of Justice.

The court's reliance on 28 U.S.C. § 516 further shows that it is not faithfully following *Young*. The statute provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States ... is a party, ... is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.[8] But the Supreme Court has already explained that "a fair reading of *Young* indicates that a federal court's inherent authority to punish disobedience and vindicate its authority is an excepted provision or authorization within the meaning of §[] 516." *United States v. Providence J. Co.*, 485 U.S. 693, 704 (1988). In other words, the Supreme Court has said that the judicially initiated criminal contempt proceedings envisioned in *Young* are *not* "reserved to officers of the Department of Justice, under the direction of the Attorney General" because those proceedings are "otherwise authorized by law." 28 U.S.C. § 516.

The Court was correct to hold in *Providence Journal* that *Young* is incompatible with direction of the contempt proceeding by the Attorney General.[9] A

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[8] Section 519 contains similar language. *See* 28 U.S.C. § 519 ("*Except as otherwise authorized by law*, the Attorney General shall supervise all litigation to which the United States ... is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.") (emphasis added).

[9] *See also Hollingsworth v. Perry*, 570 U.S. 693, 711 (2013) (noting that "special prosecutors appointed by federal courts to pursue contempt charges" are "subject to the ultimate authority of the court that appointed them").

court would have no authority to "punish acts of disobedience" if the contempt prosecution could proceed only at the pleasure and direction of the executive branch. *Young*, 481 U.S. at 796. The Court was clear in *Young* that "while the exercise of the contempt power is subject to reasonable regulation, the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered *practically inoperative*." *Id.* at 799 (internal quotation marks omitted) (emphasis added). If the court were correct that § 516 or another statute dictates that judicially appointed special prosecutors are removable at will by the executive branch, then under *Young* that statute would be unenforceable.

In sum, the court's decision today does not faithfully apply *Young* but further proves that *Young* is no longer the law. And because *Young* is the only plausible basis the court provides for the appointment of the special prosecutor, that appointment was invalid.

III

The violation of the Appointments Clause in this case is not a technicality. Every party and every court in these proceedings agrees that the Attorney General may remove the special prosecutor— despite the inconsistency of that conclusion with *Young*. That consensus confirms the obvious: criminal contempt prosecution is an executive function, and the special prosecutors exercise executive power.

"The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General." *United States v.*

Cox, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring); *see also Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."). It is also undisputed where such power must reside. "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. CONST. art. II, § 1, cl. 1).

That "power, in turn, generally includes the ability to remove executive officials." *Id.* at 2197. But we have consistently held for the same reason that "[t]he Executive ... has the exclusive authority to decide *whether* to prosecute." *United States v. Huerta*, 878 F.2d 89, 92 (2d Cir. 1989) (emphasis added); *see also Pyke v. Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001) ("[C]ourts grant special deference to the executive branch in the performance of the 'core' executive function of deciding whether to prosecute."). I agree that the President and the Attorney General can remove a special prosecutor because without the removal power "the President could not be held fully accountable for discharging his own responsibilities," *Free Enter. Fund*, 561 U.S. at 514, which include the executive function of prosecution. But the initiation of a prosecution is as much an executive function as the conduct of a prosecution. There is no basis for holding

that the executive branch must control one but not necessarily the other. [10]

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[10] The court draws a sharp distinction between the appointment of the special prosecutors and the initiation of the prosecution against Donziger, insisting that it is only "the appointment of special prosecutors that is at issue," *ante* at 27, as if Donziger were not challenging his prosecution. The distinction is illusory. The district court appointed the special prosecutors specifically "*to prosecute* Steven Donziger on the charges of criminal contempt of court set forth in the Order to Show Cause," as the order of appointment makes clear. App'x 59 (emphasis added). *Young* similarly did not treat the initiation of a contempt proceeding as separate from the appointment of a prosecutor. The Supreme Court has explained that *Young* "recognized that federal courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, and this authority necessarily *includes* the ability to appoint a private attorney to prosecute the contempt." *Morrison*, 487 U.S. at 682 n.20 (emphasis added). At the same time, the court ignores the very real distinction between contempt proceedings that a court may initiate as an exercise of the Article III judicial power—that is, the common-law power to impose "sanctions for conduct that interfered with the orderly administration of judicial proceedings," *United States v. Dixon*, 509 U.S. 688, 694 (1993)—and the prosecution of criminal contempt charges by an executive officer, which even the court recognizes is an executive function. Federal courts have long "had power to 'inforce the observance of order,' but those 'implied powers' could not support common-law jurisdiction over criminal acts." *Id.* (quoting *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)). The court points to *Young*'s statement that "the prosecution of in-court and out-of-court contempts ... both proceed at the instigation of the court." *Ante* at 28 n.15 (quoting *Young*, 481 U.S. at 799). But this statement was based on *Young*'s observation that "[t]he fact that we have come to regard criminal contempt as a crime in the ordinary sense does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage." 481 U.S. at 799-800 (internal quotation marks and citation omitted). The court does not adhere to that understanding because it spends the first half of its

The power "to initiate criminal investigations and prosecutions" is a "core executive power." *Seila Law*, 140 S. Ct. at 2200. That principle is well-settled. "[T]he decision of a prosecutor in the Executive Branch not to indict ... has long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). So uniquely executive is that power that we have said "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 138 (2d Cir. 2017) (quoting *United States v. Ross*, 719 F.2d 615, 620 (2d Cir. 1983)). In this case, the district court went beyond reviewing the executive branch's decision about instituting a prosecution. The district court appointed a prosecutor and instituted the prosecution itself. That was not a constitutional exercise of inherent judicial authority.

* * *

In today's decision, the court attempts to reconcile *Young* with the constitutional separation of powers. It ends up following neither. The court's half-hearted adherence to *Young* on plain error review undermines that precedent by rendering ineffective the judicial power *Young* described as necessary. The court's split-the-baby approach to executive power—under which the executive must have the power to

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opinion explaining that the special prosecutors must be "subject to the supervision of the Attorney General." *Ante* at 21.

oversee a prosecution but the judiciary may decide to *initiate* one—undermines the constitutional principle that "[t]he entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197 (quoting U.S. CONST. art. II, § 1, cl. 1).

When the U.S. Attorney declined to prosecute Donziger, he did so as "an officer of the executive department." *Cox*, 342 F.2d at 171. "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *Id.* That is a straightforward conclusion, and it was plainly erroneous not to reach it. I would hold that the appointments of the special prosecutors were void, and I would vacate Donziger's conviction. Accordingly, I dissent.

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 19-CR-561 (LAP)
-against-	No. 11-CV-691 (LAK)
STEVEN DONZIGER,	
Defendant.	

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court is Defendant Steven Donziger's motion to dismiss Counts One, Two, and Three of the Court's July 31, 2019 Order to Show Cause. (Dkt. no. 225; see also dkt. no. 225-1; dkt. no. 241.) The Government opposes the motion. (See dkt. no. 238.) For the reasons below, the motion is DENIED.

I. Background

The Court has already provided a high-level overview of the lengthy procedural history of this case in a previous order. (See dkt. no. 68 at 2-7.)[1] Consequently, the Court will summarize only the history relevant to the instant motion here.

This criminal contempt case is an outgrowth of Chevron Corp. v. Donziger, 11-CV-691 (S.D.N.Y.), over

[1] Unless otherwise specified, all docket cites in this order refer to dkt. no. 19-CR-561.

which Judge Lewis A. Kaplan presides. (Id. at 2.) In 2014, following a lengthy trial, Judge Kaplan issued a decision and judgment in Chevron's favor. See Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). Four years later--following the Court of Appeals' affirming that judgment and the Supreme Court's denying certiorari--Judge Kaplan issued a supplemental judgment for costs in the amount of $813,602.71 against Mr. Donziger and others. (See dkt. no. 1962 in 11-CV-691 at 2.)

On March 5, 2019, as part of the post-judgment discovery proceedings, Judge Kaplan issued an order (the "Protocol Order") establishing a protocol to govern the collection, imaging, and examination of Mr. Donziger's electronic devices. (See dkt. no. 2172 in 11-CV-691.) That order required Mr. Donziger to, inter alia: (1) provide a list of all his electronic devices and accounts to an appointed forensic expert, (id. ¶ 4); and (2) surrender those devices to the forensic expert for imaging, (id. ¶ 5). Mr. Donziger did not comply with either directive, informing the expert that he would not do so "until [his] due process rights [we]re respected." (Dkt. no. 2173-1 in 11-CV-691 at 2.)

A few months later, Judge Kaplan issued another order (the "Passport Surrender Order") directing Mr. Donziger to surrender his passport(s) to the Clerk of the Court. (See dkt. no. 2232 in 11-CV-691 at 2.) That order was imposed as a coercive civil contempt sanction, in addition to a series of coercive fines, based on Mr. Donziger's noncompliance with the Protocol Order. (See id. at 1-2.) Mr. Donziger filed an emergency motion to stay the contempt sanctions pending an appeal, (see dkt. no. 2234 in 11-CV-691),

which Judge Kaplan granted in part and denied in part on July 2, 2019, (see dkt. nos. 2252, 2254 in 11-CV-691). In so ordering, Judge Kaplan again directed Mr. Donziger to surrender his passports and declined to stay the Protocol Order pending appeal. (See dkt. no. 2254 in 11-CV-691 at 3.) Mr. Donziger still did not comply and did not seek a stay or a writ of mandamus from the Court of Appeals.

On July 31, 2019, Judge Kaplan issued an order, pursuant to Federal Rule of Criminal Procedure 42, directing Mr. Donziger to show cause why he should not be held in criminal contempt, in violation of 18 U.S.C. § 401(3). (See dkt. no. 2276 in 11-CV-691.) That order to show cause, which was made returnable before the undersigned, cited six charges for criminal contempt. (See id. ¶¶ 1-21.)

On February 27, 2020, Mr. Donziger sought pre-trial relief on several grounds, including, inter alia, dismissal of the criminal contempt charges. (See dkt. no. 60 at 24-33.) The Government opposed that motion. (See dkt. no. 62 at 27-32.) On May 7, 2020, the Court denied the motion, finding that (1) many of Mr. Donziger's fact-based contentions could only be resolved at trial and (2) his remaining legal arguments were not supported by the governing law. (See dkt. no. 68 at 20-24.)

On December 16, 2020, Mr. Donziger again moved to dismiss the criminal contempt charges but this time sought dismissal of only Counts One, Two, and Three. (See dkt. no. 225.) Those counts allege Mr. Donziger's refusal to (1) provide a list of his electronic devices and accounts in violation of paragraph 4 of the

Protocol Order, (dkt. no. 2276 in 11-CV-691 ¶¶ 1-3); (2) turn over those devices to the forensic expert for imaging in violation of paragraph 5 of the Protocol Order, (id. ¶¶ 4-6); and (3) surrender his passports as required by the Passport Surrender Order, (id. ¶¶ 7-9.). Like Mr. Donziger's previous motion to dismiss, the Government opposes the instant motion. (See dkt. no. 238.)

II. Discussion

When addressing a motion to dismiss criminal contempt charges, the Court must take factual allegations in the charging instrument as true. See, e.g., United States v. Hogan, Nos. 07 Cr. Misc. 1 (LAP) & 88 Civ. 04486 (LAP), 2009 WL 3817006, at *3 (S.D.N.Y. Nov. 12, 2009). Disputes regarding the facts underlying the contempt charges are properly resolved at trial, not on a motion to dismiss. See, e.g., United States v. Cutler, 815 F. Supp. 599, 610 (E.D.N.Y. 1993).

18 U.S.C. § 401(3) empowers a federal court "to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). Notably, that statute does not offer any qualifications on the type of order for which criminal contempt may be charged or impose any temporal limitations on when the charges may be levied.

The Supreme Court has long recognized, however, that the "judicial contempt power is a potent

weapon" that should be exercised with care. Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967). In that vein, the Court has provided for many limitations on courts' contempt powers.[2] Despite those limitations, the High Court has established a clear baseline rule regarding litigants' obligations to obey court orders:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 458 (1975) (emphasis added). When confronted with disobedience of its order, "the choice of sanctions--civil or criminal--is vested in the discretion of the District Court," Dinler v. City of New York (In re City of New York), 607 F.3d 923, 934 (2d Cir. 2010), and the same "conduct can amount to both civil and criminal contempt," United

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[2] For example, the Supreme Court has held that "criminal contempt sanctions are entitled to full criminal process." Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833 (1994).

States v. United Mine Workers of Am., 330 U.S. 258,299 (1947).

To get out from under that baseline rule, Mr. Donziger invokes what he describes as a well-trodden exception for production orders: "A party who is willing to risk civil contempt to seek appellate review of a production order cannot be held in criminal contempt pending appellate review." (Dkt. no. 225-1 at 2-3.) Central to Mr. Donziger's argument is his contention that production orders differ from other court orders--such as injunctions or orders for testimony--for the purpose of contempt because "they compel affirmative, irreversible acts." (Id. at 5.) For support, Mr. Donziger relies on four Supreme Court cases which he maintains implicitly establish that principle: (1) Alexander v. United States, 201 U.S. 117 (1904); (2) Cobbledick v. United States, 309 U.S. 323 (1940); (3) United States v. Ryan, 402 U.S. 530 (1971); and (4) Maness. (See id. at 3-5.). But Mr. Donziger misreads those cases; they do not establish the rule for which he advocates.

In Alexander, 201 U.S. at 121–22, the Court held that it lacked jurisdiction because the judicial order--which required witnesses to appear before a special examiner to answer questions and produce documents--was not "final" and thus was not appealable. Likewise, in Cobbledick, 309 U.S. at 324, 327-29, the Court held, relying on Alexander, that an order denying a motion to quash a subpoena duces tecum also was not appealable. In both cases, the Court suggested that the witness could obtain review

of the order by refusing to comply, subject to possible contempt proceedings.[3] Importantly, though, the Court did not limit the type of contempt to which the witnesses could be subjected. To the contrary, Alexander appears to contemplate that a contemnor could face criminal sanctions.[4]

Nor does Ryan limit a court's power to charge criminal contempt. Exactly like Cobbledick, Ryan, 402 U.S. at 530–32, held that a district court's order denying a motion to quash a subpoena requiring production of documents to a grand jury was not appealable. Moreover, like Alexander and Cobbledick, Ryan suggested that a litigant could obtain review of that subpoena by "refus[ing] to comply" and then litigating whether the subpoena was "unduly burdensome or otherwise unlawful . . . in the event that contempt or similar proceedings [we]re brought against him." Id. at 532. But, again like Alexander and Cobbledick, Ryan did not limit the type of contempt that could be charged. Instead, in expressly distinguishing Walker v. City of Birmingham, 388

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[3] See Alexander, 201 U.S. at 121 ("Let the court go further, and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case."); Cobbledick, 309 U.S. at 328 ("Whatever right he may have requires no further protection . . . than that afforded by the district court until the witness chooses to disobey and is committed for contempt.").

[4] See Alexander, 201 U.S. at 121 (indicating that the court could "punish the witness for contempt of its order" (emphasis added)); see also Bagwell, 512 U.S. at 828 (observing that the Court had historically described the purpose of criminal contempt as "punitive").

U.S. 307 (1967), the Court merely observed that the collateral bar rule[5] would not preclude the subpoenaed party from litigating the lawfulness of the subpoena in related contempt proceedings. See Ryan, 402 U.S. at 532–33 & n.4.

Finally, Maness, 419 U.S. at 470, held that an attorney could not "suffer any penalty" of contempt for advising his client "in good faith" not to surrender subpoenaed documents on Fifth Amendment self-incrimination grounds. In reaching that conclusion, the Court, citing Alexander, Cobbledick, and Ryan, recognized that the attorney could obtain pre-compliance review of the subpoena by refusing to comply and subjecting himself to contempt. See id. at 460-61. But again, like Alexander, Cobbledick, and Ryan before it, Maness did not purport to limit the type of contempt that a court may charge for failure to obey its order. In fact, although the Supreme Court did not explicitly state as much, the contempt charged in Maness appears to be of the criminal variety.[6]

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[5] The collateral bar rule recognizes "that a defendant generally is barred from collaterally attacking the constitutionality of a court order as a defense to his criminal contempt prosecution." United States v. Terry, 17 F.3d 575, 579 (2d Cir. 1994) (citing Walker, 388 U.S. at 314–15). Rather, "[t]he appropriate method for challenging the validity of a court order is to petition to have the order vacated or amended." Id. Notably, though, Walker, 388 U.S. at 309, involved a challenge to a "temporary injunction."

[6] See Maness, 419 U.S. at 455, 457 (noting that the trial court "fixed punishment . . . at 10 days' confinement and a $200 fine" and that "the penalty" was later changed "to a $500 fine

Importantly, as stated above, the Supreme Court ultimately reversed that contempt conviction on the merits. Id. at 470.

As a critical component of his argument, Mr. Donziger assumes that he "cannot be relieved of a conviction for criminal contempt even when the validity of the underlying order is rejected on appeal." (Dkt. no. 225-1 at 6.) That is somewhat surprising, given that he argued in his opposition to the Government's motion in limine that the collateral bar least some of the judicial orders underlying the rule would not preclude review of the lawfulness of at contempt charges in this case. (See dkt. no. 110 at 10-14.) In any event, the Court has "defer[red] ruling on the collateral bar issue until trial, when the Court will have the benefit of a fuller factual record." (Dkt. matter is necessary here.

In sum, the cases on which Mr. Donziger relies do sanction an avenue whereby a litigant may obtain review of certain court orders, such as a subpoena duces tucem, by refusing to comply and risking contempt. But they do not limit a court's discretion as no. 191 at 2.) No further discussion of the to what

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with no confinement" (emphasis added)); see also Bagwell, 512 U.S. at 828-29 (stating that "a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience" and observing a similar rule for "flat, unconditional fine[s]" (quotation marks omitted)).

flavor of contempt to impose.[7] The caselaw from the Court of Appeals supports that principle.[8] Accordingly, Mr. Donziger is not entitled to a dismissal.

III. Conclusion

For the foregoing reasons, Mr. Donziger's motion to dismiss Counts One, Two, and Three of the Court's July 31, 2019 Order to Show Cause [dkt. no. 225] is DENIED. The Clerk of the Court shall close the open motion.

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[7] The other cases Mr. Donziger cites provide him no more help. (See dkt. no. 225-1 at 5-6.) Although in some of those cases the district court imposed civil contempt rather than criminal, those cases do not limit a district court's discretion to impose criminal contempt. See, e.g., United States v. Beckerman, 1999 WL 97237, at *1 (2d Cir. Feb. 24, 1999) (summary order) WL 97237, at *1 (2d Cir. Feb. 24, 1999) (summary order) WL 97237, at *1 (2d Cir. Feb. 24, 1999) (summary order) WL 97237, at *1 (2d Cir. Feb. 24, 1999) (summary order) (not discussing the type of contempt a court can charge for failure to violate its order); Chevron Corp. v. Berlinger, 629 F.3d 297, 306 (2d Cir. 2011) (same).

[8] See, e.g., Del Carmen Montan v. Am. Airlines, Inc. (In re Air Crash at Belle Harbor), 490 F.3d 99, 104 (2d Cir. 2007) ("[T]he remedy of the party witness wishing to appeal is to refuse to answer and subject himself to criminal contempt." (quoting Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 591 F.2d 174, 177 (2d Cir. 1979) (Friendly, J.)); Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 574 (2d Cir. 2005) ("[I]n a criminal or civil proceeding, a witness wishing to contest a subpoena must usually disobey the subpoena, be held in civil or criminal contempt, and then appeal the contempt order.").

Mr. Donziger's attempts to discount those authorities, (see dkt. no. 225-1 at 7 n.3), are unavailing. Instead, those authorities recognize that, in the mine run of cases involving production orders, merely going into civil contempt is not

SO ORDERED.

Dated: January 10, 2021
New York, New York

LORETTA A. PRESKA
Senior United States District Judge

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enough to obtain appellate review. Indeed, when a contemnor is a party to the case--as Mr. Donziger was in the civil case before Judge Kaplan--he can generally "only appeal a civil contempt sanction after a final judgment." Dinler, 607 F.3d at 934. In contrast, only an "order of criminal contempt" is immediately appealable. Id.

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 19-CR-561 (LAP)
-against-	No. 11-CV-691 (LAK)
STEVEN DONZIGER, Defendant.	MEMORANDUM & ORDER

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court are Defendant Steven Donziger's (1) motion to dismiss the July 31, 2019 Order to Show Cause on the grounds of vindictive or selective prosecution, (see dkt. no. 258; see also dkt. nos. 259, 260, 280, 292),[1] and (2) his related request for oral argument, (see dkt nos. 262, 267). The Special Prosecutors[2] oppose the motion to dismiss, (see dkt. no.271), and defer to the Court on the issue of oral argument, (see dkt. no 262). For the reasons explained below, the motion to dismiss and request for oral argument are DENIED.

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[1] Unless otherwise specified, all docket cites in this order refer to 19-CR-561. Mr. Donziger filed only a reply declaration; he did not file a reply memorandum of law. (See dkt. no. 280.)

[2] On February 2, 2021, Mr. Donziger requested that the Court use the designation "Special Prosecutor" to refer to the prosecution. (Dkt. no. 246.) The Court will do so.

I. Background

The Court has already recounted the lengthy procedural history of this case in several previous orders. (See, e.g., dkt. no. 68 at 2-7; dkt. no. 243 at 1-4.) Consequently, the Court will summarize only the history relevant to the instant motion here.

a. The Charges

This criminal contempt case is an outgrowth of Chevron Corp. v. Donziger, 11-CV-691 (S.D.N.Y.), over which Judge Lewis A. Kaplan presides. (See dkt. no. 68 at 2.) In 2014, following a lengthy trial, Judge Kaplan issued a decision and judgment in Chevron's favor ("the RICO Judgment"). See Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). The Court of Appeals affirmed that judgment, see Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016), and the Supreme Court denied certiorari, 137 S. Ct. 2268 (2017). Most relevantly, the RICO Judgment: (1) established "a constructive trust for the benefit of Chevron on all property" that Mr. Donziger has received or receives that is traceable, directly or indirectly, to the Ecuadorian Judgment, including Mr. Donziger's personal interest in that judgment; and (2) enjoined Mr. Donziger from "undertaking any acts to monetize or profit from" the Ecuadorian Judgment. (Dkt. no. 1875 in 11-CV-691 11 1, 5.)

Thereafter, Judge Kaplan issued a supplemental judgment for costs against Mr. Donziger and others. (See dkt. no. 1962 in 11-CV-691.) On March 5, 2019, as part of the post-judgment discovery proceedings and following Mr. Donziger's refusal to produce documents, Judge

Kaplan issued an order (the "Protocol Order") establishing a protocol governing the collection, imaging, and examination of Mr. Donziger's electronic devices. (See dkt. no. 2172 in 11-CV-691.) That order required Mr. Donziger, inter alia, to: (1) provide a list of all his electronic devices and accounts to an appointed forensic expert, (id. ¶ 4); and (2) surrender those devices to the forensic expert for imaging, (id. ¶ 5). Mr. Donziger did not comply with either directive, informing the expert that he would not do so "until [his] due process rights [we]re respected." (Dkt. no. 2173-1 in 11-CV-691 at 2.)

A few months later, Judge Kaplan issued another order (the "Passport Surrender Order") directing Mr. Donziger to surrender his passport(s) to the Clerk of the Court. (See dkt. no. 2232 in 11-CV-691 at 2.) That order was imposed, in addition to a series of coercive fines, as a civil contempt sanction based on Mr. Donziger's noncompliance with the Protocol Order. (See id. at 1-2.) Mr. Donziger filed an emergency motion to stay the contempt sanctions pending an appeal, (see dkt. no. 2234 in 11-CV-691), which Judge Kaplan granted in part and denied in part on July 2, 2019, (see dkt. nos. 2252, 2254 in 11-CV-691). In so ordering, Judge Kaplan again directed Mr. Donziger to surrender his passports and declined to stay the Protocol Order pending appeal. (See dkt. no. 2254 in 11-CV-691 at 3.) Mr. Donziger still did not comply and did not seek a stay or a writ of mandamus from the Court of Appeals.

On July 31, 2019, Judge Kaplan issued an order, pursuant to Federal Rule of Criminal Procedure 42 ("Rule 42"), directing Mr. Donziger to show cause why he should not be held in criminal contempt, in violation of 18 U.S.C. § 401(3). (See dkt. no. 1.) The Order to

Show Cause, which was made returnable before the undersigned, cited six charges for criminal contempt premised on Mr. Donziger's alleged violations of court orders contained in the RICO Judgment, the Protocol Order, and the Passport Surrender Order. (See id. ¶¶ - 21.)

b. The Initial Pretrial Motions

On December 30, 2019, Mr. Donziger filed a letter seeking, inter alia, an order directing the Special Prosecutors to disclose the extent to which they had been in contact with Judge Kaplan during the pendency of this criminal case. (See dkt. no. 49 at 2.) The Special Prosecutors responded that "the prosecution does not work for Judge Kaplan and makes its own decisions in this case." (Dkt. no. 50 at 2.) At a January 6, 2020 hearing on the issue, the Special Prosecutors clarified that "the prosecution does not seek Judge Kaplan's input with respect to our prosecution decisions or our strategy, and Judge Kaplan does not weigh in on our prosecution decisions or strategy." (Dkt. no. 52 at 16:25-17:3.) Based on those representations, the Court denied the request for disclosure. (See id. at 18:13-22.)

On February 27, 2020, Mr. Donziger sought pretrial relief on several grounds. (See dkt. no. 60.) Most relevantly, Mr. Donziger sought: (1) recusal of the Court based on the improper transfer of this case to the undersigned, (see id. at 15-16); (2) the Special Prosecutors' disqualification on the basis that the law firm of Seward & Kissel LLP ("Seward") was not disinterested, (see id. at 17-24); and (3) dismissal of the charges because of, among other reasons, Judge

Kaplan's "demonstrable bias" against Mr. Donziger and Judge Kaplan's improper invocation of the criminal contempt power, (see id. at 8-14, 24-33). The Court rejected each of those arguments.

As to the Court's recusal, the Court found that, because Rule 42 did not require Judge Kaplan "to recuse himself, there [wa]s no merit to Mr. Donziger's contention that [Judge Kaplan's] decision to transfer this case to the undersigned was somehow inappropriate."[3] Regarding disqualification of the Special Prosecutors, the Court analyzed the facts under Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), and found disqualification unwarranted for two reasons: (1) Seward's relationships with clients who do business with Chevron or other oil companies were far too attenuated to justify relief, and (2) Seward did not have a current attorney-client • relationship with Chevron and its past work for the company was both extremely limited and entirely unrelated to this case. (See dkt. no. 68 at 13-20.) As for Judge Kaplan's invocation of the criminal contempt power, the Court found that "[f]rom the facts set forth in

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[3] (Dkt. no. 68 at 12; see also id. at 12 n.3.) The Court also denied Mr. Donziger's request that the Court disclose how Judge Kaplan transferred the case for two reasons: (1) the Court was not aware of, and Mr. Donziger did not identify, any "rule of law that entitles a defendant to serve discovery demands on the presiding judge"; and (2) Judge Kaplan had already explained, in mandamus papers filed with the Court of Appeals, how the case arrived before this Court. (Id. at 12 n.3; see also dkt. no. 28 in 2d Cir. No. 20-464 at 44-47 (Kaplan, J., Response to Petition for Writ of Mandamus).)

the parties' papers, . . . it appears that Mr. Donziger left Judge Kaplan with no real option other than criminal charges." (Id. at 22.)

c. **Additional Disclosure and Recusal Motions**

On August 21, 2020, Mr. Donziger filed a letter asking the Court to, among other things, (1) direct the Special Prosecutors to disclose any communications with Judge Kaplan regarding Mr. Donziger, and (2) order the Special Prosecutors to produce all documents related to any communications with Judge Kaplan. (See dkt. no. 131 at 1.) The Special Prosecutors responded by reiterating their previous representation that Judge Kaplan was not consulted or involved in prosecutorial decisions or strategy. (See dkt. no. 141 at 2.) The Court denied Mr. Donziger's request for three reasons. First, the Court found no legal authority applicable to criminal discovery that permitted the disclosures sought. (See dkt. no. 150 at 1.) Second, the Court observed that it had already denied the same request by Mr. Donziger and that he "cite[d] no fact or law overlooked by the Court sufficient to merit reconsideration." (Id. at 2.) And third, the Court again credited the Special Prosecutors' representation that Judge Kaplan did not contribute to any prosecutorial decisions or strategy. (See id.)

A few weeks later, on September 14, 2020, Mr. Donziger filed a letter again requesting that the Court recuse itself. (See dkt. no. 171.) The letter asserted that recusal was required because of (1) the circumstances surrounding the Court's acceptance of the case from Judge Kaplan, (2) Mr. Donziger's

speculation that Judge Kaplan was communicating ex parte with the Court and the Special Prosecutors, and (3) the Court's alleged mistreatment of Mr. Donziger in hearings and written orders. (See id. at 1-4.) The Court denied the motion, finding that none of Mr. Donziger's "arguments provide[d] a basis for disqualification." (Dkt. no. 172 at 2.) "[B]ecause Mr. Donziger's arguments about Judge Kaplan [we]re just a repackaged version of the theories the Court previously rejected"--and because Mr. Donziger did not point to any facts or law that the Court overlooked--the Court declined to reconsider its prior recusal order. (Id. at 3.) As for Mr. Donziger's complaints regarding his treatment by the Court, the Court noted "that a party's unhappiness with the judge's decisions is not a basis for recusal." (Id. at 4.)

d. The December 2020 Motion to Dismiss

On December 16, 2020, Mr. Donziger again moved to dismiss the criminal contempt charges but this time sought dismissal of only Counts One, Two, and Three. (See dkt. no. 225.) Those counts required Mr. Donziger to produce certain electronic devices and documents to the Court. (See dkt. no. 1 ¶¶ 1-9.) Mr. Donziger's principal argument, premised on four Supreme Court cases,[4] was that those criminal contempt charges must be dismissed because he had

[4] Those cases were Alexander v. United States, 201 U.S. 117 (1906), Cobbledick v. United States, 309 U.S. 323 (1940), United States v. Ryan, 402 U.S. 530 (1971), and Maness v. Meyers, 419 U.S. 449 (1975).

voluntarily invited civil contempt in order to seek appellate review. (See dkt. no. 225-1 at 3-12.) The Court disagreed, ruling that, although the cases on which Mr. Donziger relied did "sanction an avenue whereby a litigant may obtain review of certain court orders . . . by refusing to comply and risking contempt," those cases did "not limit a court's discretion as to what flavor of contempt to impose." (Dkt. no. 243 at 9.) The Court also observed that Mr. Donziger's desire to appeal did not, absent a stay, absolve him of his responsibility to comply with the challenged orders. (See id. at 5 (citing Maness, 419 U.S. at 458).)

e. The Court of Appeals' March 2021 Opinion

On March 4, 2021, the Court of Appeals issued an opinion resolving Mr. Donziger's appeal of several orders in the underlying civil case, most notably the supplemental judgment awarding costs to Chevron and orders finding Mr. Donziger to be in civil contempt and awarding compensatory sanctions. See Chevron Corp. v. Donziger, 990 F.3d 191, 196 (2d Cir. 2021). The Court of Appeals affirmed the judgment awarding costs, holding that "there [wa]s nothing unfair about this result" because "Donziger failed to object to the imposition of costs when he had the opportunity to do so." Id. at 204. As for the civil contempt findings, the Court of Appeals affirmed, save for one exception. Id. at 214.

The Court reversed the "contempt finding as to Donziger's sale of interests in the Ecuadorian Judgment other than of interests in his contingent share of that judgment" and vacated "the supplemental

judgments awarding Chevron . . . compensatory sanctions related to that erroneous finding and attorneys' fees." Id. (emphasis added). In doing so, the Court of Appeals went out of its way to stress the narrowness of its ruling:

> Lest this Opinion be taken as somehow vindicating Donziger, it is important to put our holding in context. Our ruling today has no effect on, and does not in any way call into question, the district court's thorough and fully persuasive fact findings and legal conclusions, which we have already affirmed in full, establishing Donziger's violations of law and ethics that added up to a pattern of racketeering in violation of the RICO statute. Nor does it question in any way the district court's conclusions that Donziger acted in contempt of the Injunction that resulted from the RICO Judgment in numerous ways. Indeed, except with respect to the very specific alleged violation of the Injunction discussed in this Opinion, Donziger does not even attempt to challenge the district court's findings of his contumacious conduct.

Id. at 212-13. The Court of Appeals then remanded for "the district court to determine the fees reasonably expended to secure the contempt findings affirmed on appeal, and for any further proceedings consistent with this Opinion." Id. at 215.

f. The Instant Motion

Just over one week after the Court of Appeals' decision, Mr. Donziger moved for a third time to dismiss the criminal contempt charges. (See dkt. no. 258.) Mr. Donziger avers that: (1) the charges must be dismissed on grounds of vindictive and selective prosecution; (2) Rule 42 is unconstitutional as applied to the facts of this case; (3) if dismissal is not granted, Mr. Donziger nevertheless is entitled to discovery on his claims; and (4) the Court must recuse itself. (See id.; see also dkt. no. 259 at 5-11.) Mr. Donziger also seeks oral argument on the motion. (See dkt nos. 262, 267.) Like Mr. Donziger's previous motions to dismiss, the Special Prosecutors oppose this motion. (See dkt. no. 271.) The Special Prosecutors defer to the Court on whether argument is necessary. (See dkt. no. 262.)

II. Discussion

a. Selective and Vindictive Prosecution

First, Mr. Donziger asserts that dismissal of the criminal contempt charges is necessary on the grounds of both vindictive prosecution and selective prosecution. (See dkt. no. 259 at 5-10.) Although those claims are related, the legal standards differ slightly.

1. Legal Standards

"As an initial proposition, the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, and a prosecutor's pretrial charging decision is presumed legitimate." United States v. Sanders, 211 F.3d 711, 716 (2d Cir. 2000) (cleaned up). But "[a]ctual vindictiveness must play no part in a

prosecutorial . . . decision and, since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of his rights, the appearance of vindictiveness must also be avoided." United States v. Johnson, 171 F.3d 139, 140 (2d Cir. 1999) (per curiam). Criminal charges will be dismissed "if actual vindictiveness has been demonstrated, or if, under the circumstances, there is a presumption of vindictiveness that has not been rebutted by objective evidence justifying the prosecutor's action." United States v. Stewart, 590 F.3d 93, 122 (2d Cir. 2009) (quotation marks omitted).

"To demonstrate an actual vindictive motive, the defendant must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a stalking horse, and (2) the defendant would not have been prosecuted except for the animus." United States v. Bout, 731 F.3d 233, 238 (2d Cir. 2013) (footnote and quotation marks omitted). "To establish a presumption of prosecutorial vindictiveness, the defendant must show that the circumstances of a case pose a realistic likelihood of such vindictiveness." Sanders, 211 F.3d at 717 (quotation marks omitted). The Court of Appeals "has consistently adhered to the principle that the presumption of prosecutorial vindictiveness does not exist in a pretrial setting." Stewart, 590 F.3d at 122.

Just as a prosecution cannot be motivated by animus, a "decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." United States v. Armstrong, 517 U.S. 456, 464 (1996) (quotation marks omitted). "To make out a claim of selective prosecution, a

defendant . . . must provide clear evidence that the prosecutorial decision or policy in question had both [1] a discriminatory effect and [2] was motivated by a discriminatory purpose." United States v. Alameh, 341 F.3d 167, 173 (2d Cir. 2003) (cleaned up). That standard is a "rigorous" one. Armstrong, 517 U.S. at 468.

To establish discriminatory effect, a defendant must show "that similarly situated individuals of a different classification were not prosecuted." Alameh, 341 F.3d at 173 (cleaned up). To establish discriminatory purpose, a defendant must show more than "intent as awareness of consequences." Wayte v. United States, 470 U.S. 598, 610 (1985). "Absent a showing that a defendant was prosecuted `because of protected status or conduct, a `claim of selective prosecution fails.'" United States v. Avenatti, 433 F. Supp. 3d 552, 563 (S.D.N.Y. 2020) (quoting Wayte, 470 U.S. at 610). "In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion." Armstrong, 517 U.S. at 464 (quotation marks omitted).

2. Analysis

Mr. Donziger recognizes that the traditional frameworks for analyzing vindictive and selective prosecution claims pose a difficult hurdle to clear given the "presumption of regularity" for prosecutorial decisions and the high standard for presuming vindictiveness. (See dkt. no 259 at 2-3.) Mr. Donziger asserts, however, that those standards do not apply in his case because Judge Kaplan initiated the contempt charges

and appointed private attorneys to prosecute the matter. (See id. at 2-4.) In Mr. Donziger's view, "the manifest irregularity of the foundation of this case justifies scrutiny, not deference." (Id. at 4 (emphasis omitted).)

Mr. Donziger offers no caselaw to support his proposed rule, however, beyond invoking the Constitution's separation-of-powers principle. While the Court recognizes that the prosecutorial function is traditionally housed within the Executive Branch, federal law spells out a separate process for criminal contempt charges. The charging judge must first "request that the contempt be prosecuted by an attorney for the government," but "[i]f the government declines the request" then "the court must appoint another attorney to prosecute the contempt." FED. R. CRIM. P. 42(a)(2) (emphasis added). The Supreme Court has stressed the importance of that provision, noting that "[t]he ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be mere boards of arbitration whose judgments and decrees would be only advisory." Young, 481 U.S. at 796 (quotation marks omitted) (emphasis added). The Court will not flip the presumption of regularity on its head where Rule 42 and the Supreme Court explicitly sanction--and, in fact, appear to require--the charging procedure used in this case when the Government declines to prosecute criminal contempt charges.

Undeterred, Mr. Donziger argues that three bases for vindictiveness or selectivity exist: (1) "Judge Kaplan's 10+ years of animus against Mr. Donziger," (dkt. no. 259

at 5); (2) "Judge Kaplan's targeting of Mr. Donziger's decision to voluntarily undertake civil contempt as a means to achieve appellate review," (id. at 8); and (3) the Special Prosecutors' channeling of Judge Kaplan's vindictiveness and their independent vindictiveness caused by their conflicts of interest, (id. at 9-10). Those arguments are not painted on a blank canvas; Mr. Donziger has raised many of them before, some more than once, in other motions. Although Mr. Donziger now attempts to shoehorn those contentions into a claim for either vindictive prosecution or selective prosecution, none evinces either actual vindictiveness or selectivity.[5]

First, Mr. Donziger avers that "Judge Kaplan's animosity toward Mr. Donziger stretches back over a decade and is evident at every turn in the underlying civil litigation and behind the founding prosecutorial decision in this case." (Id. at 5.) That "animus," Mr. Donziger suggests, "appears to be based on a combination of personal perhaps based on Judge Kaplan's career in private practice, and a strategic decision to target and retaliate against Mr. Donziger's exercise of his constitutional free speech and petitioning rights." (Id. at 6-7.) To support that contention, Mr. Donziger points to (1) Judge Kaplan's decision to press forward with charging Mr. Donziger after the United States

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[5] Mr. Donziger acknowledges that a presumption of "vindictiveness generally does not arise in the pretrial setting," but he contends that, "given the extraordinary and unprecedented conflicts in this matter and the absence of executive branch control of the prosecutorial function, that principle does not apply here." (Dkt. no. 259 at 2 (emphasis omitted).) Because he cites no authority for that proposition, the Court will not depart from the Court of Appeals' longstanding rule. See Stewart, 590 F.3d at 122.

Attorney's Office respectfully declined to prosecute due to resource constraints, (2) Judge Kaplan's refusal to recuse himself, (3) Judge Kaplan's "hand-pick[ing] this court to preside over the criminal case," and (4) his "hand-pickling] private prosecutors with financial ties to Chevron and the oil and gas industry." (Id. at 7.)

This is not the first time Mr. Donziger has made these arguments. Indeed, he raised all of those points in previous motions.[6] The Court rejected them.[7] Rather, the only thing new about these arguments is the package in which they are presented. Yet, even setting aside the recycled nature of Mr. Donziger's contentions, he still is not entitled to a dismissal. At base, Mr. Donziger's assertions of vindictiveness and selectivity boil down to

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[6] (See, e.g., dkt. no. 60 at 8-14 (alleging "demonstrable bias" by Judge Kaplan); id. at 15-16 (suggesting that Judge Kaplan should have recused himself and asserting that this case was improperly transferred to the undersigned); id. at 17-24 (averring that the Special Prosecutors were not disinterested and must be disqualified); id. at 24-33 (averring that Judge Kaplan improperly invoked the power of criminal contempt); dkt. no. 171 at 1-2 (seeking this Court's disqualification based on the transfer of this case).)

[7] (See dkt. no. 68 at 10-12 & n.3 (finding nothing improper about how this case came before the undersigned); dkt. no. 172 at 1-2 (same); dkt. no. 68 at 11-12 (noting that Rule 42 did not require Judge Kaplan to recuse himself); id. at 12-20 & n.4 (observing that Mr. Donziger's arguments regarding the interestedness of the Special Prosecutors did not merit disqualification); id. at 22-23 (finding that Judge Kaplan's charging Mr. Donziger with criminal contempt was not excessive or unwarranted under the circumstances alleged); dkt. no. 172 at 2-3 (denying second recusal request based).)

his disagreement with several of Judge Kaplan's decisions (or comments) in the underlying civil proceedings. But those rulings, especially considered in light of the presumption of regularity and Mr. Donziger's refusal to comply with the Court's orders, do not evidence that Judge Kaplan "had it in for [Mr. Donziger] for reasons unrelated to [his] view of the law."[8]

Second, Mr. Donziger asserts that Judge Kaplan initiated the criminal proceedings against him "as a strategic and bad-faith means to intimidate and oppress Mr. Donziger into giving up his legal appellate rights" related to several of Judge Kaplan's post-judgment discovery orders:[9] Mr. Donziger offers no evidence, United States v. Sanchez, 517 F.3d 651, 671 (2d Cir. 2008) ("Generalized allegations of improper motive do not disturb the presumption of regularity."). Moreover, as the Court has already recognized, (see dkt. no. 243 at 5-

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[8] Keith v. Barnhart, 473 F.3d 782, 789 (7th Cir. 2007); see also Liteky v. United States, 510 U.S. 540, 555-56 (1994) ("Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.").

[9] (Dkt. no. 259 at 9.) Mr. Donziger also asserts that his "core contentions as to the unlawfulness of [the post-judgment] discovery process have now been affirmed by the Second Circuit." (Id. at (emphasis omitted).) Not so. To the contrary, the Court of Appeals affirmed the district court's judgments--including the award of costs to Chevron and the findings of civil contempt--in all respects save for the civil contempt finding and compensatory sanctions related to Mr. Donziger's "sale of interests in the Ecuadorian Judgment other than of interests in his contingent share of that judgment." Donziger, 990 F.3d at 214. Indeed, the Court of Appeals took pains to clarify the narrow scope of its holding, "[1]est [its] Opinion be taken as somehow vindicating Donziger." Id. at 212.

9), Mr. Donziger's willingness to go into civil contempt beyond his own speculation, to support that position. See did not (1) relieve him of his obligations to comply with any unstayed orders that he wished to appea1,[10]or (2) limit Judge Kaplan's discretion to charge criminal contempt if Mr. Donziger refused to comply with those orders.[11]

Next, Mr. Donziger contends that the Special Prosecutors are merely channeling Judge Kaplan's vindictiveness through their continued prosecution of this case. For support, Mr. Donziger points to Judge Kaplan's refusal to recuse himself, which Mr. Donziger surmises must be to provide cover for Judge Kaplan's "continufing] to influence or control the prosecution from behind the scenes." (Dkt. no. 259 at 9.) That theory is long on conjecture but short on evidence. Mr. Donziger's suppositions regarding Judge Kaplan's motivations or involvement with the prosecution cannot substitute for actual evidence of vindictiveness or selectivity, see Sanchez, 517 F.3d at 671, especially because the Special Prosecutors have repeatedly represented that Judge Kaplan is not involved in any prosecutorial strategy decisions, (see dkt. no. 52 at16:25-17:3; dkt. no. 150 at 2).

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[10] See Maness, 419 U.S. at 458 ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.").

[11] (See dkt. no. 243 at 6-9 (analyzing Alexander, Cobbledick, Ryan, and Maness, on which Mr. Donziger relied to support his proposed rule).)

Finally, Mr. Donziger posits that the Special Prosecutors' conduct is independently vindictive because (1) Seward "has an attorney-client relationship to Chevron and a deep loyalty to the oil & gas sector," (dkt. no. 259 at 9); (2) "it appears [Seward] is using this criminal case to deliver a `payback' for an entire industry that was deeply threatened by the litigation model that Mr. Donziger openly espoused and dedicated his career to," (id. at 9-10); (3) Chevron and, by extension, its counsel at Gibson, Dunn & Crutcher LLP ("Gibson Dunn"), effectively bankroll and control the criminal prosecution of Mr. Donziger through a "partnership" with the Special Prosecutors, (see dkt. no. 280 If 12-15); and (4) Seward's actions are driven by an understanding that it will receive business or a "kickback" potentially worth "tens or hundreds of millions of dollars" in future legal fees from Chevron or others, (see id. 911 17-26).[12]

As to the first contention, Mr. Donziger already raised the same arguments in the context of his previous motion to disqualify the Special Prosecutors. (See dkt. no. 60 at 17-24.) The Court rejected them, (see dkt. no. 68 at 13-20), and Mr. Donziger has provided no controlling law or overlooked facts supporting reconsideration. See

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[12] The third and fourth arguments were raised for the first time in a reply declaration filed--under penalty of perjury, no less--by Mr. Donziger's attorney Martin Garbus. "It is well settled that a court has wide discretion to accept or reject factual assertions and arguments made for the first time on reply." Wells Fargo Bank, N.A. v. Watts, No. 16-CV-6919 (ENV) (RER), 2020 WL 6370057, at *1 (E.D.N.Y. May 27, 2020), rep. & recommendation adopted, 2020 WL 5200903 (E.D.N.Y. Sept. 1, 2020). Although these contentions certainly could have been raised in Mr. Donziger's initial moving papers, the Court will address them nonetheless.

Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). As for the remaining allegations, they are, again, premised solely on Mr. Donziger's conjectures and suppositions, not actual evidence. See Sanchez, 517 F.3d at 671. The Court will not indulge Mr. Donziger's "free-wheeling theories of sinister prosecutorial motives." United States v. Basciano, No. 05-CR-060 (NGG), 2009 WL 8673013, at *3 (E.D.N.Y. Jan. 20, 2009).

In short, Mr. Donziger has not established a claim of either vindictive prosecution or selective prosecution under the governing legal standards. See Bout, 731 F.3d at 238; Alameh, 341 F.3d at 173. To the extent Mr. Donziger's arguments are not explicitly addressed above, the Court has considered them and found them to be meritless. Accordingly, Mr. Donziger is not entitled to a dismissal.

b. Fed. R. Crim. P. 42

Next, Mr. Donziger asserts that Rule 42 is unconstitutional as applied to this case because the Special Prosecutors are "interested" and "[t]he actual conduct of the prosecutors after their appointment" establishes that point. (Dkt. no. 259 at 10.) But that argument simply attempts to repackage Mr. Donziger's previous contentions that the Special Prosecutors are not disinterested, which the Court has already rejected. (See dkt. no. 68 at 13-20.) Consequently, Mr. Donziger's as-applied constitutional challenge to Rule 42, which relies only on those previously rejected arguments, necessarily fails. Mr. Donziger's assertion that "there appears to be no case in the United States dealing with Rule 42 that is anything like this" does not alter that conclusion. (Dkt. no. 280 15.)

c. Discovery

Mr. Donziger nevertheless maintains that he is entitled to various forms of discovery, including, among other things, records and depositions regarding billing, marketing materials, communications, and internal business decisions from the Special Prosecutors and Seward as well as numerous non-parties including Chevron, Gibson Dunn, the United States Attorney's Office, former U.S. Attorney Geoffrey Berman, and unnamed public relations firms. (See dkt. no. 259 at 10-11; dkt. no. 280 1 40; dkt. no. 292 11 1-5.) This is not the first time that Mr. Donziger has sought at least some of this discovery. (See dkt. nos. 49, 60, 131.)

"The standard for discovery in aid of a claim of vindictive prosecution or selective prosecution is the same." Avenatti, 433 F. Supp. 3d at 563-64. To obtain such discovery, "a defendant must provide some evidence tending to show the existence of the essential elements of the defense."[13] "Mere assertions and generalized proffers on information and belief are insufficient." United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992). The Supreme Court has made clear that "the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." Armstrong, 517 U.S. at464 (emphasis added).

[13] Sanders, 211 F.3d at 717 (quotation marks omitted). Mr. Donziger asserts that the governing "standard should be dramatically relaxed and even reversed" based on the facts of this case, (dkt. no. 259 at 10), but he cites no legal authority for that proposition beyond a generalized invocation of the Constitution's separation-of-powers principle.

Mr. Donziger has not met that standard. As discussed above, Mr. Donziger's arguments rely on: (1) his displeasure with Judge Kaplan's rulings in the underlying civil case, (2) unsupported assertions that Judge Kaplan is somehow influencing this case from behind the scenes, (3) speculation that the Special Prosecutors are deliberately trying to punish Mr. Donziger on behalf of their clients or stand to gain millions of dollars worth of future business following their prosecution of this case, and (4) speculation that Chevron is bankrolling the prosecution of this case or otherwise pulling the strings from behind the scenes. Related to the first bucket, the Court concluded above that Judge Kaplan's orders in the underlying civil case do not evidence that his charging Mr. Donziger was vindictive or selective. (See supra at 16-17 & n.7.) As for the remaining buckets, those unsupported allegations are of exactly the kind that are insufficient to merit discovery. See Fares, 978 F.2d at 59. Indeed, Mr. Donziger's moving papers point to absolutely nothing--only innuendo and conjecture--that would entitle him to the vast swath of discovery that he seeks.

In short, as the Court has already recognized, "Mr. Donziger's speculation that the universe is conspiring against him is not a basis for compelling disclosure." (Dkt. no. 68 at 24.) Because Mr. Donziger has not offered evidence tending to show the elements of either vindictive or selective prosecution, he is not entitled to discovery.

d. Renewed Request to Recuse the Court

In his notice of motion, Mr. Donziger, for a third time, requests that the Court recuse itself. (See dkt. no. 258.) Mr. Donziger does not elaborate much on that argument in his memorandum of law, however, offering only that the Judge Kaplan "hand-picked private prosecutors . . . who also appear to have personal ties to the presiding judge, having served on a law school alumni committee together." (Dkt. no. 259 at 7.)

The Court understands Mr. Donziger to be referring to the undersigned's and Ms. Glavin's membership on the Board of Directors of the Fordham Law School Alumni Association ("FLAA"), an organization with more than 100 members. Canon 4 of the Code of Conduct of United States Judges expressly authorizes a judge to "engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities." The undersigned's involvement with the FLAA provides no basis for recusa1.[14]

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[14] See, e.g., In re Aguinda, 241 F.3d 194, 203 (2d Cir. 2001) (holding that a judge's participation in programs sponsored by bar associations or law schools does not require recusal); Kinchen v. St. John's Univ., 830 F. App'x 691, 692-93 (2d Cir. 2020) (summary order) (holding that allegations of a judge's "participat[ion] in a speaking engagement at St. John's and maintain[ing] professional relationships with St. John's alumni . . . raise no inference of bias"); Marcavage v. Bd. of Trs. of Temple Univ., 232 F. App'x 79, 83 (3d Cir. 2007) ("Common membership in a legal organization between a judge and counsel is not, by itself, enough to create a situation in which a judge's impartiality might reasonably be questioned."); Casciani v. Town of Webster, No. 09-CV-6519L, 2012 WL 6131017, at *1 (W.D.N.Y. Dec. 11, 2012) (holding that disqualification was not warranted where

To the extent Mr. Donziger's request relies on other previously raised grounds, the Court construes it as a motion for reconsideration of its past recusal orders. And because Mr. Donziger has identified no facts or law that the Court overlooked in those orders, reconsideration is not warranted. See Shrader, 70 F.3d at 257.

e. Oral Argument

Although parties may request oral argument, "the decision whether or not to hold an oral hearing on a motion to dismiss lies in the sound discretion of the trial court." Greene v. WCI Holdings Corp., 136 F.3d313, 316 (2d Cir. 1998) (per curiam); see also Basciano, 2009 WL 8673013, at *2 (applying Greene's rule in a criminal case). Mr. Donziger believes that his "motion raises serious Constitutional issues and . . . should not be decided on submission." (Dkt. no. 267 at 1.) But, as has been explained repeatedly above, the Court has already considered--some more than once--the lion's share of issues underlying Mr. Donziger's motion. To the extent the motion raises new issues not before considered, the Court has had the benefit of detailed briefing from the parties, which more than adequately presents the issues. Oral argument is not necessary.

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judge and potential witness had "attended the same college" and belonged "to the same alumni association"); Am. Dairy Queen Corp. v. Blume, No. Civ. 11-358 (RHK/TNL), 2012 WL 1005015, at *2 (D. Minn. Mar. 26, 2012) ("Simply put, a judge must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation, but such associations do not require recusal." (quotation marks omitted)).

III. Conclusion

For the foregoing reasons, Mr. Donziger's (1) motion to dismiss the Order to Show Cause [dkt. no. 258] and (2) request for oral argument [dkt nos. 262, 267] are DENIED. The Clerk of the Court shall close the open motions.

Trial in this matter will begin, as scheduled, on May 10, 2021 at 10:00 a.m. in Courtroom 24B.

SO ORDERED.

Dated: May 6, 2021
New York, New York

LORETTA A. PRESKA
Senior United States District Judge

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 19-CR-561 (LAP)
-against-	No. 11-CV-691 (LAK)
STEVEN DONZIGER,	ORDER
Defendant.	

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court are Defendant Steven Donziger's (1) motion for reconsideration of the Court's May 7, 2020 order denying Mr. Donziger's motion to dismiss the charges against him and (2) fourth motion to dismiss the criminal contempt charges in the July 31, 2019 Order to Show Cause. (See dkt. no. 274.) The Special Prosecutors oppose the motion. (See dkt. no. 288.) Mr. Donziger did not file a reply by the agreed-upon May 6, 2021 deadline. For the reasons below, the motion for reconsideration and the motion to dismiss are DENIED.

I. Background

The Court already has recounted the lengthy procedural history of this case in several prior orders. (See, e.g., dkt. no. 68 at 2-7; dkt. no. 243 at 1-4; dkt. no. 297 at 2-11.) Consequently, the Court will summarize only the history relevant to the instant motion here.

This criminal contempt case is an outgrowth of Chevron Corp. v. Donziger, 11-CV-691 (S.D.N.Y.), over which Judge Lewis A. Kaplan presides. (See dkt. no. 68 at 2.) In 2014, following a lengthy trial, Judge Kaplan issued a decision and judgment in Chevron's favor ("the RICO Judgment"), See Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). The Court of Appeals affirmed that judgment, see Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016), and the Supreme Court denied certiorari, 137 S. Ct. 2268 (2017). Most relevantly, the RICO Judgment: (1) established "a constructive trust for the benefit of Chevron on all property" that Mr. Donziger has received or receives that is traceable, directly or indirectly, to the Ecuadorian Judgment, including Mr. Donziger's personal interest in that judgment; and (2) enjoined Mr. Donziger from "undertaking any acts to monetize or profit from" the Ecuadorian Judgment. (Dkt. no. 1875 in 11-CV-691 ¶¶ 1, 5.)

Thereafter, Judge Kaplan issued a supplemental judgment for costs against Mr. Donziger and others. (See dkt. no. 1962 in 11-CV-691.) On March 5, 2O19, as part of the post-judgment discovery proceedings and following Mr. Donziger's refusal to produce documents, Judge Kaplan issued an order (the "Protocol Order") establishing a protocol governing the collection, imaging, and examination of Mr. Donziger's electronic devices. (See dkt. no. 2172 in 11-CV-691.) That order required Mr. Donziger, inter alia, to: (1) provide a list of all his electronic devices and accounts to an appointed forensic expert, (id. 4); and (2) surrender those devices to the forensic expert for imaging, (id. ¶ 5). Mr. Donziger did not comply with either directive, informing the expert

that he would not do so "until [his) due process rights [we]re respected." (Dkt. no. 2173-1 in 11-CV-691 at 2.)

A few months later, Judge Kaplan issued another order (the "Passport Surrender Order") directing Mr. Donziger to surrender his passport(s) to the Clerk of the Court. (See dkt. no. 2232 in 11-CV--691 at 2.) That order was imposed, in addition to a series of coercive fines, as a civil contempt sanction based on Mr. Donziger's noncompliance with the Protocol Order. (See id. at 1-2.) Mr. Donziger filed an emergency motion to stay the contempt sanctions pending an appeal, (see dkt. no. 2234 in 11-CV-691), which Judge Kaplan granted in part and denied in part on July 2, 2019, (see dkt. nos. 2252, 2254 in 11-CV-691). In so ordering, Judge Kaplan again directed Mr. Donziger to surrender his passports and declined to stay the Protocol Order pending appeal. (See dkt. no. 2254 in 11-CV-691 at 3.) Mr. Donziger still did not comply and did not seek a stay or a writ of mandamus from the Court of Appeals.

On July 31, 2019, Judge Kaplan issued an order, pursuant to Federal Rule of Criminal Procedure 42, directing Mr. Donziger to show cause why he should not be held in criminal contempt, in violation of 18 U.S.C. § 401(3). (See dkt. no. 1.) The Order to Show Cause, which was made returnable before the undersigned, cited six charges for criminal contempt premised on Mr. Donziger's alleged violations of court orders contained in the RICO Judgment, the Protocol Order, and the Passport Surrender Order. (See id. ¶¶ 1-21.)

On February 27, 2020, Mr. Donziger sought pre-trial relief on several grounds. (See dkt. no. 60.) Most relevantly, Mr. Donziger sought dismissal of the criminal

contempt charges, asserting that: (1) some of the charges were unwarranted because Mr. Donziger purged the underlying contempt by taking corrective action before Judge Kaplan issued the Order to Show Cause, (see id. at 24, 31-32); (2) some of his alleged contemptuous conduct was "benign" or "too trivial" to warrant criminal sanctions, (id. at 24); and (3) Judge Kaplan's resort to criminal charges conflicted with the "principle that 'only the least possible power adequate to the end proposed' should be used in contempt cases," (id. at 5 (quoting Young v. United States ex rel. Vuitton et Fits S.A., 481 U.S. 787, 801 (1987); see also id. at 24).

The Court rejected each of those arguments. The first contention failed "because it misunderst[ood] the crucial distinction between civil contempt, which serves to coerce compliance with an outstanding order, and criminal contempt, which punishes the contemnor for a 'completed act of disobedience.'"[1] The second argument was "meritless" because the caselaw "acknowledge[d] that criminal contempt includes 'a broad range of conduct, from trivial to severe.'" (Dkt. no. 68 at 22 (quoting United States v. Carpenter, 91 F.3d 1282, 1284 (9th Cir. 1996).) As for the last assertion, the Court observed that:

> [f]rom the facts set forth in the parties' papers, however, it appears that Mr.

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[1] (Dkt. no. 68 at 21 (citing Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994)).) "In the same way that a car theft defendant cannot extricate himself from exposure by eventually returning the stolen vehicles," the Court explained, "a contempt defendant is not entitled to dismissal because he eventually complied with the previously disobeyed orders." (Id.)

> Donziger left Judge Kaplan with no real option other than criminal charges. Mr. Donziger is alleged to have repeatedly defied court orders, openly invited civil contempt, and refused to budge even when faced with coercive sanctions. That course of conduct gives no basis for thinking that more orders, warnings, or threats would have produced improvement.

Id. at 22 (quotation marks and citations omitted). On those bases, the Court denied Mr. Donziger's motion. (See id. at 25.)

On April 30, 2021, Mr. Donziger filed the instant motion, seeking (1) reconsideration of the Court's May 7, 2020 order denying his motion to dismiss as to Counts IV and V because Mr. Donziger complied with the relevant orders before he was charged with criminal contempt, and (2) dismissal of the criminal contempt charges on the grounds that Judge Kaplan did not make a judicial "determination" that imposing civil contempt sanctions would be inappropriate or futile. (See dkt. no. 274 at 1-3.) Like Mr. Donziger's previous motions to dismiss, the Special Prosecutors oppose this motion. (See dkt. no. 288.)

II. Discussion

a. Motion for Reconsideration

The standard governing reconsideration motions "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-

-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple." Analytical Survs., Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (quoting Sequa Corp. v. GB,' Corp., 156 F.3d 136, 144 (2d Cir. 1998). Nor is a reconsideration motion properly made to "reargue those issues already considered when a party does not like the way the original motion was resolved." United States v. Lisi, No. 15 Cr. 457 (KPF), 2020 WL 1331955, at *2 (S.D.N.Y. Mar. 23, 2020) (quotation marks omitted).

Mr. Donziger asserts that reconsideration of the Court's May 7, 2020 order is warranted as to Counts IV and V of the Order to Show Cause, which charge violations of paragraph 1 of the RICO Judgment. (See dkt. no. 274 at 1-3; see also dkt. no. 1 ¶¶ 10-12, 15.) Count IV is based on Mr. Donziger's refusal to assign to Chevron, between March 4, 2014 and September 3, 2018, his 6.3% contingent fee interest in the Ecuadorian Judgment pursuant to a January 5, 2011 Retainer Agreement (the "2011 Retainer"). (See id. ¶¶ 10-14.) Count V is predicated on Mr. Donziger's failure to assign to Chevron, between November 1, 2017 and May 27, 2019, his 6.3% contingent fee interest in the Ecuadorian Judgment pursuant to a Retainer Agreement entered into on or about November 1, 2017 (the "2017 Retainer"). (See id. ¶¶ 15-18.) Mr. Donziger avers that it was unlawfully excessive for Judge Kaplan to charge him with Counts

IV and V after he had purged the underlying contempt by transferring his interests under the 2011 Retainer and 2017 Retainer to Chevron. (See dkt. no. 274 at 1-3.) Put differently, Mr. Donziger asserts "that criminal contempt may be used only as a last resort," which Mr. Donziger maintains could not have happened here. (Id. at 2.)

Mr. Donziger's theory essentially combines two arguments that he raised in his initial pretrial motions: (1) that some of the charges were unwarranted because Mr. Donziger had purged the contempts before he was criminally charged, and (2) Judge Kaplan improperly invoked criminal contempt sanctions, i.e., he did not use criminal contempt as a "last resort" option. (See dkt. no. 60 at 1, 5, 24, 31-32.) The Court rejected those contentions separately after reviewing the controlling precedent, including Young, 481 U.S. at 801, on which Mr. Donziger principally relies. (See dkt. no. 68 at 21-23; see also dkt. no. 274 at 2.) Based on that, whether Mr. Donziger's new theory combining two previously rejected ones is a proper subject for a reconsideration motion is questionable. See Analytical Survs, 684 F.3d at 52.

But even setting that aside and assuming reconsideration would otherwise be proper, Mr. Donziger still would not be entitled to a dismissal of Counts IV and V. It is hornbook law that the same contemptuous act can subject a contemnor to both civil and criminal sanctions.[2] That makes sense because

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[2] See, e.g., In re Grand Jury Witness, 835 F.2d 437, 440 (2d Cir. 1987) ("Refusal to obey a court order may subject a person to both civil and criminal contempt for the same acts."); SEC v. Am. Bd. of Trade, Inc., 830 F.2d 431, 439 (2d Cir. 1987) ("When a district

civil and criminal contempt serve two different purposes.[3] Indeed, In re Irving--which Mr. Donziger avers establishes the legal rule for which he advocates, (see dkt. no. 274 at 2)--recognizes that, "[l]n responding to a single contemptuous act, a court may well impose both criminal and civil sanctions wishing to vindicate its authority and to compel compliance." 600 F.2d 1027, 1031 (2d Cir. 1979) (emphasis added). The fact that Mr. Donziger ultimately acquiesced to Judge Kaplan's orders before he was criminally charged does not mean that Judge Kaplan was then forced to ignore the years of alleged noncompliance up to the purges.[4] Mr. Donziger's motion for reconsideration of the Court's May 7, 2020 order is denied.

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court's order has been violated, the court may impose either civil contempt remedies or criminal contempt sanctions, or both."); Universal City Studios, Inc. v. N.Y. Broadway Int'l Corp., 705 F.2d 94, 96 (2d Cir. 1983) ("Though the use of judicial power to secure future compliance with a court order involves civil contempt remedies, the use of such power in the aftermath of past violations can take the form of either civil contempt remedies or criminal contempt punishments, or both." (citations omitted)); In re Weiss, 703 F.2d 653, 664 (2d Cir. 1983) ("If conduct is tantamount to a willful refusal to obey an order of the court, and the contemnor has the power to end his contumacy, a court may impose criminal contempt sanctions, or civil contempt sanctions, or both.")

[3] See, e.g., In re Grand Jury Witness, 835 F.2d at 440 ("An adjudication of civil contempt is coercive--to compel obedience to a lawful court order--criminal contempt is imposed to punish the contemnor for an offense against the public and to vindicate the authority of the court.").

[4] Count IV alleges a period of noncompliance of more than four years, (see dkt. no. I If 10-14), and Count V alleges a period of noncompliance of nearly two years, (see id. III 15-18).

b. Motion to Dismiss

Next, Mr. Donziger asserts that all six criminal contempt charges must be dismissed as procedurally deficient because "Judge Kaplan failed to make basic determinations that are a condition precedent to using the criminal contempt power," namely that imposing civil sanctions would be "inappropriate or useless." (Dkt. no. 274 at 1, 3.) To support that position, Mr. Donziger invokes a passage from Irving, which states that "[a] judge should resort to criminal contempt only after he determines that holding the contemnor in civil contempt would be inappropriate or fruitless." 600 F.2d at1037 (citing Shillitani v. United States, 384 U.S. 364, 371& n.9 1966)).

Mr. Donziger's contention misses the mark. In Universal City, 705 F.2d at 96 n.1--a case decided four years after Irving--the Court of Appeals explicitly rejected the contemnors' argument that "criminal contempt sanctions may not be imposed until there has been a determination that civil contempt remedies are ineffective." The contemnors had relied on Shillitani, just as Irving did. In so holding, the Court of Appeals clarified that Shellitani's rule--and, by extension, Irving's--"applies when a court is endeavoring to secure future compliance with a court order, not when a court is taking cognizance of past violations." Id. (citations omitted) (emphasis added). Put simply, contrary to Mr. Donziger's assertions, Irving does not impose a procedural requirement for charging criminal contempt when the charges are backward-looking rather than forward-looking. The contempt charges in this case are of the latter variety: Each criminal contempt charge

alleges Mr. Donziger's past violations of Judge Kaplan's orders. (See dkt. no. 1 1% 3, 6, 9, 14, 18, 21.)

In short, because the criminal contempt charges against Mr. Donziger are not directed at securing his future compliance with a court order, Irving provides him no help. Accordingly, Mr. Donziger's Irving-based motion to dismiss is denied.

III. Conclusion

For the foregoing reasons, Mr. Donziger's (1) motion for reconsideration and (2) fourth motion to dismiss (dkt. no. 274] are DENIED. The Clerk of the Court shall close the open motions.

SO ORDERED.

Dated: May 7, 2021
New York, New York

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 19-CR-561 (LAP)
-against-	No. 11-CV-691 (LAK)
STEVEN DONZIGER, Defendant.	FINDINGS OF FACT & CONCLUSIONS OF LAW

Appearances

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Table of Contents

LORETTA A. PRESKA, Senior United States District Judge:

I. Introduction

The events giving rise to this criminal contempt case mark the latest chapter in a sprawling legal saga--spanning multiple continents and over twenty-five years of fierce litigation--between Defendant Steven Donziger and Chevron Corporation ("Chevron") regarding oil pollution in the Orienté region of the Ecuadorian Amazon.[1] This case, however, is wholly unconcerned with the debate regarding any responsibility Chevron might bear for that pollution.[2] Yet, this case is no less important to a

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[1] The full story of Mr. Donziger's clash with Chevron has been recounted in painstaking detail elsewhere. See generally Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014). That opinion is in evidence as Government Exhibit 1874 ("GX 1874"). When citing documents marked for identification as "Government Exhibits," the Court will use the abbreviation "GX." When citing documents marked for identification as "Defense Exhibits," the Court will use the abbreviation "DX." Unless otherwise specified, all exhibits cited herein were admitted into evidence for their truth.

[2] See United States v. Terry, 17 F.3d 575, 576 (2d Cir. 1994) ("The actions leading to the criminal contempt conviction from which this appeal was taken lay grounded in the highly charged societal debate over abortion rights. This appeal, however, is unconcerned with that debate."). To be clear, this decision makes no determination regarding pollution in Ecuador, the cleanup of any

(continued on following page)

society, like ours, that holds the rule of law among its cardinal virtues.[3] Indeed, at stake here is the fundamental principle that a party to a legal action must abide by court orders or risk criminal sanctions, no matter how fervently he believes in the righteousness of his cause or how much he detests his adversary.[4]

By order to show cause dated July 30, 2019 (the "Order to Show Cause"), Judge Lewis A. Kaplan charged Mr. Donziger with six counts of criminal contempt arising from Mr. Donziger's refusal to comply with multiple court orders in Chevron Corp.

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such pollution, climate change, environmentalism, Mr. Donziger's long advocacy for clients seeking to raise environmental issues,the apparent high regard in which Mr. Donziger is held by various celebrities and other people who are strangers to these proceedings, and other issues that have been raised (largely by Mr. Donziger) outside the record and in various public fora outside the Court. Accordingly, any submissions addressing or based on those or any other topics beyond the narrow merits of this criminal contempt case are irrelevant and thus played no part in the decision reached herein.

[3] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("[W]e submit ourselves to rulers only if under rules.").

[4] See, e.g., Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) ("[R]espect for judicial process is a small price to pay for the civilizing hand of the law, which alone can give abiding meaning to constitutional freedom.").

v. Donziger, No. 11-CV-691 (LAK) (S.D.N.Y.).[5] Contempt proceedings involving attorneys invariably are difficult, and "[t]his case is no exception."[6] Following a five-day bench trial--and upon careful consideration of the trial record and arguments made in the post-trial briefing[7]--the Court makes the following findings of fact and conclusions of law.[8]

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[5] (See Order to Show Cause Why Defendant Steven Donziger Should Not Be Held in Criminal Contempt ("Order to Show Cause"), dated July 30, 2019 [dkt. no. 1 in 19-CR-561; dkt. no. 2276 in 11-CV-691].) Unless otherwise specified, all docket number citations herein refer to the docket in 19-CR-561.

[6] United States v. Cutler, 840 F. Supp. 959, 961 (E.D.N.Y. 1994).

[7] (See Proposed Findings of Fact of the United States of America ("Sp. Pros. Br."), dated June 8, 2021 [dkt. no. 327]; Findings of Fact and Conclusions of Law as to Counts IV, V, and VI ("Def. IV/V/VI Br."), dated June 8, 2021 [dkt. no. 326]; Findings and Conclusions and Offer of Proof ("Def. I/II/III Br."), dated June 8, 2021 [dkt. no. 328].)

Mr. Donziger also filed a post-trial letter motion to dismiss on June 3, 2021. (See Letter ("June 3 Letter MTD"), dated June 3, 2021 [dkt. no. 324]; see also Response, dated June 18, 2021 [dkt. no. 329]; Reply in Support of Motion to Dismiss ("June 25 Reply"), dated June 25, 2021 [dkt. no. 335].)

Mr. Donziger filed a second post-trial letter motion to dismiss on June 22, 2021. (See Motion to Dismiss ("Appointments MTD"), dated June 22, 2021 [dkt. no. 330]; see also Letter Response, dated July 9, 2021 [dkt. no. 338]; Letter Reply to Response ("Appointments Reply"), dated July 19, 2021 [dkt. no. 343].)

[8] See FED. R. CRIM. P. 23(c). At the outset, the Court notes that the proposed findings of fact filed by the Special Prosecutors, which are exceptionally detailed with generous citations to the trial record, have proven helpful in understanding

(continued on following page)

II. Findings of Fact

a. The "Lay of the Land"

Although the facts surrounding the decades of underlying civil litigation between Mr. Donziger and Chevron have little (if any) significance to the legal questions before the Court in this case, the Court will nevertheless provide some high-level context to set the stage. Mr. Donziger was one of the lead plaintiffs' lawyers in a lawsuit originally filed in this District but tried in the Republic of Ecuador ("the Lago Agrio Case") alleging that Chevron's predecessor-in-interest, Texaco, Inc., had massively polluted the Amazonian rainforest through its oil operations.[9] In 2011, after years of litigation, Mr. Donziger won an $8.6 billion judgment (the "Ecuadorian Judgment") against Chevron on behalf of his Amazonian clients.[10] That

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the long and detailed history of the underlying civil proceedings before Judge Kaplan. The Court stresses, however, that while it sometimes found those proposed findings illuminating, it did not adopt any proposed findings verbatim or wholesale. The Supreme Court has criticized that practice when, unlike here, the trial judge assigns the preparation of such findings to a prevailing party. See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985) (citing United States v. Marine Bancorporation, 418 U.S. 602, 615 n.13 (1974); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656–57 (1964)). Here, by contrast, the Court requested post-trial briefing from both parties and adopted only those findings of fact supported by the evidence after an independent and comprehensive review of the trial record.

[9] (See GX 1874 at 1.)

[10] (See GX 1874 at 179.)

success, however, was relatively short-lived. In 2011, Chevron sued Mr. Donziger and others in the Southern District of New York, claiming that they had procured the Ecuadorian Judgment by fraud.[11] In 2014, after a lengthy bench trial, Judge Kaplan ruled in Chevron's favor.[12] In doing so, Judge Kaplan found that Mr. Donziger and his team had engaged in a veritable smorgasbord of corrupt and fraudulent acts in the Ecuadorian case, including, inter alia, submitting false evidence, paying a consulting firm to "ghostwrite" a purportedly independent expert's report, and bribing the judge to rule in their clients' favor.[13] Judge Kaplan's comprehensive 485-page opinion was affirmed in full by the Court of Appeals.[14] Mr. Donziger has since been disbarred in New York State as a result of his misconduct in the Ecuadorian proceedings.[15]

In this case, Mr. Donziger faces six counts of criminal contempt for disobeying multiple orders issued by Judge Kaplan.[16] The criminal charges are premised on three of Judge Kaplan's orders: (1) the March 4, 2014 judgment entered in Chevron's favor (the "RICO Judgment");[17] (2) the March 5, 2019 Forensic Inspection

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[11] (See GX 1874 at 298-99.)

[12] (See GX 1874 at 484-85.)

[13] (See GX 1874 at 362-63.)

[14] See Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016), cert. denied, 137 S. Ct. 2268 (2017). That opinion is also in evidence. (See GX 1914 at 3-129 (mandate from the Court of Appeals, docketed at dkt. no. 1914 in 11-CV-691).)

[15] See Matter of Donziger, 128 N.Y.S.3d 212 (1st Dep't 2020), leave to appeal denied, 168 N.E.3d 1152 (N.Y. 2021).

[16] (See Order to Show Cause at 1-10 ¶¶ 1-21.)

[17] (See GX. 1875 (dkt. no. 1875 in 11-CV-691).)

Protocol (the "Protocol");[18] and (3) the June 11, 2019 order related to Mr. Donziger's passport(s) (the "Passport Order").[19]

Also relevant to the charges are two agreements Mr. Donziger entered into related to his representation of the plaintiffs in the Lago Agrio case: (1) a January 5, 2011 retainer agreement (the "2011 Retainer");[20] and (2) a November 1, 2017 retainer agreement (the "2017 Retainer").[21] The 2011 Retainer was among four parties: (1) the individual plaintiffs in the matter Maria Aguinda y Otros v. Chevron Corporation (the "LAPs"), (2) El Frente de Defensa de la Amazonia ("ADF"), (3) Asamblea de Adectados por Texaco ("ADAPT") and (4) Donziger & Associates, PLLC.[22] The 2017 Retainer was between Mr. Donziger personally (i.e., not his law firm) and ADF.[23]

The Order to Show Cause charges Mr. Donziger as follows:

> Count I. For the period of March 8, 2019 to May 28, 2019, Mr. Donziger willfully violated paragraph four of the Protocol, which directed him to provide, by March 8, 2019, a sworn list of all his electronic

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[18] (See GX. 2172 (dkt. no. 2172 in 11-CV-691).)

[19] (See GX 2232 (dkt. no. 2232 in 11-CV-691).)

[20] (See GX 1978-6 (2011 retainer filed to the public docket as dkt. no. 1978-6 in 11-CV-691).)

[21] (See GX 120 (copy of the 2017 Retainer attached to email correspondence from Randy M. Mastro to Steven Donziger).)

[22] (See GX 1978-6 at 1.)

[23] (See GX 120 at DONZIGER_107415.)

devices, communication and messaging accounts, and document management services accounts that he had used since March 4, 2012.

Count II. For the period of March 18, 2019 to at least May 28, 2019, Mr. Donziger willfully violated paragraph five of the Protocol, which directed him to surrender, on March 18, 2019 at 12:00 p.m., to a neutral forensic expert all of his "Devices" and "Media" for imaging.

Count III. Mr. Donziger willfully violated the Passport Order, which directed him to surrender, to the Clerk of Court by June 12, 2019 at 4:00 p.m., every passport issued to him.

Count IV. For the period of March 4, 2014 to September 3, 2018, Mr. Donziger willfully violated paragraph one of the RICO Judgment by refusing to assign to Chevron his contractual rights to a contingent fee under the 2011 Retainer.

Count V. For the period November 1, 2017 to May 27, 2019, Mr. Donziger willfully violated paragraph one of the RICO Judgment by refusing to assign to Chevron his contractual rights under the 2017 Retainer.

Count VI. On December 23, 2016, Mr. Donziger willfully violated paragraph five of the RICO Judgment by assigning

> and pledging a portion of his own personal interest in the Ecuadorian Judgment in exchange for personal services.[24]

Below, the Court catalogues and groups the relevant facts and court orders with respect to: (1) Counts IV, V, and VI; and (2) Counts I, II and III.

b. The Trial Record & Initial Observations on Witness Credibility

Before diving into the charges, a discussion of the record evidence is necessary. At trial, the Court received more 160 exhibits and heard testimony from seven witnesses: (1) Anne Champion, a partner in the law firm Gibson, Dunn & Crutcher LLP ("GDC");[25] (2) Sonia Berah, a certified Spanish-English translator;[26] (3) Courtney Decasseres, Finance Manager in the Clerk's Office of the Southern District of New York (the "Clerk's Office");[27] (4) David Ng, Supervisor of Records Management in the Clerk's Office;[28] (5) David Zelman, an executive coach;[29] (6) William Thomson, another GDC partner;[30] and (7) Ondrej Krehel, the

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[24] (See Order to Show Cause at 1-10 ¶¶ 1-21.)

[25] (See Trial Transcript ("Trial Tr."), dated May 10-13, 17, 2021 [dkt. nos. 311, 313, 315, 317, 319] at 71:21-188:14, 200:6-279:13, 291:22-373:21, 383:6-485:22, 488:10-553:5.)

[26] (See Trial Tr. At 283:3-291:14.)

[27] (See Trial Tr. At 554:11-560:15.)

[28] (See Trial Tr. At 561:9-569:2.)

[29] (See Trial Tr. At 569:13-591:24, 598:20-626:2.)

[30] (See Trial Tr. at 626:10-786:18.)

court-appointed Neutral Forensic Expert in 11-CV-691.[31] Mr. Donziger elected not to testify in his own defense, and he waived his right to do so in open court.[32] The Court draws no adverse inference against Mr. Donziger for exercising his constitutional right.[33] That does not, however, constrain the Court from noting that after the Special Prosecutors spent four days presenting their case in which they called seven witnesses, Mr. Donziger elected (as was his constitutional right) to rest without calling a single witness.[34]

"It is the job of the factfinder in a judicial proceeding to evaluate, and decide whether or not to credit, any given item of evidence. Whether, and to what extent, testimony that has been admitted is to be credited are questions squarely within the province of the factfinder."[35] In this bench trial, that responsibility falls to the Court. "Like any other factfinder who assesses witness credibility," the Court "is free to believe all, some, or none of a witness's testimony."[36] That is

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[31] (See Trial Tr. at 788:15-831.)

[32] (See Trial Tr. at 847:12-848:12.)

[33] See, e.g., Mitchell v. United States, 526 U.S. 314, 327-28 (1999).

[34] (See Trial Tr. at 849:23-850:2 ("MR. KUBY: Unless I'm misunderstanding -- unless I'm misunderstanding trial proceedings, which I may well be doing, because it's been a while since I've had a trial -- ooh, that rhymes -- the defense rests. THE COURT: Thank you, sir.").)

[35] United States v. Norman, 776 F.3d 67, 77 (2d Cir. 2015).

[36] Norman, 776 F.3d at 78.

true even if the Court "identifies falsity in part of a witness's testimony."[37] The Court bears this in mind when evaluating the credibility of each of the witnesses.[38]

After carefully scrutinizing their testimony, the Court finds Ms. Berah, Mr. Decasseres, and Mr. Ng to be credible witnesses. Ms. Berah's testimony was based on her education as well as her extensive experience as a federally certified English/Spanish interpreter, and

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[37] Hyman v. Brown, 927 F.3d 639, 661 (2d Cir. 2019).

[38] When making credibility determinations, the Court is mindful of the following instruction commonly given to juries:

> In making your assessment of that witness you should carefully scrutinize all of the testimony given by that witness, the circumstances under which each witness has testified, and all of the other evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness's intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

1A KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 15:01 (6th ed. 2021).

she testified clearly regarding several documents that had been translated from Spanish to English.[39] Similarly, Mr. Decasseres's testimony was informed by his more than twenty years of service in the Clerk's Office, and he delivered that testimony confidently and with no hesitation. Likewise, although the Court observed that Mr. Ng was at times a bit nervous,[40] his testimony showed obvious expertise and attention to detail. Based on its observations, the Court identified no reason to doubt the veracity of Ms. Berah's, Mr. Decasseres's, or Mr. Ng's testimony.

The Court finds Mr. Krehel's testimony largely to be credible as well. His expertise in digital forensics was patent, and his demeanor was self-assured, especially on direct examination. Mr. Krehel provided a coherent and concise account of the actions he took pursuant to the Protocol--most notably his traveling to Mr. Donziger's apartment and his communications with Mr. Donziger as well as Chevron's counsel--and his testimony was consistent with contemporaneous documents. Although Mr. Krehel did not always deliver responsive or direct answers to counsel's questions on cross-examination, in the Court's view that unresponsiveness was driven primarily by confusion regarding what was being asked rather than by any attempt to be evasive. Rather, Mr. Krehel was genuine

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[39] While the Court notes that Ms. Berah was paid for her work in connection with her testimony, that fact standing alone does not alter the Court's conclusion regarding her credibility. (See Trial Tr. at 289:13-291:11.)

[40] Based on its observations of Mr. Ng, the Court finds that those nerves--which were present on both Mr. Ng's direct and cross examinations--were not related to the truthfulness of his testimony.

in trying to communicate his understanding of his role, even though that did not always come through straightforwardly on the stand.

As for Mr. Zelman, the Court finds much of his testimony to be credible. His demeanor was sincere and forthcoming throughout his time on the stand, during both direct and cross-examination. However, Mr. Zelman, understandably, struggled to recall numerous things that he had said, written, or done,[41] and he often relied heavily on what the documents that were put in front of him said.[42] Many of those documents themselves

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[41] (See, e.g., Trial Tr. at 606:11-13 ("You began providing your services to Mr. Donziger prior to execution of your December 2016 agreement, correct? A. I actually am not certain of that."); id. at 607:17-21 ("Q. Do you remember meeting with Mr. Donziger on November 1st, Mr. Zelman? A. I don't have specific recollection, no, when we met. But does the document suggest I did? I'm asking a question because I really don't."); id. at 611:4-7 ("Q. Mr. Zelman, do you remember forwarding a litigation financing presentation to an individual named David Wallenstein, W-A-L-L-E-N-S-T-E-I-N? A. I do not -- what kind of document?"); id. at 613:19-24 ("Q. Me too. Mr. Zelman, isn't true that you at times would encourage Mr. Donziger to move away from a personal narrative and more towards a more professional one? A. I actually don't remember the specifics of those conversations but that would be the kind of thing I might offer.").)

[42] (See, e.g., Trial Tr. at 608:19-25 ("Q. I'm not asking you when you did it, Mr. Zelman. I am asking you if you in fact sent it before you met with Mr. Donziger on November 1st? A. I am not trying to be difficult. It's just that I do not have recollection. So, if there's documentation that suggests I did, I did. And otherwise, I really just don't know the answer to the question."); id. at 612:3-6 ("Q. Did you ever exchange emails with that individual? A. Larry? Yes, of course, on a daily basis. About this or about the Conscious capitalism, if you have such a document I probably did, yeah."); id. at 616:25617:3 ("Q. Does this document make you say ah-ha. I remember, Mr. Zelman? A. I remember this is consistent with something that I would have said. My memory, I don't know.").)

are in evidence, and the Court can evaluate their thrust independently as well as alongside Mr. Zelman's testimony. Also, the Court takes note of the fact that Mr. Zelman is a friend and admirer of Mr. Donziger's--which Mr. Zelman forthrightly admitted on the stand[43]--when evaluating his testimony.

That leaves only Ms. Champion and Mr. Thomson. Mr. Donziger's counsel extensively cross-examined each of them regarding his or her potential bias against Mr. Donziger as well as his or her possible financial interests in the outcome of this case.[44] Both Ms. Champion and Mr. Thomson were counsel for Chevron in the contentious underlying civil litigation between Chevron and Mr. Donziger. Chevron is a major client of GDC, GDC represents Chevron on dozens of matters, and GDC has billed Chevron for millions of

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[43] (See Trial Tr. at 624:20-625:6 ("Q. Since 2019 have you maintained a relationship with the defendant, Steven Donziger? A. Yes. . . . Q. Following your testimony yesterday when you left the courtroom, isn't it true that you hugged Mr. Donziger? A. I might have."); id. at 625:12-16 ("Q. Mr. Zelman, why did you hug, Mr. Donziger? A. Thank you for this question. Q. You're welcome. A. I respect him. I admire him. We have a relationship I value quite dearly.").)

[44] (See Trial Tr. at 459:11-472:8 (cross-examination of Ms. Champion regarding, inter alia, her meetings with the Special Prosecutors and related topics); id. at 714:5-723:3 (cross-examination of Mr. Thomson regarding, inter alia, his meetings with the Special Prosecutors and related topics).)

dollars in fees since April 15, 2019.[45] Ms. Champion,Mr. Thomson, and other GDC lawyers accompanying them spent significant amounts of time with the Special Prosecutors preparing for trial, and GDC did not bill Chevron for that time.[46] Finally, Mr. Thomson testified that Chevron paid for his first-class airfare to travel to New York to meet with the Special Prosecutors,[47] although the trial record was later corrected, without objection from Mr. Donziger's counsel, to clarify that

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[45] Reed Brodsky, counsel for Ms. Champion and Mr. Thomson, represented as much on the record at trial. (See Trial Tr. at 5:3-7.) In addition, to further evaluate the possible financial bias of the GDC witnesses, the Court received under seal and considered GDC's total billings to Chevron between April 2019 and the start of trial in this matter.

[46] (See DX I-51 (cataloguing those meetings); see also Trial Tr. at 459:14-472:7 (Ms. Champion); id. at 714:15-723:3 (Mr. Thomson).) For context, the Court also notes that trial in this matter was adjourned at least six times. (See Transcript of Telephone Conference, dated May 18, 2020 [dkt. no. 87] at 5:14-18; Order, dated Sept. 4, 2020 [dkt. no. 168] at 4-5; Order ("9/16/20 Order"), dated Sept. 16, 2020 [dkt. no. 172] at 4-5; Order, dated Oct. 28, 2020 [dkt. no. 196] at 11; Order, dated Nov. 7, 2020 [dkt. no. 209] at 1; Order, dated Jan. 10, 2021 [dkt. no. 242] at 4.)

[47] (See Trial Tr. at 721:24-722:11 ("Q. How many times have you flown in to prepare for your efficient, truthful, and accurate testimony? A. This is the second time I've flown here. Q. Who paid for that? A. Chevron pays for that. Q. Chevron paid for your flights here; correct? A. Correct. Q. To meet with the private prosecutor? A. Correct. Q. Is your flight coach? A. No. Q. Business class? A. First class.").)

GDC (not Chevron) paid for Mr. Thomson's travel.[48] Additionally, the Court observed Ms. Champion's and Mr. Thomson's demeanors shift between direct and cross examination. Although both were confident and direct in their direct testimony, they were far less forthcoming on cross. These facts are not lost on the Court, and the Court takes seriously its obligation to scrutinize the GDC witnesses'

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[48] The following exchange at trial is illustrative:

> [MR. KUBY:] So this is what I would propose: I think by now this Court either understands that Chevron has used GDC as a buffer, insulating it from its efforts to pursue Mr. Donziger criminally, or this Court [sic] not understand that. This Court either finds as relevant or this Court does not.
>
> I don't think Mr. Brodsky's submission and the Mowen affidavit will have any effect on the Court's decision; and I see no useful purpose in dragging either Ms. Mowen up from Dallas or poor Mr. Thomson back from L.A., burning more fossil fuels, for absolutely no purpose.
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> So I would be prepared to stipulate for the record that when Mr. Thomson answered the series of questions as to who was paying for his flights, the answer is Gibson Dunn Crutcher, not Chevron. And that way Mr. Thomson's incorrect testimony doesn't linger on the record to haunt him in his career and the record is clear.
>
> MS. GLAVIN: Fine with the special prosecutors, your Honor.
>
> THE COURT: Very well, sir.

(Trial Tr. at 846:3-21.)

testimony and demeanor in light of their potential biases and motivations.[49]

With that said, three more observations about Ms. Champion's and Mr. Thomson's testimony are worth mentioning. First, a large portion of Ms. Champion's testimony involved reading verbatim from various documents that the Court received in evidence.[50] Of course, the Court is perfectly capable of reading those documents for itself. Second, another significant chunk of each's testimony consisted of facts that can easily be corroborated by looking to the other documentary evidence, including docket sheets, court filings, letters, and the like. When evaluating Ms. Champion's and Mr. Thomson's testimony, the Court repeatedly tested their accounts against the other evidence admitted at trial. And third, Ms. Champion and Mr. Thomson were both testifying pursuant to a subpoena.[51] Even though those subpoenas did not

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[49] Cf. United States v. Vaughn, 430 F.3d 518, 523 (2d Cir. 2005) ("The better course would have been for the trial judge to more specifically caution the jury to scrutinize the testimony of the cooperating witness with an eye to his motivation for testifying and what he stood to gain by testifying.").

[50] (See, e.g., Trial Tr. at 95:11-96:9; id. at 132:12-136:2; id. at 154:20-155:25; id. at 201:9-205:5; id. at 265:12-21; id. at 266:20-268:13; id. at 268:24-269:6.)

[51] (See Trial Tr. at 466:14-16 ("Q. OK. Well, you say you're here under subpoena. And that's accurate. Is that correct? A. Yes."); id. at 718:8-12 ("Q. Was it time devoted to pursuing the client's interests? A. It was time devoted to preparing to respond to a subpoena that was served on me. Q. And that subpoena was served by the private prosecutor? A. Yes, by the special prosecutors.").)

require Ms. Champion or Mr. Thomson to meet with the Special Prosecutors before trial, there is nothing inherently wrongful about preparing outside of court to give testimony on the stand. On balance, the Court found Ms. Champion and Mr. Thompson to be credible witnesses.

All in all, even though the Court heard five days' worth of testimony--principally from the two GDC witnesses--the Court often found the documentary evidence to be the most probative. Nevertheless, the Court will, as necessary, discuss witness credibility as it relates to specific testimony and factual findings.

c. Counts IV, V, & VI: The RICO Judgment

On March 4, 2014, Judge Kaplan issued a 485-page opinion (the "RICO Opinion") and entered the RICO Judgment against Mr. Donziger (and others) in the underlying civil action.[52] Counts IV, V, and VI relate to the RICO Judgment.

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[52] (See GX 1874 (dkt. no. 1874 in 11-CV-691); GX 1875.) In addition to his status as a party in the underlying civil case, Mr. Donziger also filed a notice of appearance on May 13, 2013. (See GX 1147 at 1 (dkt. no. 1147 in 11-CV-691).) When an attorney files a notice of appearance, that attorney receives automatic notifications from the ECF system regarding anything that is posted to the docket. (See Trial Tr. at 80:22-81:2.) The docket sheet in 11-CV-691, which is in evidence, establishes that Mr. Donziger has made numerous pro se filings in that action. (See GX 1 (docket sheet for 11-CV-691).)

1. The RICO Judgment, the Retainer Agreements, & the Amazonia Shares

Three paragraphs of the RICO Judgment are of particular importance to this case: Paragraphs One, Three, and Five. Before reciting what those paragraphs say, it is necessary first to catalogue some definitions the RICO Judgment uses. The following definitions are relevant to the operative provisions of the RICO Judgment:

- "Amazonia" meant "Amazonia Recovery Limited, an entity registered in Gibraltar, together with its successors and assigns."[53]

- "Chevron" was defined as "Chevron Corporation and its subsidiaries and affiliates."[54]

- "Donziger" was defined as "the Donziger Defendants, and each of them, unless the text hereof otherwise provides."[55]

- The "Judgment" referred to "the judgment entered in the Lago Agrio Case on February 14, 2011 as modified by subsequent proceedings."[56]

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[53] (GX 1875 at 3 ¶ 7.2.)

[54] (GX 1875 at 3 ¶ 7.4.)

[55] (GX 1875 at ¶ 7.5.) The Donziger Defendants included Mr. Donziger personally as well as The Law Offices of Steven R. Donziger and Donziger & Associates, PLLC. (See id. at 1.)

[56] (GX 1875 at 4 ¶ 7.6.)

- "Lago Agrio Case" meant "Lawsuit No. 2003-0002, entitled Maria Aguinda y Otros v. Chevron Corporation, in the Sucumbíos Provincial Court of Justice of the Republic of Ecuador and all appeals with respect to any judgment, order or decree entered therein."[57]

- "New Judgment" was defined as "any judgment or order that hereafter may be rendered in the Lago Agrio Case by any court in Ecuador in or by reason of the Lago Agrio Case, or any judgment or order issued by any other court that has recognized or enforced the Judgment or any such subsequent judgment."[58]

- The "Retainer Agreement" referred to the 2011 Retainer.[59]

The RICO Judgment uses those defined terms throughout. Paragraph One of the RICO Judgment provides as follows:

> The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that Donziger has received, or hereafter may receive, directly or indirectly, or to which Donziger now has, or hereafter obtains, any

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[57] (GX 1875 at 4 ¶ 7.7.)

[58] (GX 1875 at 4 ¶ 7.8.)

[59] (GX 1875 at 4 ¶ 7.9.)

> right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world including, without limitation, all rights to any contingent fee under the Retainer Agreement and all stock in Amazonia. Donziger shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.[60]

Notably, as its text plainly shows, Paragraph One places the responsibility for compliance on Mr. Donziger; it does not instruct Chevron to do anything.

Paragraph Three of the RICO Judgment commands that:

> Donziger shall execute in favor of Chevron a stock power transferring all of his right, title and interest in his shares of Amazonia, and Donziger and the LAP Representatives, and each of them, shall execute such other and further documents as Chevron reasonably may request or as the Court hereafter may order to effectuate the foregoing provisions of this Judgment.[61]

Like Paragraph One, Paragraph Three placed the onus of compliance on Mr. Donziger, not Chevron.

Lastly, Paragraph Five orders that:

> Donziger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking

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[60] (GX 1875 at 1-2 ¶ 1 (emphasis added).)

[61] (GX 1875 at 2 ¶ 3.)

> any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein.[62]

Like the others, Paragraph Five was directed only at Mr. Donziger.

Each of those Paragraphs was directed at ensuring that Mr. Donziger could and would not benefit from the Ecuadorian Judgment.[63] The RICO Judgment operated as a "final judgment with respect to all claims between and among Chevron, Donziger, and the LAP Representatives," and Judge Kaplan retained jurisdiction over the parties and the case "for purposes of enforcing and resolving any disputes concerning" the RICO Judgment.[64]

Three property interests are particularly relevant to the aforementioned Paragraphs: (1) a 6.3% contingent fee interest under the 2011 Retainer (the "2011 Contingent Fee"); (2) a 6.3% contingent fee interest under the 2017 Retainer (the "2017 Contingent

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[62] (GX 1875 at 3 ¶ 5 (emphasis added).)

[63] (See GX 1874 at 485 ("The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.").)

[64] (GX 1875 at 5 ¶ 10.) Judge Kaplan also ordered that "Chevron shall recover of Donziger and the LAP Representatives, and each of them, jointly and severally, the costs of this action." (Id. at 4 ¶ 9.) More on that shortly.

Fee"); and (3) Mr. Donziger's shares in Amazonia Recovery Limited ("Amazonia"). In the RICO Opinion, Judge Kaplan explained that both the 2011 Contingent Fee and the Amazonia shares were "property" subject to Paragraph One's constructive trust.[65]

In terms of a contingent fee, the 2011 Retainer provided as follows:

> As compensation for its services hereunder, the Firm shall be entitled to an Active Lawyer Percentage of thirty one and one-half percent (31.5%) of the Total Contingency Fee Payment. The "Total Contingency Fee Payment" means an amount equal to twenty percent (20%) of all Plaintiff Collection Monies. "Plaintiff Collection Monies" means any amounts paid, whether in lump sum or installments, whether from Chevron Corporation (a/k/a Texaco; ChevronTexaco; Chevron), any other party listed as a defendant in respect of the Litigation

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[65] (See GX 1874 at 477 ("[Donziger's] right to a contingent fee and the fee itself are property subject to execution and attachment and certainly to the imposition of a constructive trust. . . . Moreover, Donziger owns, directly or through a nominee, shares of a Gibraltar company, Amazonia, through which the property collected on the Judgment is to be funneled. Those shares too are subject to a constructive trust, as whatever value they now or hereafter may have is a direct function of the fraud perpetrated by Donziger." (footnotes omitted)).)

> (including, without limitation, his or its respective affiliates and successors in interest), or any other party added or joined to the Litigation from time to time as a defendant or indemnitor or against whom proceedings are asserted or threatened. Funds are considered "paid" when the monies are disbursed to the Plaintiffs or are available to be so disbursed.[66]

Put simply, Mr. Donziger's firm was entitled to collect 6.3% of any monies recovered by the LAPs.[67] The 2011 Retainer also indicated that Mr. Donziger's law firm was to be paid, among other things, a monthly retainer.[68]

The 2017 Retainer, which unlike the 2011 Retainer was between only Mr. Donziger personally and the ADF, also granted Mr. Donziger a contingent fee interest. As to that interest, the 2017 Retainer provided the following:

> In consideration of Mr. DONZIGER's leadership, investment, professional and collection services, as set forth above, both in the past and in the future, the FDA hereby acknowledges, confirms, and undertakes to support Mr. DONZIGER's

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[66] (GX 1978-6 ¶ 3(a) (emphasis added).)

[67] The Court arrived at the 6.3% figure by multiplying Mr. Donziger's 31.5% interest by the 20% of the total recovery against which that interest operates.

[68] (See GX 1978-6 ¶ 3(b).)

> existing contractual **INTEREST** or, alternatively, to the extent it is necessary or useful, hereby grants Mr. DONZIGER an **INTEREST** in his own right equal to
>
> Mr. DONZIGER's existing contractual **INTEREST.** Such INTEREST, in any case, shall be understood to entitle Mr. DONZIGER to **6.3%** of any **FUNDS RECOVERED**, which are defined as any funds recovered in connection with the *AGUINDA* [i.e., Ecuadorian] CASE or the *AGUINDA* JUDGMENT, whether by court order or private out-of-court settlement, in Canada or in any other country . . . .[69]

As part of the 2017 Retainer, ADF "irrevocably acknowledge[d], confirm[ed] and undert[ook] to support Mr. DONZIGER's existing contractual INTEREST," and it also "hereby grant[ed] Mr. DONZIGER an INTEREST in his own right equal to his existing contractual INTEREST."[70]

As for Amazonia, Mr. Donziger testified in the underlying civil litigation that he was an Amazonia shareholder because of his contingency fee interests in

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[69] (GX 120 at DONZIGER_107417.)

[70] (GX 120 at DONZIGER_107415 (emphasis added).)

the Ecuadorian Judgment.[71] Mr. Donziger also confirmed that Amazonia's structure "was designed to reflect the contingency fee equity in the lawsuit" and that his number of shares was "the equivalent of what the contingency fee interest was before" Amazonia's creation.[72]

2. Mr. Donziger's Stay Request, Judge Kaplan's April 25, 2014 Stay Order, & the Appeal of the RICO Judgment

On March 18, 2014, Mr. Donziger filed an emergency motion before Judge Kaplan seeking (1) a stay of the RICO Judgment pending appeal, or (2) in the alternative, a temporary administrative stay.[73] Mr. Donziger argued, among other things, that the RICO Judgment's command that he transfer forthwith and assign all of his property rights and interests traceable to the Ecuadorian Judgment would cause him irreparable harm.[74] Specifically, in a sworn declaration in support of his motion, Mr. Donziger asserted that:

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[71] (See Trial Tr. at 95:11-19 ("'Q. Mr. Donziger, I want to ask you a few questions about Amazonia Recovery Limited. That's a Gibraltar company; correct, sir? 'A. Yes. 'Q. And you're a shareholder in that company; correct? 'A. That's correct.' . . . 'Q. That's because of your contingency fee interest; correct? 'A. Yes.'" (quoting from trial transcript in 11-CV-691, which was marked for identification as GX 200 but was ultimately not moved into evidence)).)

[72] (Trial Tr. 95:23-24, 96:8-9 (quoting from trial transcript in 11-CV-691).)

[73] (See GX 1888 (dkt. no 1888 in 11-CV-691).)

[74] (See GX 1888 at 15-20.)

> I presently have no personal source of earned income other than income attributable to my work arising out of the Lago Agrio litigation. If I am forced to turn over my shares in Amazonia and relinquish any interest I have in the Lago Agrio litigation, my law practice-my only means of earning a livelihood--will be effectively destroyed. Even if I prevail on appeal, I will not be able to undo the damage to my practice suffered in the interim.[75]

Mr. Donziger, through his counsel, requested an expeditious ruling so that he could, if necessary, move for a stay in the Court of Appeals under Federal Rule of Appellate Procedure 8(a)(2).[76]

> On April 25, 2014, Judge Kaplan issued an order (the "Stay Order"), granting in part and denying in part Mr. Donziger's motion for a stay pending appeal.[77] In so ordering, Judge Kaplan modified Paragraph Three of the RICO Judgment, "solely pending the determination of the appeal in this case," to read as follows:

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[75] (GX 1899 ¶¶ 2-3 (dkt. no. 1899 in 11-CV-691.)

[76] (See GX 1888 at 1-2.)

[77] (See GX 1901 (dkt. no. 1901 in 11-CV-691).) During cross-examination of the GDC witnesses at trial, Mr. Donziger's counsel referred to the Stay Order as the "Interpretation Order." (See, e.g., Trial Tr. 510:15-17, 730:2-4.)

> Donziger shall execute in favor of the Clerk of this Court a stock power transferring to the Clerk all of his right, title and interest in his shares of Amazonia. The Clerk shall hold the Amazonia shares thus transferred, and all proceeds thereof, pending the determination of the appeal in this case, for the benefit of Donziger and Chevron, as their interests then may appear. Upon request by Donziger, given on notice to Chevron at least ten days in advance of the date for the proposed vote, the Clerk shall vote, or direct the owner of record thereof such to vote, such shares as directed by Donziger unless otherwise ordered by the Court. Donziger and the LAP Representatives, and each of them, shall execute such other and further documents as Chevron reasonably may request or as the Court hereafter may order to effectuate the foregoing provisions of this Judgment.[78]

Judge Kaplan offered the following explanation for his decision to temporarily modify Paragraph Three:

> Allowing the shares to remain in Donziger's hands pending appeal would enable him to benefit from his fraud prior to any collections by selling the shares and by hiding or dissipating the sale proceeds. Taking the shares out of his hands now would prevent

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[78] (GX 1901 at 32.)

> such a result and cause no injury to Donziger that could not be undone.[79]

Judge Kaplan denied Mr. Donziger's motion "in all other respects."[80] Mr. Donziger did not appeal from Judge Kaplan's April 25, 2014 Stay Order.[81]

The RICO Judgment was not stayed during the pendency of Mr. Donziger's appeal.[82] Yet, after receiving the Stay Order, Mr. Donziger still did not transfer his Amazonia shares to the Clerk of the Court--or assign to Chevron the 2011 Contingent Fee--despite Chevron's August 7, 2014 request that he do so.[83] In an

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[79] (GX 1901 at 15.)

[80] (GX 1901 at 32.)

[81] (See GX 1 (observing no notice of appeal related to the Stay Order).)

[82] (See Trial Tr. 108:20-24 ("Q. Now, Ms. Champion, other than what Judge Kaplan had ordered in this April 25, 2024 [sic] decision, was there any stay of that March 4, 2014 RICO judgment while Mr. Donziger's appeal was pending in the Second Circuit? A. No.").)

[83] (See GX 100 at DONZIGER_107402-03 (Aug. 7, 2014 Letter from Randy M. Mastro to Steven Donziger and his counsel) ("I write on behalf of Chevron Corporation to request long overdue compliance with the Court's final judgment against Steven Donziger and his law firms . . . in the above-captioned matter. . . . Donziger, of course, should have also already complied with the other aspects of the Court's judgment, including the transfer to Chevron of any of Donziger's property that is traceable to the Ecuadorian judgment. Please tell us when Donziger will comply with the judgment in full, which should in no event be later than August 21.") Chevron's counsel even emailed a form stock power to Mr. Donziger and his counsel On August 8, 2014. (See GX 101 at DONZIGER_107405, 107407 (Aug. 8, 2014 email from Jefferson Bell to Richard Friedman with "CC" to Zoe Littlepage and Steven Donziger with attachment).)

August 21, 2014 letter to Chevron's counsel, Mr. Donziger did not mince words:

> To be clear, I have not and will not sell or otherwise transfer any of my shares in Amazonia, consistent with the district court's judgment, unless and until that judgment is modified by the district court or reversed or stayed by the U.S. Court of Appeals for the Second Circuit.[84]

Mr. Donziger further explained that he had not transferred the Amazonia shares because "[t]he onus was [ ] on Chevron to propose and request the form of the stock power and any other transactional documents deemed necessary to ensure compliance," which Chevron did not do.[85]

Mr. Donziger thereafter offered another reason why he was refusing to transfer the shares:

> My clients have informed me, via the Directors of Amazonia, that if any transfer of stock is effectuated by me to any entity, those shares will be divested immediately under the bylaws of the entity that holds the shares. As you know, my clients do not recognize Judge Kaplan's assertion of jurisdiction in this matter. The upshot is that a simple transfer to the clerk's office of my Amazonia shares would in practice

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[84] (GX 1986-1 at 1 (August 21, 2014 Letter from Steven Donziger to Randy M. Mastro, filed as dkt. no. 1986-1 in 11-CV-691) (emphasis added).)

[85] (GX 1986-1 at 1.)

> mean the complete divestiture--and potentially irretrievable loss--of more than two decades of labor on the part of me and some of my colleagues, before the Second Circuit even has a chance to decide our appeal from Judge Kaplan's judgment.[86]

Instead, Mr. Donziger proposed that the parties "enter into a stipulation . . . during the pendency of the appeal regarding the disposition of the ARL shares or the proceeds from such shares should I ever receive any."[87] Mr. Donziger sent a proposed stipulation to that effect to Chevron's counsel,[88] which Chevron refused.[89] Even so, Mr. Donziger still did not transfer his Amazonia shares to the Clerk of the Court during the pendency of his appeal.[90] During that same period, Mr. Donziger

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[86] (GX 1986-1 at 2 (emphasis added).)

[87] (GX 1986-1 at 2.)

[88] (See GX 102 at DONZIGER_107408, 107411-12 (Aug. 22, 2014 email from Steven Donziger to Randy M. Mastro along with attachment).)

[89] (See Trial Tr. 692:16-18, 693:2-3 ("Q. And did Mr. Donziger provide a stipulation, a proposed stipulation of this letter? A. He did. . . . Q. Did Chevron agree to that stipulation? A. No.").)

[90] Mr. Decasseres testified that the Clerk's Office keeps detailed records cataloguing noncash collateral, which would include items such as a stock power. (See Trial Tr. at 557:1724 ("Q. And where would the stock filing be kept in the Clerk's Office? A. It would be kept in the finance office in the safe. Q. OK. How would you determine whether the Clerk's Office received a stock filing? A. We keep meticulous records on that. We have effectively a ledger that maintains all items that are in the vault, which is audited twice a year.").) Mr. Decasseres completed a search of the relevant records

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also did not assign to Chevron the 2011 Contingent Fee.[91]

On August 8, 2016, the Court of Appeals affirmed the RICO Opinion and the RICO Judgment in their entirety.[92] The Court of Appeals observed that Judge Kaplan had "made extensive factual findings as to the acts undertaken by Donziger to procure the Lago Agrio Judgment" and that "[n]one of them [wa]s disputed."[93] On November 3, 2016, the Court of Appeals issued its mandate.[94] Mr. Donziger subsequently petitioned for a writ of certiorari, which the Supreme Court denied on June 19, 2017.[95]

3. The Supplemental Money Judgment

That same day, Chevron, through its counsel, filed a letter requesting that Judge Kaplan "reactivate [its] motion for attorneys' fees and bill of costs," which Judge Kaplan had deferred pending Mr. Donziger's appeal.[96] In that letter, Chevron also requested that

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and confirmed that the Clerk's Office did not receive a stock power or any transfer of the Amazonia shares, from Mr. Donziger or anyone else, between 2014 and 2017. (See id. 559:14-560:9.)

[91] (See GX 2085-1 at 1-2 (dkt. no. 2085-1 in 11-CV-691) (only executing such a transfer as of September 4, 2018).)

[92] See Donziger, 833 F.3d at 151 ("We have considered all of the arguments of Donziger and the LAP Representatives on this appeal and have found in them no basis for dismissal or reversal. The judgment of the district court is affirmed.").

[93] Donziger, 833 F.3d at 86.

[94] (See GX 1914 at 1.)

[95] See Donzinger v. Chevron Corp., 137 S. Ct. 2268 (2017).

[96] (GX 1922 at 1 (dkt. no. 1922 in 11-CV0691).)

Judge Kaplan order Mr. Donziger to comply with the Paragraph Three of the RICO Judgment, which required Mr. Donziger to execute a stock power in favor of Chevron for the Amazonia shares.[97] Chevron asserted that "[t]here [wa]s no justification for Donziger's continued violations" and asked that Judge Kaplan "order Donziger to comply forthwith, or else face sanctions."[98] Mr. Donziger did not respond to that letter.[99]

On July 17, 2017, Judge Kaplan entered an order (1) reactivating Chevron's motion for attorney's fees and (2) directing the Clerk of the Court to tax costs.[100] Judge Kaplan also denied without prejudice Chevron's request to order Mr. Donziger to comply with the RICO Judgment, reasoning that "this aspect of [Chevron's] application may not be made by letter motion."[101] Judge Kaplan left open the possibility that Chevron could pursue such relief by formal motion.[102] Following that

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[97] (See GX 1922 at 1.) During the pendency of his appeal, Judge Kaplan ordered Mr. Donziger to execute a stock power in favor of the Clerk of the Court, but, as discussed above, he never did so. (See GX 1901 at 32; Trial Tr. 559:14-560:9.)

[98] (GX 1922 at 1.)

[99] (See Trial Tr. at 112:7-9 ("Q. And did Mr. Donziger file a response with the Court to this June 19, 2017 letter to Mr. Mastro? A. No."); see also GX 1 (observing that the docket sheet shows no such response was filed).)

[100] (See GX 1923 at 2 (dkt. no. 1923 in 11-CV-691).)

[101] (GX 1923 at 2.)

[102] (See GX 1923 at 2.)

order, Mr. Donziger still did not transfer to Chevron his Amazonia shares or the 2011 Contingent Fee.[103]

On February 28, 2018, following motion practice, Judge Kaplan entered a supplemental judgment against Mr. Donziger and others in the amount of $813,602.71 for attorney's fees and costs (the "Money Judgment").[104] In an opinion accompanying the Money Judgment, Judge Kaplan observed that Mr. Donziger "arguably [wa]s in contempt of the final judgment of permanent injunction."[105] Mr. Donziger noticed an appeal from the Money Judgment on March 28, 2018,[106] which the Court of Appeals assigned docket number 18-855.[107]

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[103] (See Trial Tr. at 113:21-25 ("Now, Ms. Champion, after Judge Kaplan issued this order on July 17 of 2017, in the year of 2017 did Mr. Donziger execute a stock power transfer to Chevron for his interest in the Amazonia shares? A. If he did we did not receive it."); id. at 114:1-12 ("With respect to Mr. Donziger's right to a contingent fee and the 2011 retainer agreement, during the year 2014, did Mr. Donziger execute a transfer or assignment to Chevron of his interests in that contingent fee? A. No. Q. Did he do it in 2015? A. No. Q. Did he do it in 2016? A. No. Q. Did he do it in 2017? A. No.").)

[104] (See GX 1962 (dkt. no. 1962 in 11-CV-691).)

[105] (See GX 1963 at 17 (dkt. no. 1963 in 11-CV-691).)

[106] (See GX 1972 (dkt. no. 1972 in 11-CV-691).)

[107] (See GX 7 (docket in Chevron Corp. v. Donziger, 18-855 (2d Cir.)); see also Trial Tr. at 632:23-633:11 ("Moving into evidence Government Exhibit 7, which is a certified copy of the docket sheet for Second Circuit Appeal 18-855. . . . Q. Have you had an opportunity, Mr. Thomson, before today to review that docket sheet? A. Yes, I have. Q. Okay. And for which of the three appeals you mentioned, the docket sheet for -- which is Government Exhibit 7, is for which of those three appeals? A. That's for the cost award appeal, the supplemental judgment.").)

4. Chevron's March 19, 2018 Contempt Application

On March 19, 2018, Chevron moved ex parte (1) to hold Mr. Donziger in contempt for failing to transfer his shares in Amazonia as ordered in Paragraph Three of the RICO Judgment; (2) to holdMr. Donziger in contempt for actively conspiring to monetize and profit from the RICO Judgment; (3) for leave to conduct post-judgment discovery regarding the enforcement of the RICO Judgment; and (4) for a document preservation order.[108] The latter two requests marked the start of the post-judgment discovery proceedings, which underlie Counts I, II, and III. For ease of reference, the Court will discuss those facts in a separate section below. The ensuing discussion in this section will focus on Mr. Donziger's (non)compliance with Paragraphs One, Three, and Five of the RICO Judgment.[109]

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[108] (See GX 1966 at 11-18 (dkt. no. 1966 in 11-CV-691).)

[109] The Court, of course, recognizes that the Order to Show Cause does not charge Mr. Donziger with criminal contempt regarding his refusal to comply with Paragraph Three of the RICO Judgment. (See generally Order to Show Cause.) However, the Court also finds that, for much of the relevant period, Judge Kaplan and the parties grouped and discussed the Amazonia shares together with the 2011 Contingent Fee. That is unsurprising given Mr. Donziger's explanation that Amazonia's structure "was designed to reflect the contingency fee equity in the lawsuit" and that his number of shares was commensurate with his contingency fee interest. (Trial Tr. 95:23-24, 96:8-9 (quoting from trial transcript in 11-CV-691).) discussion of the history surrounding relevant to Counts IV and V. Therefore, at least some the Amazonia shares is relevant to Counts IV and V.

On March 19, 2018, the same day Chevron made its ex parte application, Judge Kaplan issued an order to show cause, which provided two important directives.[110] First, Judge Kaplan ordered Chevron to serve the order to show cause and "all papers submitted in support thereof" on Mr. Donziger no later than March 20, 2018 at 5:00 p.m.[111] And second, Judge Kaplan directed Mr. Donziger to show cause why he should not be held in contempt for failing to comply with the RICO Judgment.[112] Judge Kaplan gave Mr. Donziger until April 20 to do so.[113]

On April 24, 2018, Mr. Donziger filed a pro se opposition to Chevron's contempt application.[114] Mr. Donziger maintained that it was his understanding that Amazonia either no longer existed or was "entirely owned by Chevron after Chevron forced it into receivership."[115] Mr. Donziger also appended to his opposition his August 21, 2014 letter to Chevron, which stated that (1) Mr. Donziger would not sell or transfer his Amazonia shares and (2) Chevron had abdicated its responsibilities under the RICO Judgment of proffering the necessary documents to effectuate the transaction.[116] As for his alleged efforts to monetize the RICO Judgment, Mr. Donziger asserted that (1) the Stay Order was "effectively the applicable order of the Court" and (2)

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[110] (See GX 1968 (dkt. no. 1968 in 11-cv-691).)

[111] (GX 1968 at 2.)

[112] (See GX 1968 at 3.)

[113] (See GX 1968 at 3.)

[114] (See GX 1986 (dkt no. 1986 in 11-cv-691).)

[115] (GX 1986 at 1.)

the Stay Order specifically allowed Mr. Donziger to raise funds for case expenses and his own fees.[117]

5. The May 8, 2018 Hearing

On May 8, 2018, Judge Kaplan held a hearing regarding Chevron's contempt application and its related request for discovery.[118] At the hearing, Mr. Donziger offered the following explanation regarding his efforts to raise funds for enforcement actions related to the Ecuadorian Judgment:

> I am allowed, if I sell the shares of my clients, to get paid for my work on this case. . . . I'm selling, as an intermediary, the points or the aspects of the judgment that are held by my clients. I am not selling my own shares, because that is obviously prohibited by your Honor's RICO judgment.[119]

Mr. Donziger repeatedly represented to Judge Kaplan that he had only been selling his clients' interests in the Ecuadorian Judgment, not his own.[120]

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[116] (See GX 1986-1 at 1.)

[117] (GX 1986 at 5.)

[118] (See GX 1010 (dkt. no. 2010 in 11-CV-691).)

[119] (GX 2010 at 18:2-3, 18:23-19:1 (emphasis added).)

[120] (See GX 2010 at 21:5-7 ("What evidence have they presented to show I have sold a single piece of my interest? Zero. And it hasn't happened. I'll make that representation right now."); id. at 26:3-4 ("I'm not selling my shares; I'm selling my clients' shares."); id. at 31:5-7 ("How do we know he hasn't sold his shares?

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Regarding his failure to transfer the Amazonia shares, Mr. Donziger did not deny that he had not executed a stock power. Mr. Donziger attempted to argue that Chevron had not actively sought the transfer of the shares, but Judge Kaplan observed that, even if that were true, it did not relieve Mr. Donziger of his responsibility to execute the stock power.[121] Mr. Donziger then made his thoughts on the issue very clear:

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Well, I'm a lawyer and I'm representing to you as an officer of the court right now I have not sold my shares."); id. at 31:13-14 ("[A]gain, I'm not selling my shares, I'm selling their shares."); id. at 32:18-23 ("But if there's anything that might be arguably legit about what they're seeking, it's something related to the narrow issue of am I selling my own shares. And if you're not going to accept my representation, I can prove to you that I have not sold my own shares, and that's what it should be limited to.").)

[121] The following exchange between Judge Kaplan and Mr. Donziger is particularly salient:

> MR. DONZIGER: But I don't think we should play possum here. I think you should ask the Chevron lawyers do they own my shares, because I don't, as far as I know, have a document that has shares on it. However, I will be more than happy to do whatever the Court instructs, because I think this is a completely ridiculous issue.
>
> THE COURT: I instructed in 2014. We are all waiting.
>
> MR. DONZIGER: Why didn't they pursue it for four years?

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But I will say this: It doesn't matter, because they own it. OK. This is a fake issue. And if they want me to sign my shares over, which they already have because this could be a public relations exercise for them, I'm happy to do it. I am not going to sit here and be held in

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THE COURT: I asked that question. That's neither here nor there.

MR. DONZGIER: Just so you know --

THE COURT: You're a lawyer who says he complies with court orders. There is a court order outstanding since 2014 that compels you to deliver an executed stock power. I am told it has never happened. You have not denied that.

MR. DONZGIER: Well, that's not the end of the story, sir, OK. In 2014 – this was the problem in 2014. I sent them a letter saying I would be more than happy to negotiate something that would work for both of us.

THE COURT: I read the letter, Mr. Donziger.

MR. DONZGIER: OK. They never responded.

THE COURT: So what?

MR. DONZGIER: I acted in good faith.

THE COURT: So what?

MR. DONZGIER: So why are they here now four years later? Because we're winning in Canada?

THE COURT: They won. They got a judgment. You made them an offer. They blew it off. Not the first time in legal history, not the last.

(GX 2010 at 28:1-29:5.)

> contempt over something that's completely meaningless, when I'm here today ready to do that.
>
> So tell me what you want me to do. He says he has something for me to sign. Well, why hasn't he presented that to me? Where is it? I'm sitting here. He sent me an email this morning looking for discovery. Why is he playing possum with me? To make me look foolish? Just give me the document you want me to sign.
>
> Do you have it sir, I mean come on.[122]

Judge Kaplan declined to direct Mr. Donziger to sign any share transfer paperwork on the spot, instead indicating that he would rule on Chevron's contempt motion in due course.[123]

6. The Amazonia Shares & the 2011 Retainer

Following the May 8 hearing, Chevron presented Mr. Donziger with two forms via email: (1) a general assignment form transferring all of his property interests traceable to the Ecuadorian Judgment, and (2)

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[122] (GX 2010 at 29:13-30:1.)

[123] (See GX 2010 at 36:16-22 ("MR. MASTRO: Your honor, we do have a share transfer form and assignment ready to present to Mr. Donziger right now. THE COURT: Well, you can give it to him. I'm not going to insist that he sign it. He is a free actor. Your motion is outstanding. I imagine I'll rule on it soon. And you can let me know, both of you, whether it's in that regard moot.").

a specific form to transfer his Amazonia shares.[124] Mr. Donziger did not execute the general assignment form.[125] Mr. Donziger did sign Chevron's proposed transfer form for the Amazonia shares, but he attached an additional "Addendum of Understandings."[126] That addendum made four statements: (1) the share transfer was being executed "upon the specific threat of imposition of 'contempt of court' sanctions;" (2) Chevron had previously represented to Mr. Donziger that Amazonia had been placed into liquidation; (3) the transfer was being executed in violation of Amazonia's Articles of Association, which provided that any transfer "in violation of these Articles shall be null and void;" and (4) Mr. Donziger continued to assert that Amazonia, as an entity, was null and void.[127]

By letter dated May 10, 2018, Chevron informed Judge Kaplan of Mr. Donziger's conduct and sought contempt sanctions as well as discovery regarding Mr.

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[124] (See GX 114 at DONZIGER_ 104209-17 (May 9, 2018 email from Anne Champion to Steven Donziger with attachments).)

[125] (See GX 2003 at 2 (dkt. no. 2003 in 11-CV-691) ("Following his statements in this regard at the contempt hearing, Chevron provided Donziger with a general assignment for any interest he has in the Judgment, however held . . . . Donziger refused to execute the general assignment."); see also id. at 13 (Ex. B.) ("Please don't send me documents late at night to sign that implicate critical rights of my clients and were not part of your original contempt motion. You should have raised these issues in a timely fashion when these matters were being briefed well prior to the hearing."); Trial Tr. at 139:21-23 ("Q. So he didn't execute the transfer and assignment form for all of his property interest traceable to the judgment? A. No.")

[126] (See GX 2003-3 at 1-2 (dkt. no. 2003-3 in 11-CV-691).)

Donziger's noncompliance.[128] Chevron suggested that Mr. Donziger's attaching the "Addendum of Understandings" "effectively nullifie[d] the transfer of his shares in Amazonia."[129] Chevron also maintained that Mr. Donziger had "fail[ed] to specify in what form he holds his contingency interest in the Ecuadorian judgment."[130]

On May 16, 2018, Judge Kaplan issued an order finding Mr. Donziger previously to have been in civil contempt for failing to transfer the Amazonia shares, but Judge Kaplan found that civil contempt sanctions were inappropriate because Mr. Donziger did execute a stock power on May 9, 2018, albeit an insufficient one.[131] Although Judge Kaplan noted that the "obvious purpose" of Mr. Donziger's "Addendum of Understandings" was to negate the transfer of the Amazonia shares, Judge Kaplan nevertheless observed that the RICO Judgment required only the execution of a stock power agreement without "prescrib[ing] a particular form."[132] Judge Kaplan cautioned, however, that Chevron could seek an unqualified transfer of the Amazonia shares, with the possibility of contempt if Mr. Donziger refused to execute such a transfer.[133]

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[127] (GX 2003-3 at 1.)

[128] (See GX 2003 at 2-3.)

[129] (GX 2003 at 1.)

[130] (GX 2003 at 2.)

[131] (See GX 2006 at 9, 13 (dkt. no. 2006 in 11-CV-691).)

[132] (GX 2006 at 12-13.)

[133] (See GX 2006 at 13.)

Importantly, Judge Kaplan also noted in his May 16, 2018 order that, in its most recent letter, Chevron had raised a new possible basis for Mr. Donziger's contempt: Mr. Donziger's failure to convey to Chevron the 2011 Contingent Fee, in alleged violation of Paragraph One of the RICO Judgment.[134] Judge Kaplan noted that Chevron had not asserted any contempt claim based on Paragraph One in its moving papers and declined to address such a claim "unless and until Chevron files an appropriate motion."[135] Following the issuance of the May 16, 2018 order, Mr. Donziger still did not assign to Chevron the 2011 Contingent Fee.[136]

On June 25, 2018, at a deposition of Mr. Donziger as part of the post-judgment discovery proceedings, Chevron presented Mr. Donziger with a transfer form regarding the assignment of, among other things, the 2011 Contingent Fee.[137] Mr. Donziger did not execute the transfer at his deposition.[138] A few days later,

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[134] (See GX 2006 at 14-15.)

[135] (GX 2006 at 15.)

[136] (See Trial Tr. at 150:20-151:2 ("And after Judge Kaplan issued that opinion, that May 16th opinion, did Mr. Donziger execute an assignment to Chevron of his right to the contingent fee as granted in the 2011 retainer agreement? A. Not immediately, no. Q. And in the next four or five weeks after that opinion, did he execute an assignment of his contingent fee interest? A. No.").)

[137] (See GX 201 at 229:21-231:12 (transcript of June 25, 2018 deposition of Steven Donziger).)

[138] (See GX 201 at 231:15-20 ("This is a whole other thing I need to look at, consider, and think about, so no, I'm not willing to execute this document today, and if you are asking me to execute it, I need some time and I will get back to you.").)

Chevron moved to compel Mr. Donziger to execute two documents: (1) an unqualified transfer of his Amazonia shares and (2) a general transfer and assignment of any and all of his interests in the Ecuadorian Judgment, including the 2011 Contingent Fee.[139] Mr. Donziger opposed the motion.[140]

On August 15, 2018, Judge Kaplan ordered Mr. Donziger, among other things, to execute and acknowledge before a notary public--and deliver to Chevron's counsel by August 21, 2018--a transfer and assignment form assigning to Chevron the 2011 Contingent Fee.[141] In so ordering, Judge Kaplan expressly highlighted the RICO Opinion's holding, which Mr. Donziger did not contest on appeal, that any "right to a contingent fee and the fee itself are property," which was "subject to execution and attachment" and "immediately assignable."[142] That "particular set of contract rights," Judge Kaplan found, "ha[d] been subject since March 4, 2014 to Donziger's express obligation to transfer and assign them forthwith to Chevron, an obligation which he ha[d] disregarded for over four years."[143] Judge Kaplan appended the form to

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[139] (See GX 2047 at 3-4 (dkt. no. 2047 in 11-CV-691).)

[140] (See GX 2054 (dkt. no. 2054 in 11-CV-691).)

[141] (See GX 2072 at 9 (dkt. no. 2072 in 11-CV-691).)

[142] (GX 2072 at 7.)

[143] (GX 2072 at 8.)

be completed as Exhibit 1 to the August 15, 2018 Order.[144]

On August 20, 2018, Mr. Donziger sought an extension of time to comply with Judge Kaplan's August 15 Order.[145] Mr. Donziger stated that (1) he was "out of the country through Labor Day, with no way to access a U.S.-qualified notary" and (2) he was "not sure that a foreign notary would meet the Court's requirements."[146] Mr. Donziger also indicated that he was "seeking adequate counsel on the issue of transferring [his] contingency interest" because his clients forbid him to make the transfer on penalty of possible termination.[147]

On August 21, 2018, Judge Kaplan granted in part and denied in part Mr. Donziger's extension request.[148] Specifically, Judge Kaplan ordered Mr. Donziger to do the following:

> Donziger shall execute two sets of originals of the required forms on or before August 22, 2018. He shall send one set, which need not have notarized acknowledgments, to Chevron's lead

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[144] (See GX a 11-13.) Judge Kaplan had modified Chevron's proposed transfer form to focus solely on the 2011 Contingent Fee. (See id.)

[145] (See GX 2075 at 1 (dkt. no. 2075 in 11—CV-691).)

[146] (See GX 2075 at 1.)

[147] (See GX 2075 at 1.)

[148] (See GX 2079 (dkt no. 2079 in 11-CV-691).)

> counsel no later than August 22, 2018 by overnight courier. In order to facilitate obtaining notarized acknowledgments at a U.S. Embassy or consulate, the Court will extend his time within which to do that and to deliver fully executed documents to Chevron. Donziger shall acknowledge his signatures on the two documents constituting the second set of originals before a consular official at a U.S. consulate Embassy or no later than August 28, 2018. No later than August 29, 2018, he shall place that fully executed, acknowledged, and notarized set of originals in the hands of an overnight courier for the speediest available delivery to Chevron's lead counsel.[149]

Mr. Donziger did not comply with the express terms of that directive.

On August 22, 2018, Mr. Donziger did send Chevron, via email rather than overnight courier, an executed but unnotarized assignment of the 2011 Contingent Fee.[150] Mr. Donziger completed clean transfer forms, but he also sent Chevron a letter setting forth his "First Amendment-protected view" that he was only completing the transfer forms under duress and threat of contempt.[151] He also stated that, although

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[149] (GX 2079 at 5-6.)

[150] (See GX 123 at DONZIGER_106018-19 (Aug. 22, 2018 email from Steven Donziger to Randy M. Mastro).)

[151] (See GX 123 at DONZIGER_ 106020-21.)

Judge Kaplan ordered him to send the notarized forms by August 29, 2018, those documents as well as all "originals" would "be provided as soon as practicable, but no later than September 4, 2018."[152] Mr. Donziger ultimately provided Chevron with the executed and notarized assignment of the 2011 Contingent Fee on September 4, 2018.[153]

7. The 2017 Retainer

Backtracking slightly, at Mr. Donziger's June 25, 2018 deposition, new facts came to light: Mr. Donziger admitted, for the first time, that he had entered into the 2017 Retainer.[154] Mr. Donziger produced the 2017

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[152] (GX 123 at DONZIGER_ 106021.)

[153] (See GX 2085-1 at 1-2.) In their post-trial briefing, the Special Prosecutors also reference additional facts regarding Mr. Donziger's continued refusal to transfer his shares in Amazonia after he assigned the 2011 Contingent Fee. (See Sp. Pros. Br. ¶¶ 45-51.) The Court admitted evidence regarding that additional history at trial and will take it into account in considering, inter alia, Mr. Donziger's willfulness in failing to comply with Judge Kaplan's orders, particularly as to Counts IV and V.

[154] (See GX 201 at 28:22-29:5 ("Are you familiar with this document, Mr. Donziger, your retainer agreement from January 5th of 2011? A. Yes. Q. Is this agreement still operative? A. I think there has been a subsequent agreement."); id. at 57:10-16 ("Q. Other than Exhibit 558, which is the January 2011 retainer agreement, have you signed any other agreements that give you a percentage interest in the judgment? A. Look, I already testified to that. There is a subsequent agreement.").)

Retainer shortly thereafter.[155] Mr. Donziger indicated that it was his understanding that the 2017 Retainer superseded the 2011 Retainer.[156] The 2017 Retainer also granted Mr. Donziger a 6.3% contingent fee interest in the Ecuadorian Judgment.[157] Unlike the 2011 Retainer, the 2017 Retainer was between only Mr. Donziger and ADF.[158]

The 2017 Retainer was originally executed in Spanish.[159] After receiving the document from Mr. Donziger, Chevron's counsel provided Mr. Donziger with a certified translation of the 2017 Retainer,[160] the validity of which he did not contest.[161] Ms. Berah,

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[155] (See GX 201 at 28:19-29:20; see also GX 121 (June 29, 2018 email from Steven Donziger to Randy M. Mastro) ("My best memory is that the agreement I gave you after court is the retainer agreement I was referring to in the deposition.").)

[156] (See GX 201 at 29:17-20 ("Q. Has Exhibit 558 been terminated? A. I think it's been superseded by the subsequent agreement."); see also Trial Tr. 201:9-23.)

[157] (See GX 120 at DONZIGER 107417; see also GX 201 at 59:12-22 ("Q. Does the agreement that you signed with the FDA in the last couple of years, the retainer agreement, give you a percentage interest in the judgment, the Ecuadorian judgment? A. Yes. Q. What is that percentage interest in the FDA retainer? A. It's the same percentage interest that I have always had, to the best of my knowledge, 6.3 percent.").)

[158] (See GX 120 at DONZIGER_107415.)

[159] (See GX 120 at DONZIGER_107420-23.)

[160] (See GX 120 at DONZIGER_107419.)

[161] (See GX Trial Tr. 210:16-18 ("Did he ever contest the English translation of that 2017 retainer agreement which is in Government Exhibit 120? A. No, not to us, in any event.").)

a certified English/Spanish interpreter, testified that the English-language version of the 2017 Retainer was, save for a few minor changes, a true and accurate translation of the Spanish-language version produced by Mr. Donziger.[162]

Following this revelation, Chevron filed a letter with Judge Kaplan on July 5, 2018, asserting that additional briefing was necessary to address the implications of the 2017 Retainer vis-à-vis the RICO Judgment.[163] Mr. Donziger responded to that letter, offering the following explanation:

> Nor is there anything relevant or problematic about the content of the most recent retainer agreement. It does seek to maintain the status quo on my client's obligations to me following an organizational adjustment involving the FDA and the UDAPT where the groups decided to not work together. The terms reflect the existing uncertainty about the exact operation and significance of this Court's Judgment in light of an ongoing litigation effort that has encompassed four jurisdictions outside the United States. Holding the status quo seeks to prevent forfeiture (dissipation) of my interest entirely--a result that Chevron itself should be wary of, given that it claims

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[162] (See Trial Tr. at 283:4-287:10.) Those changes did not substantively alter the agreement. Accordingly, the Court considers the English-language version of the 2017 Retainer.

[163] (See GX 2050 at 1-2 (dkt. no. 2050 in 11-CV-691).)

> ownership of my interest through this Court's judgment.[164]

Both Chevron and Mr. Donziger submitted supplemental briefing on the issue.[165] Chevron averred that Mr. Donziger's entering the 2017 Retainer warranted contempt sanctions because, "[b]y re-committing to Donziger's enforcement efforts, and granting him a new, valuable interest in the Ecuadorean judgment separate from his contingent fee, the 2017 retainer agreement facilitates Donziger's avoiding the effect of the constructive trust."[166] Mr. Donziger countered that (1) "[t]he 6.3% contingency interest reflected in the Nov. 2017 retainer agreement [wa]s not a 'new' interest" distinct from the 2011 Contingent Fee and (2) "[t]he Nov. 2017 retainer d[id] not'circumvent the constructive trust'" whose "precise operation and effect . . . [wa]s still uncertain."[167]

On August 7, 2018, Judge Kaplan made two observations: (1) Chevron's brief "raised a new and independent ground for holding Donziger in contempt," i.e., Mr. Donziger's receipt of and failure to assign to Chevron the 2017 Contingent Fee; and (2) Mr. Donziger's response, which was unsworn and unaccompanied by a declaration or affidavit, "[wa]s shot through with factual assertions and thus contain[ed]

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[164] (GX 2051 at 1-2 (dkt. no. 2051 in 11-CV-691).)

[165] (See GX 2057 (dkt. no. 2057 in 11-CV-691); GX 2061 (dkt. no. 2061 in 11-CV-691).)

[166] (GX 2057 at 7 (quotation marks omitted).)

[167] (GX 2061 at 3-4.)

evidentiary material."[168] As for Chevron, Judge Kaplan refused to consider the new contempt allegation because Chevron had not apprised Mr. Donziger of it in a notice of motion or order to show cause.[169] Judge Kaplan did note, however, that Chevron was free to file a separate motion "charging contempt of paragraph 1" of the RICO Judgment.[170] Regarding Mr. Donziger, Judge Kaplan instructed that any factual asserttions he wished to make should be supported by affidavit or declaration. [171] Following that order, Mr. Donziger did not assign to Chevron the 2017 Contingent Fee.[172]

On October 1, 2018, Chevron moved to hold Mr. Donziger in contempt for, among other things, violating Paragraph One of the RICO Judgment by failing to transfer the 2017 Contingent Fee.[173] As part of its motion package, Chevron provided Mr. Donziger with a transfer and assignment form for the 2017 Contingent Fee.[174] In response to Chevron's motion, Mr. Donziger stated in a declaration that:

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[168] (GX 2064 at 2 (dkt no. 2064 in 11-CV-691.)

[169] (See GX 2064 at 2.)

[170] (GX 2064 at 2.)

[171] (See GX 2064 at 2.)

[172] (See Trial Tr. at 217:14-18 ("Now, after Judge Kaplan filed this August 7, 2018 order, did Mr. Donziger assign to Chevron his contingency interest as granted in the 2017 FDA retainer agreement at that time? A. No.").)

[173] (See GX 2089 at 2 (dkt. no. 2089 in 11-CV-691); GX 2113 at 24 (dkt. no. 2113 in 11-CV-691).)

[174] (See GX 2114-9 (dkt. no. 2214-9 in 11-CV-691); see also Trial Tr. at 219:17-25.)

> The contingency interest stated in the updated power-of-attorney signed by FDA leadership in November 2017 was not intended to grant a new interest, but to recognize my existing interest in any Aguinda recovery. The Court has now coerced me into signing what I understand to be the entirety of my contingency interest over to Chevron. I am not taking the position that the November 2017 contract is protected or separable from the Court's other orders with respect to my contingency interest. If Chevron feels like it needs some additional documentation with respect to the November 2017 power, it should just ask me rather than rush to file for contempt.[175]

Mr. Donziger did not execute the requested transfer.[176]

On February 21, 2019, Judge Kaplan issued an order requiring Mr. Donziger to assign the 2017 Contingent Fee by no later than February 28.[177]

Failing that, Judge Kaplan directed each party to "file a letter . . . explaining why no such instrument

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[175] (Trial Tr. at 220:12-23 (quoting GX 2122-1 ¶ 21); see also id. at 220:24-221:1 ("Is that what Mr. Donziger stated with respect to the November agreement? A. Yes.").)

[176] (See Trial Tr. at 221:2-4 ("Q. Did Mr. Donziger assign his contingency interest in the 2017 retainer agreement to Chevron at that time? A. No.").)

[177] (See GX 2165 at 3 (dkt. no. 2165 in 11-CV-691).)

ha[d] been filed."[178] In no uncertain terms, Judge Kaplan stated:

> It was and remains Donziger's obligation to comply with paragraph 1 of the RICO Judgment, which of course requires him to assign to Chevron all of his right, title and interest to any contingent fee under the ADF agreement. After all, the [2017 Retainer] by its terms granted him an "interest" equal to 6.3 percent of monies of which, if any are collected, the ADF claims to be the exclusive beneficiary.[179]

No such assignment was completed by February 28.[180]

In a March 1, 2019 letter filed by Mr. Donziger, he asserted that "yet another forced assignment of my contingency interested [sic] is unwarranted and in fact not possible."[181] Mr. Donziger took the position that the 2017 Retainer did not grant a new interest--or, in fact, "any legal interest that [he] was capable of assigning"- -and he averred that "[t]here [wa]s no need for an additional assignment" because he had previously "executed two such assignments under protest based on coercive orders of this court."[182]

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[178] (GX 2165 at 3.)

[179] (GX 2165 at 2.)

[180] (See GX 1 (showing no docket entry indicating such a filing was made); see also Trial Tr. at 224:10-13.)

[181] (GX 2169 at 1 (dkt. no. 2169 in 11-CV-691).)

[182] (GX 2169 at 1-2.)

On May 23, 2019, in a lengthy memorandum opinion (the "Contempt Order"), Judge Kaplan adjudged Mr. Donziger to be in "willful civil contempt of paragraph 1 of the RICO Judgment by virtue of his failure to assign and transfer to Chevron all rights to any contingent fee that he now has or hereafter may obtain including without limitation all such rights under the 2017 Retainer."[183] Judge Kaplan explained that Mr. Donziger had violated the RICO Judgment because (1) "paragraph 1 of the RICO Judgment [wa]s clear and unambiguous," (2) "it [wa]s undisputed that Donziger ha[d] not complied with his obligation to assign his rights under the 2017 Retainer," and (3) "Donziger ha[d] made no attempt to comply with paragraph 1 of the RICO Judgment in this respect."[184] Until Mr. Donziger assigned the 2017 Contingent Fee, Judge Kaplan imposed a series of escalating coercive fines--payable to the Clerk of the Court--beginning at $2,000 on May 28, 2019 and doubling "for each subsequent day during which Donziger fail[ed] fully to purge" the contempt.[185]

On May 28, 2019--the day that coercive fines were due to begin accruing--Mr. Donziger indicated to Chevron's counsel that he was "executing the assignment" and would "have it available for pickup by the end of the day."[186] Mr. Donziger executed the required

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[183] (GX 2209 at 69 (dkt. no. 2209 in 11-CV-691).)

[184] (GX 2209 at 36-37.)

[185] (GX 2209 at 69.)

[186] (GX 136 at DONZIGER_101695 (May 28, 2019 email from Steven Donziger to Andrea Neuman).)

assignment form that same day and provided it to Chevron.[187]

8. The Agreement with David Zelman

Backtracking once more, beginning in October 2016--after the Court of Appeals had issued its decision affirming RICO Judgment but before it issued the mandate-- Mr. Donziger began corresponding with Dallas-based executive coach David Zelman.[188] Mr. Zelman offers a signature program called the "Transitions Process," which consists of four sessions held about one month apart.[189] Each session includes approximately four hours of dialogue between Mr. Zelman and the client.[190] Mr. Zelman typically offers the Transitions Process for $15,000, although he was sometimes willing to accept a different fee structure (such as a contingent fee).[191]

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[187] (See GX 2216-1 (dkt. no. 2216-1 in 11-CV-691); see also Trial Tr. at 230:10-19 ("Showing you what is Government Exhibit 2216-1 . . . . Q. What is this document? A. This is an executed transfer form for the 2017 retainer agreement contingency fee. Q. What is the date that Mr. Donziger signed the form? A. May 28th, 2019.").)

[188] (See GX 103 at DONZIGER_ 013461 (email correspondence between Steven Donziger and David Zelman).)

[189] (See Trial Tr. at 569:17-570:11.)

[190] (See Trial Tr. at 570:6-11.)

[191] (See Trial Tr. at 571:8-20.)

Mr. Zelman and Mr. Donziger came to such an alternative arrangement for Mr. Donziger to participate in Transitions Process.[192] On December 21, 2016, Mr. Donziger proposed the following language to Mr. Zelman regarding their agreement to ensure that it was acceptable:

> I write to confirm our agreement regarding consulting services you are providing to me to develop my professional capacities with regard to the Ecuado[r] litigation matter against Chevron, and other endeavors.
>
> In exchange for you providing me with $14,000 worth of such services, I pledge to you an interest in the Ecuador judgment from my fees should they be collected. The amount pledged is based on a pro rata proportion of the latest investment round

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[192] In addition to the coaching services for himself, Mr. Donziger was also interested in obtaining executive coaching for his wife. (See GX 105 at DONZIGER_013098 ("Any chance I can fold another person (thinking my wife) into the same deal?").) Mr. Zelman agreed, and, on March 2, 2017, proposed language to Mr. Donziger that would pledge to Mr. Zelman an additional interest in the Ecuadorian Judgment from any fees that Mr. Donziger might collect. (See GX 109 at DONZIGER_013100 (Mar. 2, 2017 email from David Zelman to Steven Donziger).) That correspondence indicated that Mr. Zelman would provide Mr. Donziger's wife, Laura Miller, with $11,000 of consulting services in exchange for a 11/250 of an eighth of a point on any amount recovered. (See id.) Mr. Zelman and Mr. Donziger ultimately reached a different compensation arrangement for those services, however, whereby Mr. Zelman accepted $2,000 in cash and Ms. Miller's services in helping Mr. Zelman to develop a TED Talk. (See Trial Tr. at 579:15-25.)

> in the case, which values a $250,000 investment as one-eighth of a point in the total claim won by villagers against Chevron. Your interest thus will be valued equally with this round based on an investment of $14,000. The actual amount that will be paid to you will be based on the total amount collected. To be more specific, your amount under this agreement will be 14/250 of an eighth of a point of whatever is recovered of the total claim.
>
> Note that I am pledging this amount out of my personal fees from this litigation. Should my personal fees not be recovered from the Ecuador case, you will not be entitled to any recovery of the $14,000. Should a portion of my fees be recovered, but not the full amount, your recovery will be decrease[d] on a pro rata basis equal to the overall decrease affecting my fees.
>
> If this is acceptable to you, please send me back an email so confirming.[193]

On December 23, 2016, Mr. Donziger followed up with another email to Mr. Zelman, containing virtually identical language.[194] That same day, Mr. Zelman

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[193] (GX 105 at DONZIGER_013098 (Dec. 21, 2016 email from Steven Donziger to David Zelman) (emphasis added).)

[194] (See GX 106 at DONZIGER_ 013099 (Dec. 23, 2016 email from Steven Donziger to David Zelman).)

confirmed that the terms were acceptable to him.[195] There was also a cash component of Mr. Zelman's agreement with Mr. Donziger, whereby Mr. Donziger paid Mr. Zelman $2,000 of the $14,000 balance in cash.[196]

Mr. Zelman and Mr. Donziger met several times related to the Transitions Process program.[197] Those meetings extended beyond the originally contracted-for sixteen hours over four sessions.[198] In light of that, on March 26, 2018, Mr. Zelman emailed Mr. Donziger a proposal regarding those additional services:

> You and I agree that consistent with the terms below, I have delivered an additional $2000 worth of consulting services which entitles me to 2/250 of an eighth of a point of whatever is collected of the total claim.
>
> It is noted that you are pledging this amount out of your personal fees from the litigation. If you do not recover your personal fees, I will not be entitled to any recovery.

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[195] (See GX 106 at DONZIGER_013099 (Dec. 23, 2016 email from David Zelman to Steven Donziger) ("Thank you for this agreement. I confirm that it is acceptable to me.").)

[196] (See Trial Tr. at 576:4-8.)

[197] (See Trial Tr. at 581:12-15.)

[198] (See Trial Tr. at 581:12-15.)

> Please respond back that this is correct and that you agree.[199]

The "terms below" referred to an earlier email from Mr. Donziger that Mr. Zelman had forwarded to himself:

> David:
>
> I write to confirm our agreement regarding consulting services you are providing to me to develop my professional capacities with regard to the Ecuador litigation matter against Chevron, and other endeavors.
>
> In exchange for you providing me with $11,000 worth of such services, I pledge to you an interest in the Ecuador judgment from my fees should they be collected. The amount pledged is based on a pro rata proportion of the latest investment round in the case, which values a $250,000 investment as one-eighth of a point in the total claim won by villagers against Chevron. Your interest thus will be valued equally with this round based on an investment of $11,000. The actual amount that will be paid to you will be based on the total amount collected. To be more specific, your amount under this agreement will be

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[199] (GX 110 at DONZIGER_013102 (Mar. 26, 2018 email from David Zelman to Steven Donziger) (emphasis added).)

> 11/250 of an eighth of a point of whatever is recovered of the total claim.
>
> Note that I am pledging this amount out of my personal fees from this litigation. Should my personal fees not be recovered from the Ecuador case, you will not be entitled to any recovery of the $11,000. Should a proportion of my fees be recovered, but not the full amount, your recovery will be decreased on a pro rata basis equal to the overall decrease affecting my fees.
>
> If this is acceptable to you, please send me back an email so confirming.
>
> Thanks so much.
>
> Steven Donziger[200]

The same day, Mr. Donziger responded that he "[a]gree[d] in concept," although he wanted to "confirm the calculation."[201]

The next day, Mr. Donziger offered an important clarification to Mr. Zelman regarding their agreement:

> Just to be clear, I am barred by court order in the U.S. from collecting fees on the matter.

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[200] (GX 110 at DONZIGER_ 013102 (Feb. 27, 2017 email forwarded from David Zelman to David Zelman).)

[201] (GX 110 at DONZIGER_ 013102 (Mar. 26, 2018 email from Steven Donziger to David Zelman).)

> It is possible that the situation in that respect could change in a settlement context, but you need to be aware of the risk to you which is high.[202]

Mr. Zelman testified that he understood "on the matter" to refer to the Ecuadorian Judgment.[203] Mr. Zelman also testified that, before receiving that email, he was not aware that the RICO Judgment prevented Mr. Donziger from collecting fees.[204]

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[202] (GX 111 at DONZIGER_ 013103 (Mar. 27, 2018 email from Steven Donziger to David Zelman).)

[203] (See Trial Tr. 587:24-588:5, 589:3-19.)

[204] (See Trial Tr. at 587:16-23 ("Q. Prior to Mr. Donziger sending you this email on March 27, 2018, had Mr. Donziger told you that he was barred by court order from collecting fees on the matter? A. I don't think he ever used that language. Q. And when you say you don't think he ever used that language, had he ever indicated to you that a court order prevented him from collecting the fees, his fees? A. I don't believe so. I don't believe so."); id. at 617:20-618:5 ("Q. Mr. Zelman, did there come a time when Mr. Donziger informed you that he was barred by court order from collecting fees on this matter? A. I saw an email between himself and myself. I don't know what the date was but, yes. Q. But you knew that prior to that e-mail, didn't you, Mr. Zelman? A. That -- sorry. What did I know? Q. That there had been a court order related to Mr. Donziger's ability to collect fees in this matter? A. I don't think I knew that prior to that email.").)

On March 20, 2019, after obtaining access to many of these emails in the post-judgment discovery process,[205] Chevron moved to hold Mr. Donziger in contempt for violating Paragraph Five of the RICO Judgment by pledging a portion of his contingent fee interest to Mr. Zelman.[206] In response, Mr. Donziger offered the following explanation:

> I understand how the agreement with Mr. Zelman can be seen as a monetization of my interest in the Ecuador Judgment arguably in conflict with the Court's interpretation of the terms of the RICO Judgment, although to be clear I do not concede that it is in conflict. I did not fully appreciate this at the time these services were provided, for reasons I do not specifically recall--although I assume it was because I thought the restrictions of the RICO Injunction were linked, per the

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[205] Those documents were produced by Mr. Zelman, not Mr. Donziger. (See Trial Tr. 355:8-11 ("Q. These exhibits -- 105, 106, 109, 110, 111 -- were they provided to you at any point by Steve Donziger in the discovery process? A. No."); id. at 583:1-14 ("Q. So Mr. Zelman, this particular email, you received a subpoena from Gibson Dunn for some documents; correct? A. Yeah. Q. And this is one of the documents that you produced; is that correct? A. I would suppose so. Q. And when you collected documents to provide to Gibson Dunn, did you review your emails and print them out? A. Yes. Q. Okay. And this would have been one of the emails that you've printed out or viewed; correct? A. Yes. Q. And provided to Gibson Dunn; correct? A. Correct.").)

[206] (See GX 2179 at 9-17 (dkt. no. 2174 in 11-CV-691).)

> April 2014 Opinion, to the context of a collection or recovery. Additionally, my recollection and understanding is that neither Mr. Zelman nor I ever understood the agreement to be legally binding, but rather an expression of the sentiment that his generosity in providing services to me pro bono at a critical transition point in my professional life would be matched with generosity by me in the event I received a significant monetary recovery.[207]

Nevertheless, Mr. Donziger maintained that "[t]he Zelman issue [wa]s obviously de minimis."[208]

Ultimately, on April 21, 2019--while Chevron's contempt motion was pending--Mr. Zelman emailed Mr. Donziger and notified him that, "[d]ue to all the complications regarding our financial arrangement, I am cancelling our deal."[209] Mr. Zelman informed Mr. Donziger that they had "NO agreement going forward from this date,"[210] but Mr. Zelman confirmed that he understood his financial agreement with Mr. Donziger to have been intact prior to sending that correspondence.[211]

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[207] (GX 2184 at 7-8 (dkt. no. 2184 in 11-CV-691).)

[208] (GX 2184 at 8.)

[209] (GX 135 at DONZIGER_ 119100 (Apr. 21, 2019 email from David Zelman to Steven Donziger).)

[210] (GX 135 at DONZIGER_ 119100.)

[211] (See Trial Tr. at 591:17-23.)

Mr. Zelman elected to cancel the agreement after a conversation with Mr. Donziger.[212]

Mr. Zelman understood that the chances of Mr. Donziger's recovering his fees related to the Ecuadorian Judgment were "very, very low" and "a long shot."[213] But Mr. Zelman admitted that he hoped that Mr. Donziger would be paid his fees from the Ecuadorian Judgment and that he did not, in fact, provide or even offer any services to Mr. Donziger for free.[214]

On May 23, 2019, Judge Kaplan issued the Contempt Order finding Mr. Donziger, among other things, "in willful civil contempt of paragraph 5 of the RICO Judgment by virtue of his selling, assigning, pledging, transferring or encumbering part of his putative contingent fee interest to David Zelman in exchange for approximately $11,000 worth of personal services."[215] In making that determination, Judge Kaplan noted that Mr. Donziger's pledging a portion of his contingent fee interest to Mr. Zelman was

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[212] (See Trial Tr. at 590:20-591:5 ("Q. And Mr. Zelman, can you explain the circumstances which prompted you to send this email to Mr. Donziger on April 21st of 2019? A. During a conversation with Steven, he let me know that the arrangement that we had was problematic and -- I'm sorry, what's the question again? Q. So what were the -- I've asked you to explain what prompted you to send this email. A. He told me there was a problem that might result in something like this. And I said that was never the intent, and let's just cancel the agreement.").)

[213] (See Trial Tr. at 615:17-19, 617:14-19.)

[214] (See Trial Tr. at 620:2-18.)

[215] (GX 2209 at 70.)

contemptuous even under Mr. Donziger's theory that the RICO Judgment and Stay Opinion did not proscribe him from raising funds by selling interests in the Ecuadorian Judgment other than his own.[216] With respect to that contempt, as well as the others, Judge Kaplan found that Chevron was entitled to recover its reasonable attorney's fees for prosecuting the contempt applications.[217]

d. Counts I, II, & III: Post-Judgment Discovery

At the same time Mr. Donziger and Chevron were litigating the issues surrounding Mr. Donziger's refusal to transfer his Amazonia shares, the 2011 Contingent Fee, and the 2017 Contingent Fee, another branch of the case was evolving: the post- judgment discovery proceedings. Counts I, II, and III flow from the disputes arising out of those proceedings.

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[216] (See GX 2209 at 42 ("Donziger was entitled to 6.3percent of any proceeds related to the Ecuador Judgment. He concedes that any act to monetize the Ecuador Judgment, including by attempting to transfer, sell, pledge, or assign any part of that 6.3 percent interest, violated paragraph 5 of the RICO Judgment. Thus, even on Donziger's own view concerning the effect and meaning of the Stay Opinion, he is in contempt of paragraph 5 by virtue of his commitment to pay Zelman '14/250 of an eighth of a point of whatever is recovered on the total claim' out of Donziger's 'personal fees from this litigation.'" (footnotes omitted)).) By Mr. Donziger's own admission, "Mr. Zelman was not and never ha[d] been an investor in the [Lago Agrio] case." (GX 2184 at 7.)

[217] (See GX 2209 at 70-71.)

1. Chevron Seeks Post-Judgment Discovery

On March 19, 2018--the same day that Chevron moved to hold Mr. Donziger in contempt for failure to transfer his shares in Amazonia--Chevron also moved ex parte for, among other things, (1) a document preservation order and (2) leave to conduct post-judgment discovery.[218] In a ruling the same day, Judge Kaplan granted Chevron's request for a preservation order, albeit with a few modifications to the original request.[219] As for leave to take discovery regarding the non-monetary portions of the Ecuadorian Judgment, Judge Kaplan concluded that Mr. Donziger should first be afforded an opportunity to respond to Chevron's request.[220] Judge Kaplan gave Mr. Donziger until April 20, 2018 to respond.[221] Importantly, however, Judge Kaplan ruled that, "to the extent the discovery is sought in aid of the enforcement of the monetary portion of the judgment, leave of court is not required."[222]

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[218] (See GX 1966 at 19-20.)

[219] (See GX 1968 at 2; see also id. at 4 ("The attached order grants, in somewhat modified form, so much of the application as seeks a preservation order.").

[220] (See GX 1968 at 4 ("[T]he Court concludes that there is no need for a determination with respect to discovery with respect to enforcement of the non-monetary portions of the judgment that is so immediate that Donziger should not be afforded an opportunity [to] respond to so much of the application as seeks discovery with respect to the alleged and possible contempts.").)

[221] (See GX 1968 at 3.)

[222] (GX 1968 at 4.)

On April 16, 2018, Chevron served Mr. Donziger with three documents: (1) its "First Set of Requests for Production of Documents in Aid of the Supplemental Judgment" (the "Document Requests");[223] (2) its "First Information Subpoena in Aid of the Supplemental Judgment" (the "Information Subpoena");[224] and (3) a subpoena ad testificandum for Mr. Donziger's deposition.[225] The Document Requests sought thirty-eight categories of documents, including, most relevantly, the following:

> 26. ALL DOCUMENTS evidencing or relating to any payment, proceeds, compensation, revenue, or any other thing of value YOU have received, contracted to receive, or have been promised related to any aspect of YOUR involvement in the ECUADOR LITIGATION, ECUADOR JUDGMENT, and/or ECUADOR ENFORCEMENT ACTIONS. . . .
>
> 29. ALL DOCUMENTS evidencing or relating to any payment, compensation, revenue, or any other thing of value YOU have delivered, contracted to deliver, or have promised to any PERSON or

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[223] (GX 1989-1A at 1 (Ex. A to dkt. no. 1989-1 in 11-CV-691).)

[224] (GX 1989-1B at 1 (Ex. B to dkt no. 1989-1 in 11-CV-691).)

[225] (GX 1989-1C at 1 (Ex. C to dkt no. 1989-1 in 11-CV-691).)

> ENTITY from any proceeds that may be received from the ECUADOR JUDGMENT or the ECUADOR ENFORCEMENT ACTIONS.
>
> 30. ALL DOCUMENTS evidencing or relating to any attempted or completed sale, assignment, or transfer of rights, title, claims, or interest of any proceeds or other interest held by YOU, whether directly or indirectly, in the ECUADOR JUDGMENT or the ECUADOR ENFORCEMENT ACTIONS, whether or not such attempt was successful.[226]

The Information Subpoena similarly contained thirty-one interrogatories, including, most relevantly, the following:

> 21. Identify and describe in detail any act that YOU, the LAGO AGRIO PLAINTIFFS, or any PERSON acting on YOUR behalf or on behalf of the LAGO AGRIO PLAINTIFFS, has undertaken to monetize or profit from the ECUADOR JUDGMENT, INCLUDING by selling, assigning, pledging, transferring, or encumbering any interest therein. . . .
>
> 25. Identify and describe in detail any ASSET, payment, proceeds, compensation, revenue, or any other thing of value YOU have delivered, contracted to deliver, or have promised to any PERSON or ENTITY

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[226] (GX 1989-1A at 14-15 ¶¶ 26, 29-30).)

> from any proceeds received or that may be received from the ECUADOR JUDGMENT, enforcement of the ECUADOR JUDGMENT, or any investment in the ECUADOR JUDGMENT.[227]

Both the Document Requests and the Information Subpoena included an instruction--consistent with Rule 26.2(b) of the Local Rules for the Southern and Eastern Districts of New York (the "Local Rules")[228]--requiring the production of a privilege log for any responsive information withheld on the basis of privilege.[229] The Document Requests and Information Subpoena were

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[227] (GX 1989-1B at 11, 13 ¶¶ 21, 25.)

[228] See S.D.N.Y LOCAL CIV. R. 26.2(b) ("Where a claim of privilege is asserted in response to discovery or disclosure other than deposition, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) above shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the Court.").

[229] (See GX 1989-1A at 5 ¶ 9 ("If YOU object to a portion or an aspect of a REQUEST, state the grounds for YOUR objection with specificity and respond to the remainder of the REQUEST. If any DOCUMENTS, or portion thereof, are withheld because YOU claim that such information is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine, YOU are required to PROVIDE a privilege log . . . ."); GX 1989-1B at 8 ¶ 21 ("If any information called for by this subpoena is withheld on the basis of privilege, please state the nature of the information being claimed as privileged, the type of privilege claimed, and all circumstances upon which you are relying to support each claim of privilege with enough specificity so that a court can determine the appropriateness of the objection.").)

returnable on or before April 27, 2018,[230] and Mr.Donziger's deposition was initially noticed for May 7, 2018.[231]

On April 24, 2018, in a pro se opposition to Chevron's contempt application, Mr. Donziger asserted that "Chevron ha[d] not met even the weakest threshold showing that discovery is warranted" because it had not offered evidence that Mr. Donziger was violating the RICO Judgment through his ongoing fundraising efforts related to the Lago Agrio Case.[232] Mr. Donziger did not, in that submission at least, challenge Chevron's discovery requests in aid of enforcement of the Money Judgment.

Mr. Donziger did not produce any responsive documents prior to the return dates for the Document Requests and Information Subpoena.[233] He did not

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[230] (See GX 1989-1A at 1-2; GX 1989-1B at 2.) Specifically, the Information Subpoena requested the responses be provided within 10 days of Mr. Donziger's receipt of the subpoena. (See GX 1989-1B at 2.)

[231] (See GX 1989-1C at 2.)

[232] (See GX 1986 at 8-9.)

[233] (See Trial Tr. at 241:23-242:1 ("Q. Now, did Mr. Donziger produce any document or record to Chevron in response to their discovery requests by April 30th of 2018? A. No."); see also GX 201 at 47:16-48:7 ("Q. And what's the volume of documents that you are withholding? A. Well, it is a few hundred pages, but if Judge Kaplan were to order me to produce everything that you are asking for, it obviously would be a lot more than that. Q. And so what is the difference between the "a lot more" and the few hundred pages? Because I'm not sure I'm

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provide a privilege log either.[234] Instead, on April 30, 2018, Mr. Donziger sent a letter to Chevron, asserting blanket objections to the Document Requests and Information Subpoena.[235]

Specifically, Mr. Donziger asserted eight "General Objections," including: (1) discovery was not appropriate at that time because the Money Judgment was on appeal; (2) Chevron's requests were "unduly burdensome;" (3) Chevron's requests were overbroad and irrelevant because they "swe[pt] broadly past what [wa]s necessary to establish a clear picture of [Mr. Donziger's] available assets and net worth;" and (4) many of the requests were objectionable because they called for the production of information protected by the

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following your train of thought. A. The difference is I have not searched for documents responsive to every request in your subpoena. I mean, some of them, in my personal opinion, would be impossible to do.").)

[234] (See Trial Tr. at 267:17-20 (quoting from GX 201 at 48:17-22) ("Q. So these documents that you searched for, found, and are withholding on the basis of privilege, you have not produced a privilege log for those documents; correct? "A. That's correct."); id. at 269:11-17 ("Q. And had Mr. Donziger produced any privilege log to you at least as of his deposition on June 25th, 2018? A. No. Q. Did Mr. Donziger ever produce a privilege log to Chevron with respect to documents he was withholding on privilege grounds? A. No."); id. at 296:4-6 ("Q. Had Mr. Donziger produced any privilege log as of August 15 in 2018? A. No.").)

[235] (See GX 112 at DONZIGER_103538-47 (Apr. 30, 2018 email from Steven Donziger to Randy M. Mastro, with attached letter).)

attorney-client privilege, work-product doctrine, or common-interest privilege.[236] Mr. Donziger also stated that his "financial situation [wa]s not much more complicated than that of an average household" and proposed that, instead of responding to Chevron's discovery requests, he would provide "a short summary of [his] financial condition and assets, backed up by supporting documents."[237] Mr. Donziger suggested that he and Chevron's counsel "meet and confer . . . to better identify any areas of dispute prior to the hearing before the district court scheduled for May 8."[238] Importantly, Mr. Donziger did not object to Chevron's discovery requests on First Amendment grounds.

2. Chevron Moves to Compel & Judge Kaplan's May 17, 2018 Order

On May 4, 2018--following two meet and confers at which Mr. Donziger indicated that he would not produce discovery materials absent a court order[239]--Chevron moved to compel Mr. Donziger to comply with the Document Requests and the Information Subpoena.[240] Mr. Donziger filed a pro se opposition to

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[236] (GX 112 at DONZINGER_103539-41.)

[237] (GX 112 at DONZINGER_103540.)

[238] (GX 112 at DONZINGER_103539.)

[239] (See Trial Tr. at 242:16-22 ("Q. Did the meet and confer occur on May 4th, the day Chevron filed this motion? A. Yes. Before we filed the motion. Q. Do you remember what Mr. Donziger said to you during that meet and confer? A. He said that he would not produce documents without a court order.").)

[240] (See GX 1989 (dkt. no. 1989 in 11-CV-691).)

that motion, asserting the following primary contention:

> [T]he issues are moot or potentially moot because I am preparing to post a supersedeas bond that will stay all proceedings on the Court's Supplemental Judgment (Dkt. 1962) pending resolution of my lodged appeal. If I am unsuccessful in the appeal, the bond will be used to satisfy the Supplemental Judgment. Accordingly, Chevron will soon be fully protected and there will remain no basis for discovery into my assets, or those of any other person, in aid of enforcement of the Supplemental Judgment. Because Chevron's discovery requests are now proceeding entirely and exclusively on the aid-of-enforcement basis, those requests should be suspended forthwith and withdrawn as soon as the bond is posted.[241]

Mr. Donziger also asserted that he had "individual relevance, overbreadth, and undue burden objections to Chevron's various requests."[242] In lieu of complying with Chevron's requests, Mr. Donziger reiterated his proposal that he "provide Chevron with a descriptive

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[241] (GX 2002 at 1 (dkt. no. 2002 in 11-CV-691).)

[242] (GX 2002 at 2.)

summary or guidance as to [his] relatively simple financial condition, backed up by documentation."[243]

On May 17, 2018, Judge Kaplan issued an order granting, in part, Chevron's motion to compel.[244] In so ordering, Judge Kaplan divided Chevron's requests into two buckets: (1) requests "directed to identifying assets with respect to which the judgment may be enforced and related matters," which Judge Kaplan denominated the "Money Judgment Discovery;" and (2) requests targeting information regarding Mr. Donziger's alleged noncompliance with Paragraph Five of the RICO Judgment, which Judge Kaplan denominated the "Paragraph 5 Compliance Discovery."[245] Judge Kaplan found that Chevron was "entitled to appropriate Paragraph 5 Compliance Discovery," but he deferred "ruling on the specific discovery requests" until an evidentiary hearing could be held.[246] As for the Money Judgment Discovery, Judge Kaplan found Mr.

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[243] (GX 2002 at 2.) Mr. Donziger also indicated that he could possibly "begin a rolling production of the most relevant non-privileged responsive documents during this time period," but he submitted "that it would be most efficient to focus on the summary first, and then begin rolling production as deemed necessary." (Id. at 3 n.1.)

[244] (See GX 2009 at 3 (dkt. no. 2009 in 11-CV-691.)

[245] (GX 2009 at 1.)

[246] (GX 2009 at 2-3.)

Donziger's objections to be "almost entirely without merit."[247]

Judge Kaplan made three findings related to the Money Judgment Discovery requests. First, Judge Kaplan found that "[d]iscovery [wa]s entirely appropriate," rejecting as "frivolous" Mr. Donziger's theory "that Chevron should not be permitted to conduct discovery for the purpose of enforcing the money judgment because" of Mr. Donziger's pending appeal.[248] Judge Kaplan noted that Mr. Donziger had not posted a supersedeas bond "in the months since the money judgment was entered" or otherwise demonstrated why he should be entitled to a stay of the post-judgment proceedings.[249] Second, Judge Kaplan determined that Mr. Donziger's "contention that the discovery requests [we]re unduly burdensome [wa]s entirely unsubstantiated" and that Mr. Donziger's suggestion that Chevron was entitled only to a summary of his financial condition and assets was meritless.[250] And third, Judge Kaplan rejected as frivolous Mr. Donziger's argument that he "should not be compelled to furnish documents and information that [we]re within his control but not in his immediate physical

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[247] (GX 2009 at 2.) Judge Kaplan did make a few minor alterations to the discovery requests in the Document Requests and the Information Subpoena. (See id. at 3 (striking request number 15 in the Document Requests); id. at 4-5 (Schedule A & Schedule B).)

[248] (GX 2009 at 2.)

[249] (GX 2009 at 2.)

[250] (See GX 2009 at 2.)

possession."[251] In light of those determinations, Judge Kaplan ordered Mr. Donziger to sit for a deposition and to comply with the Document Requests and the Information Subpoena by June 15, 2018.[252]

3. Mr. Donziger's May 31, 2018 Motion & Judge Kaplan's June 1, 2018 Order

On May 31, 2018, Mr. Donziger filed a pro se motion seeking two things.[253] First, Mr. Donziger sought a declaratory judgment that the RICO Judgment did not preclude the beneficiaries of the Ecuadorian Judgment "from raising funds to cover litigation fees and expenses."[254] Second, Mr. Donziger requested dismissal under Rule 12(b)(6) and (f) of the related portions of Chevron's March 19, 2018 contempt application.[255] In support of his motion, Mr. Donziger asserted, inter alia, that "[a]s long as any expense funding does not specifically assign, commit, or otherwise leverage interests specific to those three individuals"--one of whom was Mr. Donziger--"there is no violation of Paragraph 5" of the RICO Judgment.[256]

On June 1, 2018, Judge Kaplan ordered Mr. Donziger to produce some Paragraph 5 Compliance

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[251] (GX 2009 at 2.)

[252] (See GX 2009 at 3.)

[253] (See GX 2018 (dkt. no. 2018 in 11-CV-691).)

[254] (See GX 2018 at 1.)

[255] (See GX 2018 at 1-2.)

[256] (GX 2018 at 11.)

Discovery by June 15, 2018.[257] Judge Kaplan ordered those documents produced in anticipation of a June 28, 2018 evidentiary hearing regarding Mr. Donziger's alleged contempt of Paragraph Five of the RICO Judgment involving conduct with Elliott Management Corporation.[258] Judge Kaplan "continue[d] to reserve judgment" regarding Paragraph 5 Compliance Discovery matters other than those involving the alleged "attempt to obtain funding from the Elliott Group."[259] Mr. Donziger's pending motion for declaratory relief and to dismiss Chevron's contempt motion, filed the day before, did not affect Judge Kaplan's ruling; Judge Kaplan indicated that he would address "that motion in due course."[260]

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[257] (See GX 2020 at 2 (dkt. no. 2020 in 11-CV-691).)

[258] (See GX 2020 at 1.) In its contempt application, Chevron alleged that Mr. Donziger solicited an investment from Elliott to fund litigation expenses in exchange for an interest in the proceeds from the Ecuadorian Judgment should any enforcement action prove successful. (See GX 1966 at 5.) Chevron suggested that those actions violated Paragraph Five of the RICO Judgment. (See id. at 14-16.)

[259] (GX 2020 at 2.)

[260] (See GX 2020 at 1 n.1.)

4. Mr. Donziger's June 15, 2018 Motion & Judge Kaplan's June 25, 2018 Order

On June 15, 2018, Mr. Donziger produced only eighteen pages of documents, including one record listing his bank accounts as well as records related to two different LLCs.[261] Mr. Donziger sent Chevron's counsel a letter, which responded to some requests, asserted supplemental objections to others, and indicated that for others he was "still collecting responsive materials."[262] Mr. Donziger raised, for the first time, the following First Amendment objection to the Document Requests and Information Subpoena:

> After careful review of materials potentially responsive to your Requests, I have concluded that the forced production of many of these materials in this context would violate First Amendment associational rights of me and others.

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[261] (See GX 118 at DONZINGER_012136-53; see also Trial Tr. at 255:17-256:4 ("Did Mr. Donziger provide Chevron with some documents in response to the discovery requests that he had been ordered to comply with on that day? A. He did provide about -- I think it was about 18 pages worth of documents. Q. I am going to show you what is Government Exhibit 118. Just go through the pages of this exhibit. What is Government Exhibit 118? A. This is the production that Mr. Donziger made in the middle of June. Q. In response to Chevron's discovery requests? A. Exactly.").) These documents were filed with the Court in redacted form, consistent with counsels' agreement, to protect Mr. Donziger's private banking information. (See Trial Tr. at 256:5-22.)

[262] (GX 119 at DONZIGER_ 103456 (June 15, 2018 letter from Steven Donziger to Anne Champion et al.).)

> Specifically, it would be using the authority of the court to authorize intrusion and infiltration into the organizational and operational practices and strategies of a targeted social and political advocacy group by an avowed opponent of that group, and . . .would likely give rise to reprisals, harassment and economic extortion by your client against group members in retaliation for their associational activity.[263]

Mr. Donziger also asserted renewed relevance and undue burden objections, averring that the "Requests sweep drastically beyond the legitimate scope of inquiry," which, in Mr. Donziger's view and contrary to Judge Kaplan's order, pertained only to the "present whereabouts and extent of assets potentially available to satisfy the judgment."[264] Mr. Donziger did not submit a privilege log in advance of his limited production and supplemental objections,[265] despite

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[263] (GX 119 at DONZIGER_ 103457.) Mr. Donziger applied this objection to several specific requests as well. (See id. at DONZIGER_103460, 103463.)

[264] (GX 119 at DONZIGER_ 103457.) Mr. Donziger also applied this objection to several specific requests. (See id. at DONZIGER_103460, 103462-63.)

[265] (See Trial Tr. at 269:11-17 ("Q. And had Mr. Donziger produced any privilege log to you at least as of his deposition on June 25th, 2018? A. No. Q. Did Mr. Donziger ever produce a privilege log to Chevron with respect to documents he was withholding on privilege grounds? A. No."); id. at 296:4-6 ("Q. Had Mr. Donziger produced any privilege log as of August 15 in 2018? A. No.").)

indicating in a June 7, 2018 email to Chevron's counsel that he would do so.[266]

Also on June 15, 2018, Mr. Donziger moved for a protective order on First Amendment free-association grounds.[267] Mr. Donziger sought the following:

> [A]n order precluding any discovery in these post-judgment proceedings (including discovery sought from third- parties) that would tend to reveal the identity of any funder or other material supporter of the Ecuador Litigation and/or the internal operational, organizational, administrative, or financial management practices of the teams of individuals and organizations that directly and indirectly oppose Chevron in the Ecuador Litigation . . . and/or more broadly engage in Ecuador Litigation-related advocacy . . . .[268]

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[266] (See GX 116 at DONZIGER_ 104173 (June 7, 2018 email from Steven Donziger to Anne Champion et al.) ("It also appears that even the so-called Money Judgment Requests may tread into privileged material in some respects, and with my objections I have specifically preserved my right to withhold privileged documents, which I will do if necessary. I will of course provide an appropriate log and articulated bases for any such assertion of privilege upon any such withholding that may be necessary."); see also Trial Tr. at 253:23-25 ("When Mr. Donziger referred to an appropriate log, what did you understand him to mean? A. Privilege log.").)

[267] (See GX 2026 (dkt. no. 2026 in 11-CV-691).)

[268] (GX 2026 at 2.)

Mr. Donziger maintained that a protective order was necessary "to prevent discovery in this case from turning into a private 'blank warrant' allowing Chevron to intrude and infiltrate itself into the First Amendment-protected political activities, associations, speech, operational practices, and strategic deliberations of Mr. Donziger and others."[269] Specifically, Mr. Donziger asserted that Chevron would seek to cut off funding for the Lago Agrio Case and Prevent supporters from associating with that case, the litigation team, or its supporters.[270]

At Mr. Donziger's June 25, 2018 deposition, Mr. Donziger confirmed that he had withheld numerous responsive documents on First Amendment grounds as well as because he had then-pending motions before Judge Kaplan.[271] Mr. Donziger also refused to answer

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[269] (GX 2026 at 1.)

[270] (See GX 2026 at 19.)

[271] (See, e.g., GX 201 at 44:3-8 ("Q. What's the volume of the documents that you reviewed, approximately? A. There is a fair number of documents that I have withheld from you guys on the basis of privilege or First Amendment issues or of the pending motions."); id. at 47:9-15 ("I did a fair amount of searching and document gathering and I have more documents that you are seeking that I don't believe is appropriate to turn over at this point given the sort of outstanding legal issues that need to be resolved by the Court."); id. at 49:9-18 ("Q. So you are withholding non-privileged documents on the basis of a First Amendment objection? A. I didn't say that. Q. I'm just asking if you are or you aren't. A. I don't know. I would have to give that a think. I do know that some of the documents, many of the documents, are being withheld on First Amendment grounds."); id. at 69:22-70:5 ("Q. And is the summary that you looked at a document that you produced or one

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myriad questions on First Amendment grounds, again citing his pending motion for a protective order.[272] Mr. Donziger likewise confirmed that he had withheld

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didn't produce it is because I believe it is First Amendment protected, subject to the resolution of our pending motion for a protective order."); id. at 231:21-232:15 ("Q. Okay. In terms of cleaning up a little bit where we are on these document issues, so any documents that you've withheld as privileged either from Mr. Rizack's production or your own, you said you had your own group of documents that were privileged, are you willing to produce those pursuant to the 502 or do you intent to provide a log, and, if so, by when? A. Well, I don't know the answer to that question. . . . I think with regard to my documents, I could provide a log, but I think a lot of them are being withheld not on privilege grounds but on First Amendment grounds.").)

[272] (See, e.g., GX 201 at 17:10-18 ("Q. Have you, since March of 2014, have you raised money in connection with the Ecuador litigation for any clients other than the FDA? A. I'm going to decline to answer on the grounds that that is First Amendment protected, and I have a pending motion, as you know, for a protective order on First Amendment grounds . . . ."); id. at 63:2-13 ("Q. What is your role in the Canadian case, if any? A. How does that relate to the deposition? Q. It relates to whether monies you are receiving are for compensation of work done in Canada or something else. A. Well, I get the retainer for a variety of different pieces of work that I do, but I'm not going to get into that on First Amendment grounds and because of the pending motion."); id. at 68:23-69:5 ("Q. And other than fundraising and preparing accountings for you and your firm, any other functions Ms. Sullivan was hired to perform? A. I'm not going to answer that question. That is First Amendment protected."); id. at 81:3-13 ("Q. How much you're paid? A. That would implicate First Amendment considerations. Q. Can you define for me this First Amendment objection? Because you seem to apply it to financial documents, all kinds of documents. So I'm not understanding it. Can you describe it for the record, please? A. No,

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certain documents due to privilege.[273] Notwithstanding those assertions, Mr. Donziger still had not submitted a privilege log.[274]

That same day, Judge Kaplan denied--with an opinion to follow--Mr. Donziger's motions (1) for a declaratory judgment and to dismiss Chevron's contempt application and (2) for a protective order.[275] Two days later, Judge Kaplan issued a memorandum opinion explaining his reasoning.[276]

Judge Kaplan denied the first motion for three reasons.[277] First, Judge Kaplan found that the motion

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I'm not going to describe it. Read it. I have a 24-page motion."); id. at 100:19-22 ("Q. When were the monies that were paid to you on January 24th of 2018 raised? A. No, nice try. Beyond the scope, First Amendment protected.").)

[273] (See GX 201 at 44:3-8 ("Q. What's the volume of the documents that you reviewed, approximately? A. There is a fair number of documents that I have withheld from you guys on the basis of privilege or First Amendment issues or of the pending motions.").)

[274] (See GX 201 at 48:17-22 ("Q. So these documents that you searched for, found, and are withholding on the basis of privilege, you have not produced a privilege log for those documents; correct? A. That's correct."); Trial Tr. at 269:11-17 ("Q. And had Mr. Donziger produced any privilege log to you at least as of his deposition on June 25th, 2018? A. No. Q. Did Mr. Donziger ever produce a privilege log to Chevron with respect to documents he was withholding on privilege grounds? A. No.").)

[275] (See GX 2037 (dkt. no. 2037 in 11-CV-691).)

[276] (See GX 2045 (dkt. no. 2045 in 11-CV-691).)

[277] (GX 2045 at 17-19.)

was "entirely without merit on procedural grounds alone."[278] Second, Judge Kaplan determined that the motion was "nothing more than an untimely and baseless effort to obtain reconsideration" of Judge Kaplan's order to hold an evidentiary hearing on Chevron's contempt application.[279] And third, Judge Kaplan determined that "events may have overtaken" the motion, pointing specifically to the entry of a judgment enjoining the defaulting defendants (including ADF and several of the LAPs) from monetizing or profiting from the Ecuadorian Judgment.[280]

Judge Kaplan also thoroughly rejected the motion for a protective order, applying both the governing standard for a protective order and substantive First Amendment law.[281] Specifically, Judge Kaplan denied the motion for the following reasons: (1) Mr. Donziger waived or forfeited his First Amendment argument by not timely raising it; (2) Mr. Donziger had not shown good cause sufficient to warrant the issuance of a protective order; (3) Mr. Donziger failed to present competent evidence that he would suffer a cognizable injury absent a protective order; (4) Mr. Donziger lacked standing to assert the First Amendment rights of the third parties on whose behalf he sought relief, some or all of whom may also have lacked a connection to the United States sufficient

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[278] (GX 2045 at 17.)

[279] (GX 2045 at 18.)

[280] (GX 2045 at 18-19.)

[281] (See GX 2045 at 20-35.)

to entitle them to the First Amendment's protections; and (5) even setting all that aside, Mr. Donziger's First Amendment claims still failed on the merits.[282]

5. Judge Kaplan's July 23, 2018 Order, Mr. Donziger's August 13, 2018 Stay Motion, & Judge Kaplan's September 25, 2018 Order

After Judge Kaplan denied the motions, Chevron's counsel emailed Mr. Donziger to request that he "produce all documents withheld from production on the bases of the objections made" in his motions.[283] Mr. Donziger responded that he was "getting organized" and "gathering materials," but he indicated that he would respond by the end of the day on June 26, 2018.[284] He did not do so.[285] Three days later, Chevron's counsel followed up on her prior email and asked Mr. Donziger to "[p]lease confirm you will produce all other documents responsive to Chevron's

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[282] (See GX 2045 at 20-35.)

[283] (GX 149A at DONZIGER_ 103596 (June 26, 2018 email from Anne Champion to Steven Donziger).)

[284] (GX 149 at DONZIGER_ 103595 (June 26, 2018 email from Steven Donziger to Anne Champion).)

[285] (GX 149 at DONZIGER_ 103595 (June 27, 2018 email from Anne Champion to Steven Donziger) ("Hi Steven, I don't believe you responded to my email of Monday night (attached), which you said you would respond to by the end of the day yesterday. Can you please advise? Thanks.").)

requests by no later than Wednesday."[286] Mr. Donziger did not produce those documents save for two exceptions.

In the weeks following Judge Kaplan's June 25, 2018 opinion, Mr. Donziger produced only two additional documents to Chevron: (1) the 2017 Retainer, which he provided following the June 28, 2018 evidentiary hearing;[287] and (2) a document from Mr. Donziger's clients granting him a special power of attorney so that he could raise funds for the Lago Agrio Case's litigation expenses, which Mr. Donziger produced on July 5, 2018.[288]

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[286] (GX 146 at DONZIGER_ 103569 (June 29, 2018 email from Anne Champion to Steven Donziger et al.).)

[287] (See GX 120 at DONZIGER_ 107414 ("Steve, please confirm that this is the agreement that you gave me after court . . . and that it is the document you represented to the Court after yesterday's hearing is your latest retention agreement with the Frente.").)

[288] (See GX 122 at DONZIGER_ 103216 (July 5, 2018 email from Steven Donziger to Anne Champion et al.).) Mr. Donziger produced that document in its original Spanish-language form. (See id. at DONZIGER_103217-19.) Chevron obtained a certified translation of that document. (See GX 122-T at 1-4 (English-language translation of GX 122); see also Trial Tr. at 278:5-12 ("Q. Did Chevron get a translation of this document? A. We did. Q. Showing what's Government Exhibit 122-T. Have you had an opportunity to review this document before today? A. Yes. Q. Is this the translation to English of the document Mr. Donziger had provided, which is in Government Exhibit 122? A. Yes.").) Mr. Donziger did not contest that translation, (see id. at 278:13-16), and Ms. Berah testified that GX 122T was, "[w]ith several minor details," a true and accurate translation of GX 122, (id. at 288:3-6). Accordingly, the Court considers the English-language version of this document.

On July 23, 2018, Judge Kaplan issued an order directing Mr. Donziger, by August 15, 2018, to produce to Chevron certain Paragraph 5 Compliance Discovery, including (1) all documents described in Document Request Nos. 18, 21, 22 and 29, and (2) "full and complete answers" to paragraphs 21 through 25 of the Information Subpoena.[289] Judge Kaplan also ruled that Chevron was "free to conduct discovery against non-parties with respect to Donziger's compliance or non-compliance with the judgment."[290] The next day, Chevron's counsel reached out to Mr. Donziger regarding the outstanding discovery:

> I am writing to follow up on my June 29 email below requesting that you "produce all other documents responsive to Chevron's requests by no later than Wednesday," July 4. With the exception of the document you provided on July 5, we have not received any of the documents you agreed at your deposition to search for and produce. You have also failed to produce the "hundreds" of documents withheld on First Amendment grounds, despite the fact that Judge Kaplan has ruled that claim to be without merit.[291]

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[289] (GX 2056 at 2 (dkt. no. 2056 in 11-CV-691).)

[290] (GX 2056 at 2.)

[291] (GX 146 at DONZIGER_103569 (July 24, 2018 email from Anne Champion to Steven Donziger).)

Two days later, on July 26, 2018, Mr. Donziger filed a pro se notice of appeal from (1) Judge Kaplan's June 27, 2018 order denying his motions for a declaratory judgment, to dismiss Chevron's contempt application, and for a protective order; and (2) the July 23, 2018 order directing him to comply with certain portions of the Documents Requests and Information Subpoena.[292] The Court of Appeals assigned that appeal docket number 18-2191.[293]

On August 13, 2018, two days ahead of Judge Kaplan's August 15 deadline to produce more documents, Mr. Donziger moved before Judge Kaplan for a stay of post-judgment discovery pending his appeal.[294] Mr. Donziger asserted that (1) Judge Kaplan's forcing Mr. Donziger to produce discovery without ruling on the scope of the RICO Judgment was "a clear violation of due process;" and (2) Judge Kaplan's "refusal to offer protective and/or injunctive relief necessary to protect the associational rights of [him]self and others under the First Amendment [wa]s unconstitutional."[295] For the first time, Mr. Donziger indicated that he would be

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[292] (See GX 2060 at 1-2 (dkt. no. 2060 in 11-CV-691).)

[293] (See GX 8 (docket in Chevron Corp. v. Donziger, 18-2191 (2d Cir.)); see also Trial Tr. at 640:7-16 ("Q. Mr. Thomson, have you had an opportunity before your testimony today to review this docket sheet for Second Circuit Appeal 18-2191? A. Yes, I have. Q. And what docket sheet is this for, as it relates to Mr. Donziger's appeals between February 28 of 2018 and September 30th of 2019? A. This is the docket sheet for the second appeal. Q. The appeal -- A. From the four interlocutory orders.").)

[294] (See GX 2067 (dkt. no. 2067 in 11-CV-691).)

[295] (GX 2067 at 1.)

willing to risk contempt sanctions to protect the First Amendment rights he was asserting.[296] Judge Kaplan's August 15 deadline came and went without Mr. Donziger's producing any more documents or a privilege log.[297]

As a result, on August 16, 2018, Chevron moved to compel Mr. Donziger to comply with its discovery requests.[298] Chevron cited the following: (1) Mr. Donziger refused to respond to discovery "based on First Amendment objections [Judge Kaplan] ha[d] overruled;" (2) Mr. Donziger concealed material financial information from discovery, including a bank account "from which hundreds of thousands of dollars were paid to him and to co-conspirators;" (3) Mr. Donziger produced only twenty-two pages of documents and admitted "to withholding 'a few hundred pages'" of discovery based on his already-rejected First Amendment contentions; and (4) Mr. Donziger confessed to not having conducted a search for documents responsive to Chevron's requests.[299] Chevron also asserted that Mr. Donziger had waived any claims of privilege by not preparing a privilege

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[296] (See GX 2067 at 3 ("Even if I am forced to go into contempt in order to protect against this outcome, the threat still remains regarding Chevron's ongoing attempts to obtain the discovery from non-parties; additionally, the harm of enduring a contempt citation from this Court is significant in its own right.").)

[297] (See Trial Tr. at 295:25-296:6 ("Did he provide any response to Chevron to the compliance discovery request he had been ordered to produce by that date? A. No. Q. Had Mr. Donziger produced any privilege log as of August 15 in 2018? A. No.").)

[298] (See GX 2073 (dkt. no. 273 in 11-CV-691).)

[299] (GX 2073 at 2-3.)

log.[300] Chevron requested that Judge Kaplan "order Donziger to comply fully with Chevron's document requests and to present his electronic devices for forensic imaging, with the images to be lodged with the Court."[301]

Mr. Donziger filed a pro se opposition to Chevron's motion to compel as well as a "reiterated motion to stay" discovery pending his appeal.[302] Mr. Donziger did not contest that he had withheld responsive documents, instead simply stating that he "ha[d] not and w[ould] not destroy or otherwise fail to maintain any documents or materials in accordance with the preservation order entered by the Court."[303] Regarding Chevron's allegations related to privilege, Mr. Donziger asserted the following:

> I have noted privilege claims as appropriate (and to the best of my understanding as a sole practitioner) throughout the process, and my entire cooperation with Chevron's discovery up to the present has been "under the 502," pursued as part of a good faith effort to reduce litigation burdens on the parties and the Court. While we have not yet reached a stage where specific claims of privilege are necessary (including in this motion, which rests on the necessity of an

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[300] (See GX 2073 at 4.)

[301] (GX 2073 at 3.)

[302] (See GX 2077 (dkt. no. 2077 in 11-CV-691).)

[303] (GX 2077 at 4.)

> overall stay of discovery pending appeal), undersigned maintains and preserves all applicable claims of privilege and protection--which claims are necessary, of course, to protect not only undersigned's interests as an attorney but the interests of many clients who are not before the Court.[304]

Finally, Mr. Donziger maintained that "Chevron's request that forensic images be taken of [his] electronic devices [wa]s drastically intrusive and unreasonable, supported by no evidence whatsoever, and must be denied."[305] For those reasons, Mr. Donziger averred that "Chevron's latest motion to compel should be denied or held in abeyance without any consideration as to its contents."[306]

On September 25, 2018, Judge Kaplan issued an order denying Mr. Donziger's motion for a stay of post-judgment discovery pending appeal.[307] Judge Kaplan found Mr. Donziger's motion to be "frivolous for a host of reasons," including: (1) Mr. Donziger had not posted a supersedeas bond or applied for a stay of enforcement of the Money Judgment, which Chevron had every right to enforce pending his appeal; (2) precedent made clear that a district court is free to permit discovery in aid of

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[304] (GX 2077 at 3 (emphasis added).)

[305] (GX 2077 at 4.)

[306] (GX 2077 at 2-3.)

[307] (See GX 2088 (dkt. no. 2088 in 11-CV-691).)

enforcing its orders; (3) Mr. Donziger's "conclusory papers in support of this motion offer[ed] no colorable ground for supposing that" Judge Kaplan's order denying the motion for a declaratory judgment and the motion for a protective order was vulnerable to reversal on appeal; and (4) Mr. "Donziger's claims of irreparable injury [we]re unsubstantiated."[308] In so ruling, Judge Kaplan again rejected Mr. Donziger's First Amendment objection to discovery.[309]

Mr. Donziger did not seek relief from this order from the Court of Appeals, whether by requesting a stay or petitioning for a writ of mandamus.[310] Nor did he produce any further documents during 2018.[311] At that time, Chevron's motion to compel remained pending.

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[308] (GX 2088 at 2-3.)

[309] (See GX 2088 at 3.)

[310] (See GX 7 (no docket entries seeking emergency relief); GX 8 (same); see also Trial Tr. at 654:11-20 ("Q. And in the time period that I had focused you on during the course of your direct, which would be February 28th of 2018 to September 30th of 2019, did Mr. Donziger ever seek a stay in the Second Circuit? A. No, he did not. Q. Did he ever seek mandamus relief in that time period in the Second Circuit? A. No, he did not. Q. Did he ever seek expedited briefing in the Second Circuit? A. No, he did not.").)

[311] (See Trial Tr. at 301:24-302:3 ("Ms. Champion, after Judge Kaplan issued this order denying Mr. Donziger's request for a stay pending his appeal, did Mr. Donziger produce any additional discovery to you in 2018? A. No.").)

6. Judge Kaplan's October 18, 2018 Order & Mr. Donziger's Refusals to Comply

On October 18, 2018, Judge Kaplan granted Chevron's motion to compel "in its entirety."[312] Judge Kaplan observed that his prior order requiring Mr. Donziger to respond to certain discovery requests by August 15, 2018 "remain[ed] in effect and ha[d] not been stayed" and that Mr. Donziger "[wa]s obliged to comply with it in each and every respect on pain of contempt."[313] Judge Kaplan also made three other rulings. First, Judge Kaplan held that, given Mr. Donziger's repeated failures to comply with Federal Rule of Civil Procedure 26(b)(5) and S.D.N.Y. Local Civil Rule 26.2, he "ha[d] waived or forfeited any claim of privilege to responsive documents and information that otherwise might have applied."[314] Second, Judge Kaplan ordered Mr. Donziger to sit for another deposition.[315] And third, Judge Kaplan ruled that, "[g]iven Donziger's stonewalling of post-judgment discovery," it was proper that his "electronic devices be imaged and examined for any responsive documents that Donziger ha[d] not thus far produced under appropriate safeguards of the

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[312] (GX 2108 at 2 (dkt. no. 2108 in 11-CV-691).)

[313] (GX 2108 at 2.)

[314] (GX 2108 at 2.) In light of that finding, Judge Kaplan ordered Mr. Donziger to "comply fully with the outstanding discovery requests forthwith without withholding any responsive documents or information on privilege grounds." (Id.)

[315] (GX 2108 at 2.)

interests of all parties."[316] Mr. Donziger did not seek any relief from that order: he did not appeal, seek a stay of his obligation to comply, or file petition for a writ of mandamus.[317]

On October 25, 2018, Mr. Donziger emailed Chevron's counsel to announce his "anticipated course of action regarding Judge Kaplan's order regarding the motion to compel that waived all of [his] privileges."[318] He declared:

> As you know, I have yet to receive a ruling from the court regarding your client's original motion to hold me in contempt filed in March of this year. This is highly unusual and violates my due process rights, among other problems . . . .
>
> As a result, I presently see no choice other than to go into contempt until I can get a ruling on the most basic issues that are driving what I believe to be your entirely inappropriate, over-broad, intrusive, and constitutionally infirm discovery rampage

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[316] (GX 2108 at 2.) Judge Kaplan directed the parties to confer with an eye towards identifying a third party to whom Mr. Donziger would produce his devices for imaging. (Id. at 2-3.)

[317] (See GX 7 (no docket entries seeking emergency relief); GX 8 (same); Trial Tr. at 655:10-16 ("Q. Did Mr. Donziger notice an appeal from this October 18, 2018 order? A. No, I don't believe so. Q. Did he seek mandamus relief? A. No, he did not. Q. Did he seek a stay? A. No, he did not.").)

[318] (GX 129 at DONZIGER_ 102936 (Oct. 25, 2018 email from Steven Donziger to Anne Champion et al.).)

> targeting financial supports and others of the Ecuadorians that is clearly designed to dry up funding for the case and to intimidate those who support both the litigation and the broader corporate accountability campaign (what you call a "pressure" campaign) against your client Chevron.
>
> I don't want to go into contempt, but I genuinely feel that the court has given me no choice in light of its failure to rule, which is obviously designed to shield its many problematic decisions from appellate review. I will be apprising Judge Kaplan of my position as soon as I can.[319]

Chevron's counsel confirmed receipt of the email, noting that Mr. Donziger had "refused to engage on any substantive issue" during a meet and confer set up to discuss the imaging of his devices and a possible date for his court-ordered deposition.[320]

That same day, Mr. Donziger filed a letter informing Judge Kaplan that he "w[ould] be unable to comply with the order dated October 18, 2018 directing [him] to produce a potentially massive quantity of confidential and privileged documents and communications to Chevron."[321] Instead, Mr. Donziger

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[319] (GX 129 at DONZIGER_102936.)

[320] (GX 129 at DONZIGER_102935 (Oct. 25, 2018 email from Anne Champion to Steven Donziger).)

[321] (GX 2118 at 1 (dkt. no. 2118 in 11-CV-691).)

accused Judge Kaplan of undertaking a "transparently abusive strategy of silence and non-action" by "refus[ing] to address the key issue underlying Chevron's original contempt motion for over six months."[322] Mr. Donziger asserted that the post-judgment discovery "ha[d] zero basis to proceed if there [wa]s no colorable contempt case against [him],"[323] and he reiterated his already-twice-rejected position that the discovery requests "work[ed] a clear violation of the First Amendment right to association."[324] Mr. Donziger concluded by requesting Judge Kaplan to rule on Chevron's pending Elliott-Management-related contempt motion:

> If the Court really thinks that a prohibition on litigation finance was so clear after April 2014 that I can be held in contempt thereof, it should make such a finding directly, which would allow me to seek appellate review. Because the Court refuses to do this, I apparently must take a contempt sanction in this second-layer discovery context, try to consolidate it with the pending appeals, and trust that the Second Circuit will be able to appreciate it all in totality and in the larger and deeply disturbing context of these post-judgment proceedings generally. I would urge the

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[322] (GX 2118 at 2.)

[323] (GX 2118 at 2-3.)

[324] (GX 2118 at 3 n.1.)

> Court to rule on these critical issues or hold me in contempt and thereby allow me to appeal to the Second Circuit.[325]

Absent such a ruling, Mr. Donziger maintained that "Chevron would succeed in gaining near wholesale access to [his] confidential, privileged, and protected documents, without any legitimate basis."[326]

On October 26, 2018, Chevron submitted a letter attaching its proposed forensic protocol for imaging and examining Mr. Donziger's devices and accounts and a memorandum of law in support of its proposed protocol.[327] Almost two weeks later, Mr. Donziger filed another letter, reasserting his view that "discovery in these post- judgment proceedings has been illegitimate from the start" because Judge Kaplan "ha[d] refused to to rule for over six months" on Chevron's Elliott-Management-related contempt motion.[328] Mr. Donziger then reiterated the course of action he explained in his October 25, 2018 letter:

> While I could make countless other objections to the abusiveness and disingenuousness of Chevron's protocol and desired search (and attack) methodology, any and all objections are pointless or at least premature at this point in light of my intended course of action, as I openly

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[325] (GX 2118 at 3.)

[326] (GX 2118 at 3.)

[327] (See GX 2119 (dkt. no. 2119 in 11-CV-691); GX 2120 (dkt. no. 2120 in 11-CV-691).)

[328] (GX 2131 at 1 (dkt. no. 2131 in 11-CV-691.)

> informed the Court on October 25, 2018. There I indicated that my position is that I am not ethically able to comply with the Court's order to produce mountains of confidential and privileged material to Chevron under a wholly improper purported privilege waiver ruling and before the Court has even ruled on the core issue in Chevron's original contempt motion. If the Court is unwilling to rule on the legal basis of Chevron's motion and continues to refuse to allow me to assert any privilege whatsoever, I intend to openly and ethically refuse to comply with any production order and to take an immediate appeal of any resulting contempt finding the Court issues against me.[329]

Mr. Donziger concluded by stating that, should he lose his appeal, "the terms and scope of an appropriate protocol genuinely calculated to protect my legitimate privacy interests and the integrity of my data can be negotiated at that point in time."[330] Mr. Donziger also purported to "reserve all rights and objections."[331]

On November 26, 2018, Judge Kaplan issued an order responding directly to Mr. Donziger's October 25, 2018 letter:

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[329] (GX 2131 at 2 (citation omitted).)

[330] (GX 2131 at 2.)

[331] (GX 2131 at 2.)

> Donziger's letter motion overlooks or ignores so much that already is of record in prior decisions by this Court and elsewhere that no purpose would be served by a point-by-point refutation, the preparation of which could serve only to delay that which he seeks to have expedited. It suffices to say that the contempt motions now before the Court will be decided in due course, bearing in mind that this is not the only case on the Court's docket.[332]

Judge Kaplan denied Mr. Donziger's request.[333]

On January 8, 2019, Judge Kaplan held a hearing to address Chevron's proposed protocol for examining Mr. Donziger's electronic devices and media accounts.[334] At the hearing, Mr. Donziger repeatedly asserted his "foundational objection" to the post-judgment proceedings:

> MR. DONZIGER: This is the problem: You have not ruled on the key issue in this post-judgment proceeding, which is what is the scope of the Court's order with regard –

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[332] (GX 2133 at 2 (dkt. no. 2133 in 11-CV-691).)

[333] (GX 2133 at 2.)

[334] (See GX 2149 at 2:9-13 (dkt. no. 2149 in 11-CV-691) ("The main reason I asked you to come in has to do with the proposed protocol for the examination of the defendant's electronic devices and storage media because I think there's a problem, at least one problem, with what Chevron has proposed.").)

THE COURT: Mr. Donziger. Mr. Donziger.

MR. DONZIGER: What?

THE COURT: You know that. I know that. Mr. Mastro knows that, and everybody else does. Now, get to the subject of the terms of this protocol or don't.

MR. DONZIGER: I have a foundational objection, which I reiterate right now. In terms of the specifics of the protocol, what I would ask this Court to do is to hold off until this issue can be decided by the Appellate Court.

THE COURT: Denied.

MR. DONZIGER: OK. Well, hold off at least until you can rule so we know what the precise scope of whatever the post-judgment RICO injunction is.

THE COURT: Mr. Donziger, I'm not delaying it. I'm acting deliberately. It's taking some time. I'm doing that in an effort to be sensitive to concerns you've raised. I am not putting everything on hold. No way. No how. I've made that clear over and over again. Now, either address the protocol or don't.

MR. DONZIGER: Is there a sense from the Court as to when we might see a ruling in this?

THE COURT: When it's ready, you'll be among the first to know.

MR. DONZIGER: Because while this issue has been pending decision, Chevron has subpoenaed many people, I'd say 20 people, I've lost track, and conducted a series of depositions that I think, as you know, I've made myself clear, are entirely inappropriate and are designed to dry up funding for legitimate advocacy and dry up our ability to advocate.

What I'm trying to point out is the fact the Court hasn't ruled –- and I recognize you have whatever concerns you have and to the extent you're being careful, I appreciate it, but the fact the Court hasn't ruled –

THE COURT: And surprising as this may be to you, Mr. Donziger, this isn't my only professional responsibility.

MR. DONZIGER: I know. Well, I –- let me just say this: For this team here, it's the majority of their work and they have been deposing dozens of people and damaging the case, and there's no -- in my opinion, there's no legal basis because the Court has yet to rule --

THE COURT: I know in your opinion there's no legal basis. You are mistaken. That's my ruling. I know you don't like it.

MR. DONZIGER: Well, for there to be discovery in this context, I'm talking about the discovery that's going on as well as what I would call the big

enchilada, which is asking me to turn over my entire digital life to them, there has to be a plausible basis, legal basis, from which the Court can hold me in contempt, and in light of the April 2014 order, the clarification order –

THE COURT: There is no clarification order.[335]

MR. DONZIGER: Well, whatever you want to call what you issued on April 25, 2014 which laid out the terms of fundraising for this case.

THE COURT: I disagree with you.

MR. DONZIGER: There's no -- in my opinion, there's no legitimate basis for which to find me in contempt. Therefore, there's no legitimate basis for discovery.

THE COURT: Mr. Donziger, I know your opinion. I know your opinion. I know. I've ruled on your opinion. You lost.[336]

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[335] (See supra note 77.)

[336] (GX 2149 at 10:8-12:21.)

When Mr. Donziger again tried to raise his foundational objection, Judge Kaplan explained that Mr. Donziger did not have a stay:

> I don't care about your foundational objection. You don't in this court. The foundational objection I have ruled against. They have a right to conduct appropriate discovery as far as I'm concerned. I know you have an appeal pending in the Second Circuit. I know their brief is due sometime in March. That's the way it goes. You don't have a stay."[337]

Despite Judge Kaplan's plain articulation that Mr. Donziger was obligated to comply with court orders pending his appeals, Mr. Donziger still did not seek emergency relief from those unstayed orders from the Court of Appeals.[338]

7. The Protocol

On March 5, 2019, Judge Kaplan issued the Protocol to govern the collection, imaging, and examination of Mr. Donziger's devices and accounts for information responsive to Chevron's discovery

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[337] (GX 2149 at 13:20-14:1 (emphasis added).)

[338] (See GX 7 (no docket entries seeking emergency relief); GX 8 (same); see also Trial Tr. at 654:11-20 ("Q. And in the time period that I had focused you on during the course of your direct, which would be February 28th of 2018 to September 30th of 2019, did Mr. Donziger ever seek a stay in the Second Circuit? A. No, he did not. Q. Did he ever seek mandamus relief in that time period in the Second Circuit? A. No, he did not. Q. Did he ever seek expedited briefing in the Second Circuit? A. No, he did not.").)

requests.[339] The Protocol recognized two forensic experts: (1) a court-appointed Neutral Forensic Expert and (2) an expert retained by Chevron ("Chevron's Forensic Expert").[340] By order that same day, Judge Kaplan appointed

Ondrej Krehel, COO and founder of the digital forensics and incident response firm LIFARS LLC, to serve as Neutral Forensic Expert.[341] Mr. Krehel worked at Judge Kaplan's direction, not Chevron's or Mr. Donziger's.[342]

Two other portions of the Protocol are particularly germane to this case: Paragraph Four and Paragraph Five. Paragraph Four provides, in relevant part, as follows:

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[339] (See GX 2172 (dkt. no. 2172 in 11-CV-691).)

[340] (See GX 2172 at 1 ¶¶ 1-2.)

[341] (See GX 2170 at 1 (dkt. no. 2170 in 11-CV-691); see also Trial Tr. at 788:17-18, 21-24 ("Q. Mr. Krehel, where do you work? A. LIFARS, LLC. . . . Q. What is LIFARS? A. Digital forensics and incident response firm. Q. And what is your role with LIFARS? A. I am a digital forensic lead and I'm also COO and founder.").)

[342] (See GX 2170 at 1-2 ¶ 2; Trial Tr. at 791:6-17 ("Going back to Government Exhibit 2170, your appointment as the neutral forensic expert, at whose direction did you understand you were working as the neutral forensic expert? A. I work under direction of a court and Honorable Judge Kaplan. Q. Did you work at Chevron's direction? A. No. Q. Did you work at Steven Donziger's direction? A. No. Q. Did you work at Gibson Dunn's direction? A. No.").)

Within three (3) business days of entry of this Protocol, defendant Steven Donziger ("Donziger") shall provide to both the Neutral and Chevron's Forensic Experts via email a representation listing underpenalty of perjury all devices he has used to access or store information or for communication since March 4, 2012-- including, but not limited to, personal computers, tablets, phones, and external storage devices, such as external hard drives and thumb drives -- (the "Devices"), indicating for each of the Devices whether he has possession, custody, or control of the Devices and, if not, stating the reasons why that is so, i.e., whether they were destroyed, lost, etc. and the present location of the Devices. Additionally, Donziger shall produce under penalty of perjury a list of all accounts -- including, but not limited to, email accounts (including web-based email accounts); accounts (including web- or cloud-based) related to any document management services, such as Dropbox; and accounts related to any messaging services, such as WhatsApp, Facebook Messenger, instant messages, etc. – Donziger has used since March 4, 2012 (the "Media"), indicating whether he presently has the ability to access those accounts and, if not, stating the reasons why that is so.[343]

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[343] (GX 2172 at 1-2 ¶ 4.)

Paragraph Five of the Protocol provides, in relevant part:

> The Neutral Forensic Expert shall take possession of Donziger's Devices and have access to his Media for the purpose of making a mirror image of those Devices and Media. The Devices shall be surrendered to the Neutral Forensic Expert at Donziger's address at 245 West 104th Street, #7D, New York, NY 10025. The Neutral Forensic Expert shall take possession, custody, and control of the Devices and transport them directly to its offices for the imaging described herein. The devices shall be surrendered to the Neutral Forensic Expert at 12:00 pm at 245 West 104th Street, #7D, New York, NY 10025 on March 18, 2019. At no time shall Chevron's Forensic Expert have access to the original Devices or to live Media accounts absent further Court order.[344]

In plain terms, those paragraphs required Mr. Donziger to do two things: (1) to email to Mr. Krehel and Chevron's Forensic Expert a listing of his devices and accounts and (2) to provide, only to Mr. Krehel, his devices and access to his accounts for imaging.[345] Mr. Donziger was given three days to do the former and almost two weeks to complete the latter.[346]

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[344] (GX 2172 at 2 ¶ 5 (emphasis added).)

[345] (See GX 2172 at 1-2 ¶¶ 4-5.)

[346] (See GX 2172 at 1-2 ¶¶ 4-5.)

Also on March 5, 2019, Judge Kaplan issued an opinion describing how the Protocol was to operate.[347] Judge Kaplan explained that the Protocol had "four principal steps": (1) "[f]orensic imaging (i.e., copying) of the devices and media;" (2) "[g]eneration of reports indexing persons and entities named on the images from which the experts and the parties can assess whether to exclude or include documents in the subsequent analysis;" (3) "[f]orensic analysis of the devices and media for evidence of spoliation and recovery of any destroyed files, to the extent possible;" and (4) "[s]earching the documents for responsive documents."[348] Judge Kaplan then clarified that the Protocol "require[d] that the first, second, and third steps be carried out solely by a court appointed neutral expert," with Chevron's expert and counsel becoming "involved only in the fourth step."[349] Judge Kaplan indicated that "the protocol limits counsel's involvement in this process to the greatest degree possible in light of Donziger's legitimate privacy interests."[350]

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[347] (See GX 2171 (dkt. no. 2171 in 11-CV-691).)

[348] (GX 2171 at 9 (underline added).)

[349] (GX 2171 at 9.) Judge Kaplan went on to explain that "[t]he Chevron forensic expert's limited involvement in the search process, to the extent that is permitted by the protocol, is intended to give the neutral expert the benefit of the Chevron forensic expert's understanding of the case to identify more accurately and efficiently documents responsive to the document requests." (Id. at 9-10.) Judge Kaplan continued, noting that "[t]he involvement of counsel for Chevron likewise is intended to ensure that responsive documents are identified and produced." (Id. at 10.)

[350] (GX 2171 at 10.)

Additionally, Judge Kaplan addressed what he termed "Donziger's Pot Pourri of Rehashed Arguments."[351] Judge Kaplan, again, rejected Mr. Donziger's First Amendment contention, pointing out that Mr. Donziger lacked standing, had forfeited the claims, and that the claims were "entirely without merit" even if they could be asserted.[352] As for Mr. Donziger's assertion that Chevron's Elliott-Management-related contempt application provided the only basis for post-judgment discovery, Judge Kaplan found that assertion to be "false" because, among other reasons, it ignored (1) the existence of the unstayed Money Judgment that Chevron was entitled to enforce and (2) that a district court has discretion to order discovery in aid of enforcing orders that it has issued.[353] And Judge Kaplan again rejected Mr. Donziger's privilege contentions because Mr. Donziger, through his conduct, had "forfeited any privilege he might otherwise have had."[354] Mr. Donziger did not seek any emergency relief from complying with the Protocol from the Court of Appeals.[355]

Mr. Donziger did not comply with Paragraph Four of the Protocol's directive to provide a sworn list of

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[351] (GX 2171 at 11 (emphasis omitted).)

[352] (GX 2171 at 11-12.)

[353] (See GX 2171 at 12-13.)

[354] (GX 2171 at 14.)

[355] (See GX 7 (no docket entries seeking emergency relief); GX 8 (same); see also Trial Tr. at 656:13-20 ("Q. Did Mr. Donziger notice an appeal from this order which is Government Exhibit 2172? A. No, he did not. Q. Did Mr. Donziger seek a stay of this order with the Second Circuit? A. No, he did not. Q. Did he seek mandamus relief with the Second Circuit? A. No, he did not.").)

his devices and accounts by March 8, 2019.[356] Indeed, in a March 11, 2019 email to Mr. Krehel, Mr. Donziger made his intentions crystal clear:

> Judge Kaplan for the last year has been allowing largely unfettered post-judgment discovery targeting 25 or more people connected to me or the Ecuador case under the auspices of a motion that should have been resolved many months ago. Until it is resolved, I have very limited options to seek appellate review. While I naturally think the motion should be decided in my favor, even that is beside the point: it must be decided, period, before I can ethically release confidential and constitutionally-protected personal and client documents to Chevron, and certainly before I can allow my entire hard drive and online accounts to be effectively seized and mirrored.
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> I have explained this to Judge Kaplan on repeated occasions beginning almost one year ago. . . . I clearly have stated that I will voluntarily go into civil contempt of the

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[356] (See Trial Tr. at 792:22-792:5 ("Q. And Mr. Krehel, with respect to this list that Mr. Donziger was directed to provide to you of his devices and accounts within three business days of entry of this protocol, did that occur? A. No. Q. You did not receive a list from Mr. Donziger of his devices and/or his accounts within three days of the business days of entry of the protocol? A. That is correct, I did not."); GX 132 at DONZIGER_105214 (Mar. 11, 2019 email from Ondrej Krehel to Matthew Burke) ("Per the Court's Order provided to me, I (Ondrej Krehel) or LIFARS general mailbox did not receive the listing #1 or #2 from Mr. Donziger.").)

> legally unfounded orders in order to obtain proper appellate review. Judge Kaplan and Chevron have known this long before starting the pointless process of having you appointed and crafting a review protocol, etc. So I hope you have not cleared your schedule to work on this matter, because, as Chevron knows, I will not be producing documents until my due process rights are respected.
>
> This matter will presumably return to Judge Kaplan on yet another contempt motion sometime soon. At some point Judge Kaplan will find me in contempt and I will appeal. As I have also made clear to Chevron and the court, if the appellate court ultimately affirms Judge Kaplan's merits ruling on the authorizing motion and his overall handling of the post-judgment proceedings, then I will cooperate with the order of the court as is my obligation as a citizen and resident of New York. Until such time, you should not expect to hear from me.[357]

Mr. Donziger refused to comply based on positions that he had raised several times and that Judge Kaplan had rejected, including only days earlier.[358]

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[357] (GX 133 at DONZIGER_101980 (Mar. 11, 2019 email from Steven Donziger to Ondrej Krehel) (emphasis added).)

[358] (See GX 2171 at 11-15.)

Mr. Donziger did not surrender his devices for imaging on March 18, 2019 as Paragraph Five directed.[359] That day, Mr. Krehel arrived in the lobby of Mr. Donziger's apartment building at around 11:50 a.m. to take possession of Mr. Donziger's devices.[360] Mr. Krehel asked the building's doorman to call Mr. Donziger, and the doorman did so several times with no answer.[361] Mr. Krehel then emailed Mr. Donziger at12:15 p.m. indicating that he was in the lobby, that the doorman had called Mr. Donziger to no avail, and that Mr. Krehel and his associates would wait in the lobby until 12:30 p.m.[362]

Mr. Krehel remained in the lobby and eventually encountered Mr. Donziger around 1:00 p.m. as Mr. Donziger walked into the lobby carrying a cup of

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[359] (See Trial Tr. at 800:22-24 ("Q. Okay. Did Mr. Donziger provide you with any devices at all that day? A. No.").)

[360] (See Trial Tr. at 796:8-797:5.)

[361] (See Trial Tr. at 796:23-25 ("We entered the lobby of the building, asked the doorman to call Mr. Donziger. Doorman called multiple times Mr. Donziger phone, and no one answer.").)

[362] (See GX 134 at DONZIGER_ 101970-71 (Mar. 18, 2019 email from Ondrej Krehel to Steven Donziger); see also Trial Tr. at 797:20-25 ("Q. And who did you send that email to? A. I sent this email to Mr. Donziger, and I believe attorneys were cc'd as well. Q. When you say "attorneys," do you mean the attorneys of Gibson Dunn or someone else? A. Correct, Gibson Dunn.").)

coffee.[363] Mr. Krehel and Mr. Donziger conversed, and Mr. Donziger indicated that he would not surrender any of his devices for imaging.[364] During that conversation, Mr. Donziger also told Mr. Krehel that he possessed an iPhone and a MacBook Air.[365] After speaking with Mr. Donziger, Mr. Krehel left Mr. Donziger's apartment building sometime between 1:00 and 1:15 p.m.[366] Later that day, Mr. Krehel emailed Chevron's counsel, copying Mr. Donziger, confirming that Mr. Donziger had not provided any devices but had said that he possessed an iPhone and a MacBook Air.[367] As of trial,

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[363] (See Trial Tr. at 798:4-12 ("Q. Did you eventually see Mr. Donziger? A. Yes. Q. Approximately what time did you see Mr. Donziger? A. Around 1 p.m. Q. And can you tell us what happened? A. Mr. Donziger walked into the building with coffee in his hand. Q. I'm sorry, he had what in his hand? A. Coffee.").) Mr. Krehel identified Mr. Donziger in open court. (See id. at 801:14-802:6.)

[364] (See Trial Tr. at 798:14-17 ("Q. Can you tell us what he said to you and you said to him. A. From my recollection, Mr. Donziger told me that he will not surrender any devices, and that basically we will not receive any devices that day from him.").)

[365] (See Trial Tr. at 798:18-19, 800:2-8 ("Q. Did you ask him about any devices that he had? A. Yes, I did. . . . Q. And did Mr. Donziger give you a response? A. Yes, he did. Q. What do you recall him saying to you? A. To my recollection he mentioned that he has an iPhone and MacBook Air and potentially he might have had some other devices but he mentioned that they would not be related matter. They would be more like a storage devices.").)

[366] (See Trial Tr. at 800:17-21 ("Q. Now, approximately what time did you leave the apartment building, the 245 West 104? A. Most likely on or around one p.m. or 1:15 p.m. Q. After you spoke with Mr. Donziger? A. Correct.").)

[367] (See GX 134 at DONZIGER_101970 (Mar. 18, 2019 email from Ondrej Krehel to Andrew Neuman).)

Mr. Donziger still had not surrendered any devices or accounts to Mr. Krehel for imaging.[368]

8. Contempt Findings & Coercive Fines

On March 20, 2019, Chevron moved to hold Mr. Donziger in contempt for violating Paragraphs Four and Five of the Protocol by (1) failing to provide Mr. Krehel and Chevron's Forensic Expert with a listing of his devices and accounts and (2) refusing to surrender his devices and accounts to Mr. Krehel for imaging.[369] On April 8, 2019, Mr. Donziger filed a pro se response to Chevron's contempt application.[370] Mr. Donziger reiterated his intent to suffer contempt sanctions:

> [A]s I have made clear, my responses have been limited by the fact that it is my intention to go into voluntary contempt as a matter of principle rather than submit to the review process prior to achieving any appellate review. Accordingly, I have not dedicated my limited time and resources to articulating challenges to the bewilderingly and unnecessarily complex review protocol drafted by Chevron and

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[368] (See Trial Tr. at 803:23-804:6 ("Q. Did Mr. Donziger ever surrender any devices to you, Mr. Krehel, for imaging? A. No. Q. He didn't do it in June? A. No. Q. Didn't do it in July? A. Correct. Q. And as you sit here today, has that happened? A. Did not happen.").)

[369] (See GX 2175 (dkt. no. 2175 in 11-CV-691); GX 2176 (dkt. no. 2176 in 11-CV-691).)

[370] (See GX 2184 at 4-6.)

> ordered, in essentially the same form, by the Court.[371]

Mr. Donziger again raised First Amendment concerns and claimed that the Protocol "merely disguise[d] a de facto authorization for Chevron to rifle through my files largely as it wishes."[372]

Mr. Donziger concluded by claiming that he "ha[d] relentlessly sought appellate review and w[ould] continue to do so."[373]

On May 23, 2019, Judge Kaplan issued the Contempt Order finding Mr. Donziger to be, among other things, "in willful civil contempt" of Paragraph 4 of the Protocol.[374] Judge Kaplan noted that Mr. Donziger had "made no effort whatever to comply, as [wa]s evident from his anticipatory refusal to do so."[375] Until Mr. Donziger complied with Paragraph Four of the Protocol, Judge Kaplan ordered that:

> [Mr. Donziger] shall pay a coercive civil fine to the Clerk of Court with respect to May 28, 2019 and each subsequent day from that date until the date on which he fully purges himself of this contempt by doing so. The amount of the coercive fine shall begin at $2,000 for May 28, 2019

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[371] (GX 2184 at 4-5.)

[372] (GX 2184 at 5.)

[373] (GX 2184 at 11.)

[374] (See GX 2209 at 70.)

[375] (GX 2209 at 63.)

> and shall double for each subsequent day during which Donziger fails fully to purge himself of this contempt.[376]

On May 28, 2019, Mr. Donziger filed a notice of appeal of the Contempt Order.[377] The Court of Appeals assigned that appeal docket number 19-1584.[378]

On May 29, 2019, Judge Kaplan issued another order finding Mr. Donziger to be in "willful civil contempt" of Paragraph Five of the Protocol.[379] Judge Kaplan noted that he had "inadvertently failed to dispose fully of Chevron's motion to hold Donziger in contempt" in the Contempt Order.[380] Until Mr. Donziger complied with Paragraph Five of the Protocol, Judge Kaplan ordered that:

> [Mr. Donziger] shall pay a coercive civil fine to the Clerk of Court with respect to June 3,

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[376] (GX 2209 at 70.)

[377] (See GX 2211 (dkt. no. 2211 in 11-CV-691).)

[378] (See GX 9 (docket in Chevron Corp. v. Donziger, 19-1584 (2d Cir.)); see also Trial Tr. at 646:22-647:9 ("Q. Mr. Thomson, what appeal is this docket sheet for? We can scroll through the second page, you can look at it. A. Well, it's the docket sheet for the appeal from the district court's contempt order dated May 24, 2019. Q. Sir, did you say dated May 24th? A. I believe that's right, but I could be wrong. The date of the order. The date of the appeal was May 28th. Q. If you could take a look at docket entry number 2. Oh, let me take a look. I see. You're looking at docket entry number 3. A. May 23. Q. The opinion was May 23rd. A. Correct.").)

[379] (See GX 2219 at 1 (dkt. no. 2219 in 11-CV-691).) Judge Kaplan issued a corrected version of that order on June 4, 2019. (See GX 2222 (dkt. no. 2222 in 11-CV-691).)

[380] (GX 2219 at 1; GX 2222 at 1.)

> 2019 and each subsequent day from that date until the date on which he fully purges himself of this contempt by doing so. The amount of the coercive fine shall begin at $2,000 for June 3, 2019. It shall double for each subsequent day during which Donziger fails fully to purge himself of this contempt until the fine, so calculated, would reach or exceed $100,000, at which point it would become $100,000 for that and each subsequent day that Donziger fails to purge fully the contempt.[381]

Judge Kaplan also indicated that "[n]othing herein forecloses the possibility of . . . granting additional coercive relief, including increased fines and other measures, in the event the civil contempt herein is not fully purged."[382] Mr. Donziger did not notice an appeal from that order.[383]

On May 29, 2019, Mr. Donziger sent an email to Mr. Krehel attaching a declaration related to his devices and accounts.[384] In that declaration, Mr. Donziger asserted that he had and used the following devices and accounts: (1) a MacBook that he had used since 2012; (2) an iPhone, although he had used

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[381] (GX 2219 at 1; GX 2222 at 1.)

[382] (GX 2222 at 1.)

[383] (See Trial Tr. at 648:6-9 ("Q. With respect to this order or civil contempt finding which is in Government Exhibit 2219, following that finding, did Mr. Donziger notice an appeal from that order? A. No, he did not.").)

[384] (See GX 138 at DONZIGER_ 105038-40 (May 29, 21019 email from Steven Donziger to Ondrej Krehel and attachment).)

other phones since 2012 that had either been lost, damaged, or replaced; (3) the applications WhatsApp, Signal, and Telegram; (4) two email accounts, although he may have used others for which he no longer possessed login or password information; (5) Dropbox to access files posted by others; and (6) Twitter.[385] On June 5, 2019, Mr. Donziger emailed Mr. Krehel an updated declaration that expanded on the information provided in his May 29 declaration.[386]

On June 5, 2019, Judge Kaplan issued an order directing Chevron and Mr. Donziger to appear on June 10, 2019 "to resolve any remaining disagreement" related to whether Mr. Donziger had purged his contempt related to Paragraph Five of the Protocol.[387] Judge Kaplan explained that Mr. Donziger held "the keys in his pocket, figuratively speaking, with respect to any coercive fines imposed upon him," which Judge Kaplan indicated would "be avoided" if Mr. Donziger complied.[388] Prior to the hearing, Chevron filed a statement with Judge Kaplan, alleging that Mr. Donziger had not complied with either Paragraph Four or Paragraph Five of the Protocol and indicating that more stringent coercive compliance measures--such as the surrender of his passport, the seizure of his devices

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[385] (See GX 138 at DONZIGER 105039-40; see also GX 2230-1 (dkt. no. 2230-1 in 11-CV-691) (same document).)

[386] (See GX 140 (June 5, 2019 email from Steven Donziger to Ondrej Krehel with attachments); GX 2230-2 (dkt. no. 2230-2 in 11-CV-691) (same document as declaration attached to email).)

[387] (GX 2223 at 1 (dkt. no. 2223 in 11-CV-691).)

[388] (GX 2223 at 1.)

by the Marshals, or even civil imprisonment--might be necessary.[389]

At the June 10, 2019 hearing, Mr. Donziger stated that his "bank accounts [we]re frozen" and that he did not "have resources to pay the fines."[390] As for his alleged noncompliance, Mr. Donziger maintained that he intended to comply with Paragraph Four of the Protocol but Paragraph Five was a different story.[391] Mr. Donziger did not dispute that he had not complied with Paragraph Five, instead maintaining that directive "implicate[d] core constitutional rights for [himself] and many people associated with this case" and that complying would prevent him from being able to vindicate those rights.[392] Mr. Donziger also asked Judge Kaplan not to order the surrender of his passport, which, in his view, "would essentially render [him] a nullity as an advocate."[393] If Judge Kaplan was inclined to rule differently, however, Mr. Donziger indicated that he would "voluntarily surrender" his passport until he could "deal with it at the Second Circuit."[394]

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[389] (See GX 2229 at 1-2, 7-8 (dkt. no 2229 in 11-CV-691).)

[390] (GX 2352 at 14:20-21, 15:1-2.)

[391] (See GX 2352 at 7:21-8:1 ("MR. DONZIGER: That's not true. I have a draft affidavit that I sent in good faith to Chevron to work with them to get in compliance. I intend to get in compliance on paragraph 4. THE COURT: What about paragraph 5? MR. DONZIGER: That's a separate issue.").)

[392] (GX 2352 at 8:2-4, 8:13-16.)

[393] (GX 2352 at 15:21-16:4.)

[394] (GX 2352 at 16:6-9.)

Regarding the coercive sanctions, Judge Kaplan was frank with Mr. Donziger:

> You have the ability to get yourself out of whatever box you're in by complying with my orders. And the United States Supreme Court says, absent a stay, you have an obligation to do that, and if you do not discharge that obligation, you do it at your own risk. And that's been clear to you for a very long time. And you disregard order after order.[395]

When Mr. Donziger again tried to argue that complying with Paragraph Five "implicate[d] core First Amendment rights," Judge Kaplan responded:

> So you keep saying. I've heard that record played many times before. Now, let's end it. I'm not going to listen to it anymore. You've been fully heard on it. You have briefed it. I have issued an opinion on it. You appealed from that opinion. You filed a brief in the Second Circuit. It hasn't been calendared for argument. You never sought a stay of it. There it is.
>
> You're welcome to go on to the Second Circuit and see what happens. But you take your chances in doing so.[396]

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[395] (GX 2352 at 16:24-17:5.)

[396] (GX 2352 at 18:25-19:8.)

At the end of the hearing, Judge Kaplan reiterated that Mr. Donziger had the "keys in his pocket," so to speak:

> Look, Mr. Donziger, just so it's entirely clear, these coercive fines that I have imposed I have made clear will evaporate if, as, and when you are in full compliance. They will be gone. I'm not sure I had to do that, but I have made that commitment. But every day that goes by -- and indeed your statements here this morning suggest to me that they're a waste of time and that if these orders are to be enforced it's going to take more than I've done up to now.
>
> Now, you would be well advised, so far as paragraph 4 is concerned, to work out your problems with Chevron and take care of at least that part of it, which you don't seem to be as upset about as the rest. And you did manage to finally comply with an order that's been outstanding for five years in respect of the assignment. We may come to a very hard place on paragraph 5 for you. But that's where we are. And I'm being totally straight with you.[397]

Prior to adjourning, Judge Kaplan confirmed that the coercive fines related to Paragraphs Four and Five of the

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[397] (GX 2352 at 20:8-23.)

Protocol were running simultaneously and that the fines were cumulative.[398]

9. The Passport Order & Mr. Donziger's Emergency Motion for a Stay

On June 11, 2019, Judge Kaplan issued the Passport Order, which imposed additional coercive sanctions on Mr. Donziger for his refusal to comply with the Protocol.[399] Specifically, Judge Kaplan ordered the following:

> Donziger, on or before June 12, 2019 at 4 p.m., shall surrender to the Clerk of the Court each and every passport issued to him by each and every nation to have issued a passport to him, the Clerk to retain possession thereof unless and until this Court determines that Donziger has complied fully with paragraphs 4 and 5 of the Protocol.[400]

Judge Kaplan also made clear that "[a]ll [Mr. Donziger] need do to obtain release of his passport(s) is to comply fully with the Court's orders."[401]

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[398] (See GX 2352 at 20:24-21:6 ("MR. DONZIGER: May I just ask a very quick question about something you just said. On what basis are the fines running? Under lack of compliance with paragraph 4 or under lack of compliance with paragraph 5 or both? THE COURT: Both. MR. DONZIGER: So there are simultaneous fines running in your mind? THE COURT: Simultaneous and cumulative.").)

[399] (See GX 2232 at 1-2.)

[400] (GX 2232 at 2.)

[401] (GX 2232 at 2.)

That same day, Judge Kaplan issued another order denying Mr. Donziger's motion to vacate the May 29, 2019 contempt finding regarding his disobedience of Paragraph Five of the Protocol.[402] Judge Kaplan rejected the argument that Mr. Donziger's notice of appeal of the Contempt Order had divested Judge Kaplan of jurisdiction to impose the contempt sanctions.[403] Judge Kaplan concluded by noting that the denial was "without prejudice to any application by Donziger for a stay pending appeal made in full compliance with the Federal Rules of Civil and Appellate Procedure and the Local Rules of this Court, including but not limited to Local Civ. R. 7.1."[404]

On June 12, 2019, Mr. Donziger filed a pro se "Emergency Motion" seeking to stay the fines and other contempt sanctions pending his appeal of the Contempt Order as well as possible appeals of (1) Judge Kaplan's June 4, 2019 order finding Mr. Donziger in contempt of Paragraph Five of the Protocol and (2) the Passport Order.[405] Mr. Donziger requested "an immediate administrative stay of all fines and coercive orders to allow for resolution of the instant motion and if necessary an emergency stay motion to the Second Circuit."[406] Mr. Donziger asserted that his motion "implicate[d] [his] fundamental constitutional rights and the fundamental rights of thousands of Indigenous

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[402] (See GX 2233 at 2 (dkt. no. 2233 in 11-CV-691).)

[403] (See GX 2233 at 1-2.)

[404] (GX 2233 at 2.)

[405] (See GX 2234 at 1 (dkt. no. 2234 in 11-CV-691).)

[406] (GX 2234 at 1.)

peoples in Ecuador, whose lives truly hang in the balance."[407] Mr. Donziger also indicated that he would not comply with the Passport Order:

> I am not able to comply with the Court's deadline of 4 p.m. today in the Passport Order on account of this pending motion for emergency relief and the severe and irreparable harm as articulated in this motion. Indeed, I am still working to understand the nature and scope of the harm potentially imposed by the Passport Order, which issued just 24 hours ago. . . . In the last 24 hours I have prepared this emergency stay motion to Your Honor, and I am immediately turning to the task of preparing an emergency stay to the Circuit in the event Your Honor denies this motion. I will also continue to try to understand the present situation I am in and make considered decisions about the necessary next steps.[408]

On June 25, 2019, Mr. Donziger filed a pro se declaration in support of his emergency motion, in which he represented that he would "agree to submit [his] devices to a neutral forensic expert for imaging so

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[407] (GX 2234 at 1-2.)

[408] (GX 2234 at 15 n.6.)

long as the expert is directed not to allow any access to the images by anyone until the appeal is decided."[409]

On June 28, 2019, Judge Kaplan suspended the accumulation of the coercive fines because "it d[id] not appear that the further accumulation of monetary . . . sanctions . . . [wa]s likely to have the desired effect."[410] In that same order, however, Judge Kaplan made clear that "[n]othing herein forecloses the possibility of the Court granting additional coercive relief, including increased fines and other measures, in the event all civil contempts are not fully purged."[411]

On July 2, 2019, Judge Kaplan issued an order granting in part and denying in part Mr. Donziger's motion for a stay pending appeal.[412] Specifically, Judge Kaplan granted a stay pending appeal of the portions of the Protocol requiring or permitting disclosure of information to Chevron, subject to two conditions: (1) Mr. Donziger was required to file his opening brief before the Court of Appeals no later than July 31, 2019 and to file any reply no later than fourteen days after Chevron filed its opposition; and (2) Mr. Donziger was instructed not to oppose any motion to expedite any of

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[409] (GX 2250 at 3-4 (dkt. no. 2250 in 11-CV-691).) Mr. Donziger even suggested that he planned "to retain an expert to perform the imaging anyway in order to demonstrate my willingness to comply with any and all Court orders once my appellate rights have been respected." (Id. at 4 n.3.)

[410] (GX 2252 at 1 (dkt. no. 2252 in 11-CV-691).)

[411] (GX 2252 at 1.)

[412] (GX 2254 at 3 (dkt. no. 2254 in 11-CV-691).)

his appeals.[413] Judge Kaplan denied the motion "in all other respects" and clarified that Mr. Donziger "remain[ed] obligated to comply fully with paragraphs 4 and 5 of the Protocol and to surrender his passport(s) to the Clerk as previously directed."[414]

Mr. Donziger did not file his opening brief until September 9, 2019, more than one month late.[415] In the interim, Mr. Donziger did not request any extension of the July 31 deadline from Judge Kaplan.[416] Nor did he seek a stay from the Court of Appeals,[417] despite his June 12th representation that he was "immediately turning to the task of preparing an emergency stay to the Circuit in the event" Judge Kaplan denied his stay motion.[418] Finally, Mr. Donziger still did not produce

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[413] (GX 2254 at 3.)

[414] (GX 2254 at 3.)

[415] (See GX 9 at 12 (dkt. no. 48); GX 317 at 32 (Sept. 9, 2019 appellate brief filed by Mr. Donziger); see also Trial Tr. at 349:11-14 ("Q. Ms. Champion, did Mr. Donziger file his appellate brief and appendix in support of his appeal from the May 23rd, 2019, decision by July 31st, 2019? A. No.").)

[416] (See Trial Tr. at 349:15-18 ("Q. Did Mr. Donziger apply to Judge Kaplan asking for an extension on this condition that he file his appellate brief by July 31st of 2019? A. No.").)

[417] (See GX 7 (observing no motions to stay); GX 8 (same); GX 9 (same).)

[418] (GX 2234 at 15 n.6.)

his devices to Mr. Krehel for imaging[419] or surrender his passport to the Clerk of the Court.[420]

e. Mr. Donziger's Post-Judgment Appeals & the Court of Appeals' March 4, 2021 Opinion

Three Second Circuit appeals are relevant to these proceedings: (1) Mr. Donziger's appeal of the

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[419] (See Trial Tr. at 803:23-804:6 ("Q. Did Mr. Donziger ever surrender any devices to you, Mr. Krehel, for imaging? A. No. Q. He didn't do it in June? A. No. Q. Didn't do it in July? A. Correct. Q. And as you sit here today, has that happened? A. Did not happen.").)

[420] Mr. Ng, supervisor of records management in the Clerk's Office for the Southern District of New York, testified to the following: (1) the Clerk's Office takes possession of physical items such as passports; (2) if a passport is surrendered, the Clerk's Office would place it in a sealed envelope and indicate on the docket that a sealed document was placed in the vault; (3) the docket sheet (GX 1A) did not reflect that Mr. Donziger had surrendered a passport; and (4) no other Clerk's Office records indicated that Mr. Donziger had surrendered a passport to the Clerk's Office. (See Trial Tr. at 561:11-566:25.) Moreover, at his initial appearance to answer the criminal contempt charges, Mr. Donziger requested that the Court permit him to keep his passport and clear any travel plans with Pretrial Services. (See id. at 831:22-832:3 ("But what I would propose, because I don't think this is a normal kind of case, given the long history of my particular role in this case, is to allow me to keep my passport for me to propose when I want to travel to another place that I would inform the Court or inform pretrial services or whatever the process is, get permission to go for a certain period of time and be allowed to return.").)

Money Judgment ("Appeal No. 18-855");[421] (2) his appeal of Judge Kaplan's decision denying Mr. Donziger's motion to dismiss Chevron's contempt motion, his motion for a declaratory judgment, and his motion for a protective order ("Appeal No. 18-2191");[422] and (3) Mr. Donziger's appeal from the Contempt Order ("Appeal No. 19-1584").[423] On Mr. Donziger's motion, the Court of Appeals consolidated Appeals Nos. 18-855, 18-2191, and 19-1584.[424] In connection with those appeals, Mr. Donziger did not seek a stay of Judge Kaplan's orders, petition the Court of Appeals for a writ

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[421] (See GX 7; Trial Tr. at 632:23-633:11.)

[422] (See GX 9; Trial Tr. at 640:7-16.)

[423] (See GX 9; Trial Tr. at 646:22-647:9.)

[424] (See GX 7 at 14, 16 (dkt. nos. 69, 74, 117); GX 8 at 8, 10 (dkt. nos. 36, 40, 81); GX 9 at 11-12 (dkt. nos. 50, 56); see also Trial Tr. at 641:16-21 ("Q. Mr. Thomson, what relationship, if any, was there between appeal 18-855 and appeal 18-2191? A. The two appeals were consolidated on Mr. Donziger's motion. Q. And what does that mean? A. It means they were to be considered at the same time as part of the same proceeding."); id. at 648:17-24 ("Q. You mentioned Mr. Donziger's opening brief in the consolidated appeal. What relationship, if any, did case number 19-154, which is reflected in docket sheet for Government Exhibit 9, what relationship, if any, did that appeal have with consolidated appeals 18-855 and 18-2191? A. Mr. Donziger moved in the Second Circuit to have the Court of Appeals consolidate the appeals so they were all decided together in the same proceeding.").)

of mandamus, or request expedited briefing.[425] To the contrary, Mr. Donziger sought at least two extensions.[426]

On September 9, 2019, Mr. Donziger filed his opening brief in the consolidated appeal before the Court of Appeals.[427] Crucially, that brief did not, in any way, challenge: (1) the Contempt Order's finding regarding Mr. Donziger's noncompliance with Paragraph Four of the Protocol; (2) the Contempt Order's finding regarding Mr. Donziger's failure to assign the 2011 Contingent Fee or the 2017 Contingent Fee; (3) the Contempt Order's finding regarding Mr. Donziger's pledging a portion of his contingent fee interest to Mr. Zelman; (4) the May 29, 2019 contempt finding regarding Mr. Donziger's noncompliance with Paragraph Five of the Protocol; (5) the legal foundation of the Protocol; or (6) the legal foundation of the Passport Order.[428] Instead, Mr.

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[425] (See GX 7 (observing no docket entries seeking such relief); GX 8 (same); GX 9 (same); see also Trial Tr. at 654:11-20 ("Q. And in the time period that I had focused you on during the course of your direct, which would be February 28th of 2018 to September 30th of 2019, did Mr. Donziger ever seek a stay in the Second Circuit? A. No, he did not. Q. Did he ever seek mandamus relief in that time period in the Second Circuit? A. No, he did not. Q. Did he ever seek expedited briefing in the Second Circuit? A. No, he did not.").)

[426] (See GX 7 at 14 (dkt. nos. 63, 69); GX 8 at 8 (dkt. no. 36); GX 9 at 13 (dkt. no. 86).)

[427] (See generally GX 317.)

[428] (See GX 317 at 8 (statement of the issues); id. at 9-31 (substantive arguments); see also Trial Tr. at 650:2-653:10 (described some of the issues that Mr. Donziger did and did not challenge on appeal).)

Donziger's brief focused almost exclusively on Judge Kaplan's contempt finding regarding Mr. Donziger's fundraising for the Lago Agrio Case by selling interests in the Ecuadorian Judgment other than his own.[429]

On March 4, 2021, the Court of Appeals issued its opinion resolving Appeals Nos. 18-855, 18-2191, and 19-1584.[430] The Court of Appeals affirmed the Money Judgment (Appeal No. 18-855) and dismissed as moot Appeal No. 18-2191.[431] As for Appeal No. 19-1584, the Court of Appeals affirmed Judge Kaplan's orders in every respect, save for one exception.[432] The Court of Appeals reversed the "contempt finding as to Donziger's sale of interests in the Ecuadorian Judgment other than of interests in his contingent share of that judgment" and, accordingly, vacated "the supplemental judgments awarding Chevron . . . compensatory sanctions related to that erroneous finding and attorneys' fees."[433] In doing so, the Court of Appeals stressed the narrowness of its ruling:

> Lest this Opinion be taken as somehow vindicating Donziger, it is important to put our holding in context. Our ruling today has no effect on, and does not in any way call into question, the district court's thorough and fully persuasive fact findings

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[429] (See GX 317 at 8 (statement of the issues); id. at 9-31 (substantive arguments).)

[430] See Chevron Corp. v. Donziger, 990 F.3d 191 (2d Cir. 2021).

[431] Donzinger, 990 F.3d at 214.

[432] Donzinger, 990 F.3d at 214.

[433] Donziger, 990 F.3d at 214. (emphasis added).

> and legal conclusions, which we have already affirmed in full, establishing Donziger's violations of law and ethics that added up to a pattern of racketeering in violation of the RICO statute. Nor does it question in any way the district court's conclusions that Donziger acted in contempt of the Injunction that resulted from the RICO Judgment in numerous ways. Indeed, except with respect to the very specific alleged violation of the Injunction discussed in this Opinion, Donziger does not even attempt to challenge the district court's findings of his contumacious conduct.[434]

Thus, the Court of Appeals remanded for "the district court to determine the fees reasonably expended to secure the contempt findings affirmed on appeal, and for any further proceedings consistent with this Opinion."[435]

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[434] Donziger, 990 F.3d at 212–13 (emphasis added). Despite Federal Rule of Civil Procedure 11's requirements, it is exceedingly difficult to square the Court of Appeals' language with Mr. Donziger's trial counsel's claim that "Mr. Donziger's core contentions as to the unlawfulness of that discovery process have now been affirmed by the Second Circuit." (Memorandum of Law in Support of Motion to Dismiss and For Discovery in Support Thereof ("Vindictive Pros. MTD"), dated Apr. 12, 2021 [dkt. no. 259] at 8 (emphasis omitted).) As the quoted language above unequivocally shows, the Court of Appeals did no such thing.

[435] Donziger, 990 F.3d at 215.

III. Conclusions of Law & Additional Findings

The Court will first address the arguments raised by Mr. Donziger in his post-trial briefing regarding what he describes as threshold "structural" issues underlying this case.[436] Next, the Court will turn to Mr. Donziger's contention that the Court erroneously imposed the collateral bar rule at trial.[437] Finally, the Court will consider whether the Special Prosecutors have sustained their burden of proof on the criminal contempt charges.

a. Mr. Donziger's "Structural" Issues

Mr. Donziger asserts that, "[a]s a threshold issue, this case has been riddled with structural decay as to warrant immediate dismissal on all charges."[438] Mr. Donziger raises nine specific points and proposes nine related paragraphs of factual findings.[439] Mr. Donziger also offers many of these same arguments in a separately-filed, citationless letter seeking both (1) dismissal of the criminal contempt charges and (2) the Court's recusal.[440] Given the significant overlap among the arguments raised in Mr. Donziger's post-trial briefing and his letter motion, the Court will address them together.

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[436] (See Def. I/II/III Br. at 1-3; see also id. at 3-13 ¶¶ 1-9 proposing findings of fact on these issues).)

[437] (See Def. I/II/III Br. at 18.)

[438] (Def. I/II/III Br. at 1.)

[439] (See Def. I/II/III Br. at 1-13.)

[440] (See June 3 Letter MTD at 1-3.)

Before addressing those arguments, however, it is necessary to make two observations. First, many of these contentions will be familiar to anyone who has followed this case. Indeed, almost none of the arguments Mr. Donziger advances are, in any meaningful sense, "new." As will be shown below, the overwhelming majority have been considered and rejected by the Court before, some as many as three or even four times. Accordingly, many of these arguments for dismissal are properly construed as motions to reconsider the Court's past orders, and the bar for reconsideration is rightfully a high one.[441] And second, much of the "evidence" on which Mr. Donziger relies--including news articles as well as other out-of-court statements and documents--is not really "evidence" at all, i.e., it is not part of the evidentiary record at trial. Indeed, almost all of it is hearsay--much of it unsworn to boot--which would not properly be considered for the truth of any matters asserted.[442] Consequently, the Court considers these arguments in light of the evidence actually admitted at trial.

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[441] See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked--matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.").

[442] See FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."); id. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.").

1. Disinterested Special Prosecutors

Mr. Donziger first asserts that the Special Prosecutors, who are private attorneys affiliated with the law firm Seward & Kissel LLP ("Seward") and, later, with Glavin PLLC, are not "disinterested" as required by Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987).[443] In Young, the Supreme Court, "exercising [its] supervisory power," held that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order."[444] Contrary to what Mr. Donziger's counsel implies,[445] Young did not hold that the Constitution requires the appointment of a disinterested prosecutor.[446]

To support his Young-based contention, Mr. Donziger points to the following: (1) the Special Prosecutors' failure to disclose immediately that Chevron had been a Seward client as recently as 2018;

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[443] (See Def. I/II/III Br. at 1.)

[444] Young, 481 U.S. at 790 (emphasis added).

[445] (See Def. I/II/III Br. at 13 ¶ 9 (arguing that Young "renders the entire proceeding a constitutional nullity").)

[446] The separate opinions filed by Justices Blackmun and Powell confirm that understanding. See Young, 481 U.S. at 814–15 (Blackmun, J., concurring) ("I would go further, however, and hold that the practice--federal or state--of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process."); see also id. at 826 (Powell, J., concurring in part and dissenting in part) ("Here, the error is not of constitutional dimension.").

(2) Seward's "substantial oil and gas industry practice" and other indirect ties to Chevron or the oil industry; (3) Ms. Glavin's service, along with the Court and more than 100 others (including Judges of this Court and of the Court of Appeals), on the Board of Directors of the Fordham Law Alumni Association ("FLAA Board"); and (4) Ms. Glavin's involvement as a government lawyer in an unrelated prosecution of Senator Ted Stevens.[447] None advances the ball.

Mr. Donziger has already asserted, at least twice before, that the Special Prosecutors are not disinterested.[448] The Court rejected that contention both times, finding that (1) Seward's former relationship with Chevron did not merit disqualification under Young because (a) Chevron was no longer Seward's client, (b) Seward's work for Chevron, which involved the preparation of corporate forms, was entirely unrelated to this case, and (c) Seward's work for Chevron was de minimis, amounting to only two matters billed at a total of about $30,000 (i.e., less than 0.1% of Seward's annual revenue);[449] and (2) "the theory

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[447] (See Def. I/II/III Br. at 1-2, 8 ¶¶ 5-6.)

[448] (See Motions on Behalf of Steven Donziger for Various Relief ("Def. Pretrial Motions"), dated Feb. 27, 2020 [dkt. no. 60] at 17-24; Vindictive Pros. MTD at 9-10.)

[449] (See Memorandum & Order ("Pretrial Motion Order"), dated [dkt. no. 68] at 16-20; see also Memorandum & Order ("Vindictive Pros. Order"), dated May 6, 2021 [dkt. no. 297] at 21 (refusing to reconsider that ruling in a repackaged form).) As for the timing of the disclosure, the Court found that "Mr. Donziger ha[d] not demonstrated any prejudice from the timing of the Seward/Chevron disclosure that would justify outright dismissal." (Pretrial Motion Order at 20 n.7.)

that Seward has a financial conflict based on its clients' ties to Chevron" and other energy companies was "wholly unconvincing" and "far too attenuated to justify relief."[450] Because Mr. Donziger identifies no material facts or legal authority that the Court overlooked, the Court adheres to its prior rulings.[451]

Although Mr. Donziger does not appear to have argued previously that Ms. Glavin's service on the FLAA Board somehow makes her "interested" under Young--he instead raised that fact in support of one of a flurry of motions to recuse the Court[452]—that service does not in any way relate to any "interest" arising from the underlying civil case.[453] Further, even though it is unclear if Mr. Donziger previously alleged past misconduct by Ms. Glavin while she was a senior government attorney, that allegation, again, has no nexus whatsoever to 11-CV-691 or to Chevron. Moreover, the only "evidence" Mr. Donziger marshals related to the Stevens case is out-of-court statements

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[450] (Pretrial Motion Order at 15-16; see also Vindictive Pros. Order at 21 (refusing to reconsider that ruling in a repackaged form).)

[451] See Shrader, 70 F.3d at 257.

[452] (See Notice of Motion ("Vindictive Pros. Notice"), dated Apr. 12, 2021 [dkt. no. 258] at 1.) The Court has already concluded that service on the FLAA Board "provide[d] no basis for [the Court's] recusal." (Vindictive Pros. Order at 25.)

[453] By striking contrast, the private attorneys appointed in Young were counsel for the party that was the beneficiary of the very court order the contemnor was accused of violating. See Young, 481 U.S. at 790.

and documents,[454] none of which the Court may consider for the truth of any matters asserted in them.[455] Because Mr. Donziger's theories have nothing to do with any purported connection between the Special Prosecutors and Chevron—the beneficiary of the court orders Mr. Donziger stands accused of violating--they do not merit disqualification under Young.[456]

Nonetheless, Mr. Donziger maintains that "the evidence produced at trial robustly validates the [Young] argument made by the defense 18 months ago seeking disqualification of the private prosecutors and at this point renders the entire proceeding a

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[454] Specifically, Mr. Donziger cites a special counsel's investigation report filed related to Stevens (the "Stevens Report") as well as a newspaper article. (See Def. I/II/III Br. at 8 n.7; see also Ex. B to June 25 Reply ("Stevens Report"), dated Mar. 15, 2012 [dkt. no. 335-3] (appending filing from Stevens to reply letter in support of motion to dismiss).) The Stevens Report identified failures on the part of the trial team to turn over exculpatory evidence to Senator Stevens under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois, 360 U.S. 264 (1959). (See Stevens Report at 497-503.) As the report recognizes, however, Ms. Glavin was the then-Principal Deputy Assistant Attorney General, not a member of the trial team. (See id. at 44.) Further, the report indicates that although Ms. Glavin "participated directly in Stevens" on several issues--such as reviewing filings--that participation did not extend to "discovery or Brady issues." (Id. at 101-02 (emphasis added).)

[455] See FED. R. EVID. 802.

[456] Again, that stands in glaring contrast to Young, where the appointed prosecutors were current counsel to the beneficiary of the order the contemnor was accused of violating. See Young, 481 U.S. at 790.

constitutional nullity."[457] Mr. Donziger maintains that Chevron is "financing and largely driving" his prosecution, pointing to (1) the time that several GDC lawyers, two of whom were witnesses at trial, spent with the Special Prosecutors preparing for trial and (2) the fact that one GDC witness (Mr. Thomson) testified that Chevron had paid for his travel to New York to meet with the Special Prosecutors,[458] testimony later corrected at trial to reflect that GDC had paid for his travel.[459] "Because the Court refused to disqualify the deeply 'interested' private prosecutors . . . before jeopardy attached," Mr. Donziger avers, "the only remedy available at this stage is to dismiss this case."[460]

Mr. Donziger's contention lands wide of its target for at least two reasons. First, in several ways, it is simply factually inaccurate. For example, the Special Prosecutors are paid for their work by the federal judiciary (not Chevron),[461] and this case was initiated

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[457] (Def. I/II/III Br. at 13 ¶ 9.)

[458] (Def. I/II/III Br. at 10-13 ¶ 8; see also June 3 Letter MTD at 2 ("We previously argued that the Court has shown a remarkable reluctance to investigate the facts of what was obviously a Chevron-orchestrated and Chevron-financed prosecution--the first corporate prosecution in U.S. history.").)

[459] (See supra notes 47-48 and accompanying text.)

[460] (Def. I/II/III Br. at 13 ¶ 9.)

[461] (See Order, dated Aug. 18, 2020 [dkt. no. 129] at 1.) For each paid invoice, the Special Prosecutors are required to disclose certain information, including the billing totals and hours expended. (See Order, dated July 22, 2020 [dkt. no 108] at 3.)

by Judge Kaplan (not Chevron) based on Mr. Donziger's refusal to comply with several court orders over a period of years.[462] Even more fundamentally, however, Mr. Donziger misapplies Young's rule. Young requires only a disinterested prosecutor,[463] not disinterested witnesses.[464] That makes sense. It is hardly uncommon for a witness to have some interest in the outcome of a case, and juries are routinely instructed that they may consider, among other things, a witness's interest, bias, or prejudice when evaluating a witness's testimony.[465] Potential bias or interest are proper topics for cross examination precisely so that the factfinder can properly assess credibility and truthfulness.[466] Mr. Donziger plainly availed himself of his right to cross-examine the GDC witnesses for potential bias or

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[462] (See Order to Show Cause at 1-10 ¶¶ 1-21.)

[463] Again, that requirement flows from the Supreme Court's exercise of its supervisory authority, not the Constitution. See Young, 481 U.S. at 790.

[464] See Young, 481 U.S. at 804 ("A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.").

[465] See, e.g., United States v. Brutus, 505 F.3d 80, 88 n.6 (2d Cir. 2007) (approving the Seventh Circuit's pattern instruction, which states that when evaluating testimony the jury may consider "any interest, bias, or prejudice the witness may have").

[466] See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986) ("[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").

interest at trial,[467] and the Court considered that evidence in evaluating the witnesses' credibility and the truthfulness of their testimony. But Mr. Donziger offers absolutely no legal authority--and the Court is aware of none--that would authorize him to impute to the Special Prosecutors any interest or bias that the GDC witnesses may have.

In short, the evidence adduced at trial does not require that the Special Prosecutors be disqualified under Young. And, as discussed above, the Court has already considered and rejected the other grounds Mr. Donziger claims evidence that the Special Prosecutors are not disinterested. The Court will not dismiss the criminal contempt charges on that basis.

2. Home Confinement

Second, Mr. Donziger asserts that his pretrial condition of home confinement is "unprecedented" and "is in and of itself punishment."[468] Since his initial appearance in August 2019, Mr. Donziger has sought to have the home confinement condition of his pretrial release eliminated or modified no fewer than five

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[467] (See Trial Tr. at 459:11-472:8 (cross-examination of Ms. Champion regarding, inter alia, her meetings with the Special Prosecutors and related topics); id. at 714:5-723:3 (cross-examination of Mr. Thomson regarding, inter alia, his meetings with the Special Prosecutors and related topics).)

[468] (Def. I/II/III Br. at 2 (emphasis omitted).)

times.[469] The Court rejected each of those efforts, finding that Mr. Donziger was a flight risk based, inter alia, on his extensive ties to Ecuador and the possibility that he faced imprisonment for the first time.[470] Mr. Donziger twice appealed those determinations to the Court of Appeals,[471] which unanimously affirmed this Court's orders.[472] Mr. Donziger identifies absolutely no legal authority--and, again, the Court is aware of none—that would require the Court to dismiss the contempt charges on the basis of Mr. Donziger's dispute about the twice-affirmed conditions of his pretrial release.

3. The Appointments Clause

Next, Mr. Donziger avers, for the second time, that the Special Prosecutors are not supervised by the

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[469] (See, e.g., Letter Motion, dated Nov. 4, 2019 [dkt. no. 30] at 1; Letter Motion, dated Dec. 3, 2019 [dkt. no. 39] at 1; Transcript of Telephone Conference ("May 18 Tr."), dated May 18, 2020 [dkt. no. 87] at 9:12-13; Letter Motion, dated May 20, 2020 [dkt. no. 77] at 1; Letter Motion, dated Dec. 17, 2020 [dkt. no. 227] at 1.)

[470] (See, e.g., Transcript, dated Aug. 6, 2019 [dkt. no. 18] at 27:6-24; Transcript of Oral Argument, dated Nov. 25, 2019 [dkt. no. 44] at 12:7-13:3; May 18 Tr. at 13:8-14:1; Order, dated May 29, 2020 [dkt. no. 82] at 1; Order, dated June 3, 2020 [dkt. no. 90] at 1-3; Order, dated Dec. 31, 2020 [dkt. no. 237] at 11-12.)

[471] (See Notice of Appeal, dated Dec. 4, 2019 [dkt. no. 46] at 1; Amended Notice of Appeal, dated June 9, 2020 [dkt. no. 92] at 1.)

[472] (See Mandate, dated Feb. 18, 2020 [dkt. no. 61] at 1; Mandate & Amended Summary Order, dated Apr. 26, 2021 [dkt. no. 307] at 6.)

Department of Justice ("DOJ").[473] On the first day of trial, Mr. Donziger's counsel moved to dismiss the contempt charges on that basis, asserting that the defense had "learned through a letter from the Department of Justice" that it "was declining to exercise any supervision over the prosecutor in this case."[474] In response, the Court instructed counsel that it would "accept your papers when you're ready," directed counsel to confer regarding a briefing schedule, and indicated that it would rule on the motion "when the briefs [we]re in."[475] Later that day, Mr. Donziger, through counsel, filed a three-page letter motion to dismiss, along with two exhibits.[476] Mr. Donziger's counsel did not, however, append or otherwise include the letter that he claimed to have received from the DOJ.[477]

On the record the next day, the Court informed Mr. Donziger and his counsel that it could not rule on the motion until the defense filed the letter that it

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[473] (See Def. I/II/III Br. at 2; see also June 3 Letter MTD at 1-2.)

[474] (Trial Tr. at 37:16-19.)

[475] (Trial Tr. at 37:22-25.)

[476] (See Motion to Dismiss, dated May 10, 2021 [dkt. no. 302].)

[477] The first exhibit was an April 2, 2021 letter from Mr. William W. Taylor to John. P. Carlin, Acting Deputy Attorney General, requesting that Mr. Carlin review Mr. Donziger's prosecution. (See Ex. A. to Motion to Dismiss, dated Apr. 2, 2021 [dkt. no. 302-1] at 21-22.) The second was the case caption from United States v. Cutler, 840 F. Supp. 959 (E.D.N.Y. 1994). (See Ex. B to Motion to Dismiss, dated Jan. 7., 1994 [dkt. no. 302-2] at 1.)

claimed to have received from the DOJ.[478] Mr. Donziger, through his counsel, filed a supposedly responsive document on May 13, 2021.[479] Only, the document was not a "letter" from the DOJ. Rather, it was an email message from John P. Carlin--sent to Mr. William Taylor, then forwarded to Mr. Donziger, and thereafter forwarded to Mr. Donziger's counsel--saying only that "the Department declines to intervene in the federal-court initiated contempt proceedings."[480] Contrary to Mr. Donziger's counsel's representation, that email does not state that the DOJ refused to exercise any authority over the Special Prosecutors or that it could not do so.[481]

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[478] (See Trial Tr. at 193:3-16 ("THE COURT: All right. Before we get started, Mr. Garbus, we have your motion based on the U.S. Department of Justice's notification. But the motion doesn't have the notification on it. MR. GARBUS: I believe we sent since then, I think, the documents late yesterday. And I think what the document is, is a letter from a lawyer in Washington to the U.S. Attorney. And then I believe there's a phone conversation. THE COURT: There is no letter from DOJ in the package. So I can't rule on it until I see what they say. MR. GARBUS: I understand that. THE COURT: All right. So this is being put aside until I receive whatever other documents you have. MR. GARBUS: Thank you.").)

[479] (See Declaration of Martin Garbus in Support and Supplement of Motion to Dismiss ("Garbus Decl."), dated May 12, 2021 [dkt. no. 303].)

[480] (Ex. C to Garbus Decl. ("Carlin Email"), dated May 7, 2021 [dkt. no. 303-1] at 1.)

[481] See In re Giuliani, 146 N.Y.S.3d 266, 269 (1st Dep't 2021) ("Under the Rules of Professional Conduct, the prohibition against false statements is broad and includes misleading statements as well as affirmatively false statements.").

On the record on May 17, 2021, the Court informed Mr. Donziger's counsel of what it saw as a "double hearsay" problem related to the email[482] and also noted that the email simply did not say that the Special Prosecutors were not subject to DOJ supervision.[483] Mr. Donziger's counsel responded by pointing to steps the defense had taken to acquire more information or to obtain discovery from the United States Attorney's Office for the Southern District of

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[482] (See, e.g., Trial Tr. at 850:25-851:6 ("First, the communication that you reference is not a formal memorandum or even a letter from the Department of Justice; it's an email message that appears to be from Mr. John P. Carlin, whom the Court understands to be the current acting deputy attorney general. But the message wasn't sent to you; it was sent to a Mr. William Taylor, who then forwarded it to Mr. Donziger. So in my view, this is a double hearsay problem."); id. at 852:1-6 ("Counsel, counsel, it doesn't matter what you have done. What matters is what was the result. And the reason I deferred consideration of your motion is that we did not have any direct admissible evidence of a policy or a decision by the DOJ. So far as I can see, we are still in that situation, because all we have is this double hearsay email.").)

[483] (See, e.g., Trial Tr. at 856:2-9 ("I don't understand how requests for discovery from the government rise to the level of constituting some kind of constitutional impediment here. I understood your original motion to be arguing that to the extent the Department of Justice said that it was not planning [sic] and would not exercise any supervisory authority over the prosecution in this case, that it might present a problem. Turns out that's not what it said."); id. at 856:24-857:3 ("And that's exactly my point, sir. To the extent that the DOJ has said that this prosecutor is wholly unsupervised, that they will take no action and they say they have no action, that's one thing. But that's not what any of these documents says.").)

New York ("USAO").[484] The Court informed informed Mr. Donziger's counsel that a request for discovery was not a substitute for actual evidence that the Special Prosecutors were not subject to supervision.[485] After adhering to its prior rulings regarding Mr. Donziger's not

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[484] (See, e.g., Trial Tr. at 851:17-20 ("After we left court, we did three things fundamentally at your request to try and get further information about this prosecution and about the things that are referred to in the Carlin letter."); id. at 852:23-853:7 ("We have tried since then to get testimony from the Department of Justice. We have tried to get testimony from the U.S. Attorney's Office to deal with that very letter. And that was the function of this motion. What we had done since we got that letter is all we could do. We made a number of constitutional arguments. You indicated repeatedly that we did not have the facts to support those arguments. We then made every attempt we could, and we will exchange and hand up today documentation from the U.S. Attorney's Office."); id. at 855:6-9 ("All right. To the extent I can discern after a quick read, it appears that your letter, Mr. Garbus, was essentially a request for discovery on various topics from the United States Attorney's office."); id. at 855:22-24 ("No, it's not. What it is, is about Mr. Bannon's interpretation of your rulings, which preclude him from giving me information."); id. at 856:13-15 ("We made that request for discovery. And if you look at Mr. Bannon's letter, you will see at page 3 how he interprets your ruling."); id. at 857:4-6 ("The way to find out the further information is to get information from the U.S. Attorney's Office and DOJ, and we have tried to do that.").)

[485] (See, e.g., Trial Tr. at 856:10-12 ("To the extent that there is something somewhere that says that, tell me now. A request for discovery is no substitute for that."); id. at 857:7-12 ("THE COURT: But we don't have it. MR. GARBUS: Pardon me? THE COURT: But we don't have it, so that's where we are. MR. GARBUS: We made a motion for discovery early on. THE COURT: It was already denied more than once.").)

being entitled to discovery,[486] the Court then denied the motion to dismiss, finding that Mr. Donziger's "moving papers ha[d] given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch."[487]

Undeterred, Mr. Donziger filed a second post-trial letter motion to dismiss the contempt charges on Appointments Clause grounds, relying heavily on the Supreme Court's recent decision in United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).[488] There, the Court determined that the appointment of Administrative Patent Judges ("APJs") to the Patent Trial and Appeal Board ("PTAB") was inconsistent with their being inferior officers under the Appointments Clause because Congress insulated APJs' patentability "decisions from review and their offices from removal."[489] Mr. Donziger avers that "[t]he same constitutional principles necessarily limit appointments under Fed. R. Crim. P. 42(a)(2)" and it therefore "follows that the appointment

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[486] (See Trial Tr. at 857:21-858:1 ("THE COURT: The requests for discovery which you rely on and which Mr. Bannon references were denied because the defense had not made an adequate showing of its entitlement to this discovery. MR. GARBUS: Yes. And we had -- THE COURT: I adhere to that ruling."); id. at 858:15-20 ("Mr. Garbus, you have the -- the defense has asked for this discovery more than once. I have denied it more than once as not being a proper request. To the extent that you are asking for reconsideration now, reconsideration is denied because you have not proffered any fact or law which the Court overlooked.").)

[487] (Trial Tr. at 858:22-859:1.)

[488] (See Appointments MTD at 1-4.)

[489] Arthrex, 141 S. Ct. at 1986.

of the private prosecutor here exceeded the district court's constitutional authority" meaning that "the prosecutor's actions pursuant to that appointment cannot stand."[490] Mr. Donziger further asserts that "[a] proper constitutional foundation is a question of this Court's subject-matter jurisdiction," and he accuses the Court of abdicating its duty to assure itself of its own jurisdiction.[491]

Mr. Donziger's Appointments Clause contention fails for myriad reasons, which the Court catalogues below.

First, Mr. Donziger's theory about subject-matter jurisdiction is simply wrong. Mr. Donziger's Appointments Clause challenge has absolutely nothing to do with subject-matter jurisdiction, which relates to this Court's power to adjudicate this case.[492] District courts "have original jurisdiction . . . of all offenses against the laws of the United States,"[493] and federal law gives federal courts the power to punish and adjudicate

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[490] (Appointments MTD at 2.)

[491] (Appointments MTD at 4.)

[492] See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (describing "subject-matter jurisdiction" as "the courts' statutory or constitutional power to adjudicate the case"); Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) ("A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.").

[493] 18 U.S.C. § 3231.

criminal contempts.[494] Mr. Donziger's Appointments Clause argument, which he raises as a defense to his prosecution for contempt, has no effect on the Court's power to adjudicate this case.[495]

Second, because Mr. Donziger's Appointments Clause claim is non-jurisdictional, Mr. Donziger waived or forfeited that claim by failing to raise it until the first day of trial. The Supreme Court instructs that "one who makes a timely challenge to the constitutional validity of the appointment of an officer

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[494] See 18 U.S.C. § 401. Even absent that statutory authority, the Supreme Court has long recognized that federal courts have the inherent authority to adjudicate contempts. See Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994) ("Courts thus have embraced an inherent contempt authority as a power necessary to the exercise of all others." (cleaned up)); Ex parte Robinson, 86 U.S. 505, 510 (1873) ("The power to punish for contempts is inherent in all courts . . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.").

[495] See Freytag v. Comm'r, 501 U.S. 868, 893 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review."). That conclusion is buttressed by the Court of Appeals' conclusion that an Appointments Clause challenge to an administrative officer's appointment may be forfeited if it is not raised in the relevant administrative proceedings. See Gonnella v. United States Sec. & Exch. Comm'n, 954 F.3d 536, 544 (2d Cir. 2020); see also Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) (observing that issues of subject-matter jurisdiction "can never be forfeited or waived").

who adjudicates his case is entitled to relief."[496] Here, any defect in the Special Prosecutors' appointment would have (or at the very least should have) been apparent from the outset of this case, i.e., from the moment the Special Prosecutors were appointed by Judge Kaplan on July 31, 2019. Federal Rule of Criminal Procedure Rule 12(b)(3) requires certain "defenses, objections, and requests" to "be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits."[497] Failure to do so Renders such a motion "untimely."[498] Yet, for reasons unknown, Mr. Donziger tarried for nearly two years before raising this issue, notwithstanding the Court-approved February 27, 2020 deadline for filing pretrial motions.[499] Because his Appointments Clause contention alleges "a defect in instituting the prosecution,"[500] Mr. Donziger waived or forfeited that

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[496] Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (quotation marks omitted) (emphasis added).

[497] FED. R. CRIM. P. 12(b)(3).

[498] FED. R. CRIM. P. 12(c)(3).

[499] (See Memo Endorsement, dated Feb. 25, 2020 [dkt. no. 59] at 1.)

[500] FED. R. CRIM. P. 12(b)(3)(A); see also Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362 (1963) (finding motion untimely despite motion not being among those enumerated in Rule 12).

challenge by failing timely to raise it.[501] Third, even if Mr. Donziger did not waive or forfeit his Appointments Clause challenge, he has never suggested that the Special Prosecutors are "principal (noninferior) officers of the United States" who must be appointed by the President with "Advice and Consent of the Senate."[502] To the contrary, Mr. Donziger explicitly recognizes that the Special Prosecutors are so-called "inferior officers."[503] Unlike principal officers, "[i]nferior officers Congress may allow to be appointed by the President

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[501] See United States v. Suescun, 237 F.3d 1284, 1287 (11th Cir. 2001) ; see also Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). Moreover, had the Appointments Clause issue been raised timely, it was "capable of determination without the trial of the general issue (whether he was guilty of the charged offenses)." Suescun, 237 F.3d at 1286.

[502] Edmond v. United States, 520 U.S. 651, 659 (1997); see also U.S. Const., Art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .").

[503] (Appointments MTD at 2 ("Ms. Glavin was appointed as . . . a free-floating 'inferior officer' exercising federal executive power without any of the constraints of supervision by the President or a 'superior officer' nominated by the President and confirmed by the Senate.").)

alone, by the heads of departments, or by the Judiciary."[504] That is precisely what happened in this case. Federal Rule of Criminal Procedure 42 ("Rule 42") authorized--in fact, mandated--Judge Kaplan to appoint an attorney to prosecute the criminal contempt charges against Mr. Donziger.[505]

The Supreme Court has stressed the importance of a federal court's power to appoint a private attorney to prosecute a contempt:

> Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be mere boards of arbitration whose judgments and decrees would be only advisory.[506]

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[504] Morrison v. Olson, 487 U.S. 654, 670 (1988); see also U.S. Const., Art. II, § 2, cl. 2 ("[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[505] See FED. R. CRIM P. 42(a)(2) ("The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.").

[506] Young, 481 U.S. at 796 (quotation marks omitted) (emphasis added). Mr. Donziger's motion to dismiss does not even mention Young, which is somewhat surprising given that he cites that case liberally in his post-trial briefing for other propositions that he asserts support his view of this case. (See, e.g., Def. I/II/III Br. at 14 ¶ 9.)

Arthrex did not purport to call Young into question in any way,[507] and the Supreme Court has repeatedly instructed lower courts to leave to it "the prerogative of overruling its own decisions."[508] Judge Kaplan's appointment of the Special Prosecutors was constitutionally permissible.[509]

Fourth, Mr. Donziger's suggestion that the Special Prosecutors are "free-floating"--i.e., not subject to "supervision" by the DOJ--is inconsistent with the relevant legal framework established by Congress and the Supreme Court. As concededly inferior officers, the Special Prosecutors' work must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[510] Here, that supervisory authority logically can rest with only two sources: (1) Judge Kaplan or (2) the Attorney General. Rule 42 does not provide the answer, and the Supreme Court has never definitively resolved the question either. But, for several reasons, the Court finds it evident that the

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[507] Arthrex does not cite or even mention Young.

[508] Agostini v. Felton, 521 U.S. 203, 237 (1997). Even so, Mr. Donziger has never questioned Young's foundation or argued that it should be overruled, not even to preserve that issue for any possible appeal.

[509] That appointment was expressly compelled by Rule 42(a)(2), which was promulgated by the Supreme Court and adopted by Congress pursuant to The Rules Enabling Act, 28 U.S.C. § 2072. To the extent that Mr. Donziger views his challenge to be directed to the face of that Rule, and to the extent that he has not waived it already, he should direct his argument to that Court.

[510] Edmond, 520 U.S. at 663.

Special Prosecutors can be supervised, in the constitutional sense, by the Attorney General.

In Rule 42, Congress authorized only a method of appointment for inferior officers. It did not shift an entire category of criminal prosecutions from the Executive Branch to the federal judiciary. Nor could it. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both."[511] For that reason, "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated."[512] Federal law provides that, "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General,"[513] and "[a] criminal contempt prosecution in federal court, however styled," is a case "in which the United States is interested."[514] Although the Special Prosecutors may have been appointed by Judge Kaplan, they are exercising Executive Power and are subject to the Attorney General's control and supervision.

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[511] Bloom v. Illinois, 391 U.S. 194, 201 (1968).

[512] Young, 481 U.S. at 804.

[513] 28 U.S.C. § 516.

[514] United States v. Providence J. Co., 485 U.S. 693, 708 n.11 (1988); see also id. at 701 ("Congress is familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the 'interest of the United States.'").

The Appointments Clause "admits of no limitation on interbranch appointments," and Congress retains "significant discretion to determine whether it is 'proper' to vest the appointment of . . . executive officials in the 'courts of Law.'"[515] Such a system of appointment by the Judiciary but oversight by the Executive Branch is hardly foreign to our system of constitutional governance. Consider, for example, that federal law authorizes district courts, when confronted with a vacancy atop the local United States Attorney's Office, to appoint an interim U.S. Attorney until the vacancy is filled.[516] Although that appointment would be made by the federal judiciary, no one would reasonably suggest that the interim U.S. Attorney would operate free from control or influence by the Attorney General.[517] So too here. Rule 42 provides no basis to suggest that the same principle does not hold true in the context of private attorneys appointed to prosecute criminal contempt charges.

The Supreme Court's decisions in Young and Providence Journal are not to the contrary. Although there is some language in those cases that seemingly equates the appointment of a special prosecutor

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[515] Morrison, 487 U.S. at 673

[516] See 28 U.S.C. § 546(d).

[517] (See Appointments Reply at 3 ("[S]urely no one would claim that such a judicially appointed United States Attorney was not part of the executive branch subject to the supervision requirements reiterated in Arthrex.").)

with judicial prosecution,[518] that language is dicta.[519] Those cases did not present the "supervision" argument that Mr. Donziger advances here. But even so, those cases also contain language that suggests that what the Supreme Court thought critical was federal courts' authority to initiate criminal contempt proceedings, not to prosecute them.[520] For example, Young recognized that, while a federal court's power to appoint a private attorney to prosecute contempt "satisfies the need for an independent means of self-protection,"[521] the appointed prosecutor nevertheless "exercises considerable discretion in matters" that are "critical to

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[518] See, e.g., Providence J. Co., 485 U.S. at 701–02 ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." (quoting Young, 481 U.S. at 796)).

[519] Dicta, which are statements in judicial opinions that are not necessary to support the judgment reached, are not binding on lower courts. That principle has ancient roots. See Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[520] See, e.g., Young, 481 U.S. at 796 ("Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated.").

[521] Young, 481 U.S. at 796.

the conduct of a prosecution . . . outside the supervision of the court."[522]

The following example illustrates the point well. Assume for a moment that the USAO had accepted Judge Kaplan's request to prosecute this case. The United States Attorney and her deputies are unquestionably subject to the Attorney General's supervision and control.[523] By accepting Judge Kaplan's referral, Rule 42 would not thereby have shifted control over the USAO's decisions in prosecuting this matter--including trial strategy, etc.--to Judge Kaplan. The Court sees no principled reason why the USAO's declining Judge Kaplan's request should alter that

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[522] Young, 481 U.S. at 807 (emphasis added). Those matters could include "determination of which persons should be targets of investigation, what methods of investigations should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity." Id.

[523] See In re Persico, 522 F.2d 41, 54 (2d Cir. 1975) ("[The Attorney General] has supervision of all litigation in which the United States is a party and is commanded to 'direct all United States Attorneys, assistant United States Attorneys, and special attorneys . . . in the discharge of their respective duties.'" (quoting 28 U.S.C. § 519)); see also 28 U.S.C. § 518(b) ("When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.").

framework.[524] To the contrary, recognizing that the DOJ and Attorney General have a role to play in criminal contempt prosecutions provides an important check on federal courts' contempt power, "a potent weapon"[525] that can in certain circumstances be "liable to abuse."[526] That is especially important because "the United States Code itself contemplates that a Judge will preside over a criminal contempt case in which he filed the charge."[527]

With the understanding that the Constitution affords the Executive Branch a crucial role in the prosecution of criminal contempt, it is patent that Mr. Donziger's case is different-in-kind from Arthrex. In Arthrex, the governing statutory framework explicitly restricted both (1) review of the APJs' decisions and (2) their removal by officials accountable to the President.[528] Rule 42, of course, provides no such limitations; it discusses only the process for

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[524] The USAO "respectfully decline[d] on the ground that the matter would require resources that we do not readily have available." (Order of Appointment, dated July 31, 2019 [dkt. no. 2277 in 11-CV-691] at 1.) Contrary to what Mr. Donziger implies, (see, e.g., Def. I/II/III Br. at 3-4 ¶ 1 & n.2), the USAO expressed no view on the merits of the criminal contempt charges.

[525] Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967).

[526] Bloom, 391 U.S. at 202.

[527] United States v. Brennan, 395 F.3d 59, 76 (2d Cir. 2005).

[528] See Arthrex, 141 S. Ct. at 1988.

appointment.[529] The Court is aware of no legal rule that would in any way prevent the DOJ or the USAO from reviewing the Special Prosecutors' decisions or removing them from office. In that sense, the typical Executive Branch baseline remains in place. The email on which Mr. Donziger hangs his entire Appointments Clause theory--which, again, states only that "the Department decline[d] to intervene in the federal-court initiated contempt proceedings"--does not even put a dent in the governing legal scheme.[530]

Fifth, Mr. Donziger's assertion that this prosecution is constitutionally infirm because the DOJ has not, in fact, actively supervised the Special Prosecutors is meritless.[531] As the Supreme Court made clear mere weeks ago, a superior officer "need not review every decision of" an inferior officer.[532] That is entirely sensible. To require supervision by a principal officer of all decisions by line prosecutors would grind

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[529] See FED. R. CRIM. P. 42(a)(2) ("The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.").

[530] (Carlin Email at 1.)

[531] (See Appointments MTD at 2-3 ("To the extent that Ms. Glavin's appointment could have been constitutionally mitigated by active supervision of the Department of Justice, Ms. Glavin never sought to cure the constitutional infirmity discussed herein and it appears from all the facts that both the Department of Justice and the U.S. Attorney for the Southern District of New York have refused . . . to join Ms. Glavin's prosecutorial crusade.").)

[532] Arthrex, 141 S. Ct. at 1988.

the DOJ to a screeching halt. Instead, "what matters is that [a superior officer] have the discretion to review decisions" by the inferior officer.[533] In the Appointments Clause context, the standard is "cannot," not "did not." As set forth above, Rule 42 does not, in any way, limit the Attorney General's discretion to review the Special Prosecutors' decisions or remove them from their posts. The fact that the DOJ or USAO may not have supervised the Special Prosecutors to Mr. Donziger's satisfaction--or the possibility that DOJ's supervision is simply not visible to Mr. Donziger--is of no moment.

For these reasons, the Court concludes that Mr. Donziger's post-trial brief as well as the June 3 and June 23 letter motions to dismiss have not raised a factual or legal basis sufficient to convince the Court that it reached an erroneous conclusion when denying Mr. Donziger's motion to dismiss at trial.[534] Accordingly, the Court adheres to its prior ruling, and Mr. Donziger's post-trial letter motions to dismiss are denied.

4. Various Discovery Requests

Continuing on, Mr. Donziger takes issue with the Court's denying him various forms of discovery related to, among other things: (1) the Special Prosecutors' communications, if any, with Judge Kaplan; (2) what Mr. Donziger terms as Judge Kaplan's "likely" contacts and communications with the Court; (3) other supposed

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[533] Arthrex, 141 S. Ct. at 1988 (emphasis added).

[534] See Shrader, 70 F.3d at 257.

interactions among the Court, Judge Kaplan, the Special Prosecutors, GDC, and others; (4) the origins of this case, including how the case arrived before the Court and Judge Kaplan's written advice to the Assignment Committee; (5) Judge Kaplan's appointment of the Special Prosecutors; (6) the Special Prosecutors' relationship to Chevron; and (7) the USAO's declining to prosecute this case.[535] In one of his post-trial letter motions to dismiss, Mr. Donziger even goes so far as to accuse the Court, without any factual citation, of suppressing facts and "knowingly participating, joining in, creating, and permitting an unconstitutional conviction for the benefit of Chevron."[536]

The Court has done no such thing. Mr. Donziger has made several previous requests for a wide variety of discovery, including related to many (or all) of the topics above.[537] The Court has repeatedly rejected those

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[535] (Def. I/II/II Br. at 2; see also June 3 Letter MTD at 1-2.) Indeed, in his reply, Mr. Donziger catalogues dozens of questions, the answers to which he claims are critically important. (See June 25 Reply at 6-9.) Tellingly, however, Mr. Donziger cites almost no legal authority to explain why he is entitled to that discovery.

[536] (June 3 Letter MTD at 2.) Again, In re Giuliani, 146 N.Y.S.3d at 269, might apply.

[537] (See, e.g., Letter, dated Dec. 30, 2019 [dkt. no. 49] at 1-2 (seeking discovery related to Seward's ties to Chevron and the oil industry as well as the Special Prosecutors' contacts with Judge Kaplan); Pretrial Motions at 16, 33-37 (seeking information regarding how this case arrived before the Court as well as communications between the Special Prosecutors and GDC attorneys); Letter, dated Aug. 21, 2021 [dkt. no. 131] (seeking

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requests, finding that Mr. Donziger had no legal entitlement to discovery.[538] Those rulings recognized that "federal criminal discovery is far more limited

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discovery related to communications between the Special Prosecutors and Judge Kaplan); Vindictive Pros. MTD at 10-11 (seeking unspecified discovery in aid of claims of vindictive and selective prosecution); Letter, dated May 5, 2021 [dkt. no. 292] at 1 (seeking wide-ranging discovery related to past criminal contempt prosecutions in this district, records from the U.S. Attorney's Office and GDC, information from former U.S. Attorney Geoffrey Berman, and billing and fee information from Seward).) Mr. Donziger also served five subpoenas on GDC and four of its partners seeking wide-ranging discovery. (See Subpoena of Gibson Dunn, dated Oct. 15, 2020 [dkt. no. 283-1]; Subpoena of Randy Mastro, dated Oct. 15, 2020 [dkt. no. 283-2]; Subpoena of Andrea Neuman, dated Oct. 15, 2020 [dkt. no. 283-3]; Subpoena of William Thompson, dated Oct. 15, 2020 [dkt. no. 283-4]; Subpoena of Anne Champion, dated Oct. 15, 2020 [dkt. no. 283-5].)

[538] (See, e.g., Transcript of Oral Argument, dated Jan. 6, 2020 [dkt. no. 52] at 18:13-23 ("With respect to Mr. Frisch's request for additional disclosure, in my view the items that he has set out at Nos. 1 and 2 on page 2 of his January 5 letter are way too attenuated to require any additional disclosure. . . . With respect to contacts with Judge Kaplan, I am satisfied with the prosecutor's representations with respect to that."); Pretrial Motion Order at 12 n.3 (denying Mr. Donziger's request that the Court "'disclose how Judge Kaplan transferred [this] case and what information was relayed in doing so" because "there is no rule of law that entitles a defendant to serve discovery demands on the presiding judge"); id. at 24 ("Mr. Donziger's speculation that the universe is conspiring against him is not a basis for compelling disclosure."); Order ("Discovery Order"), dated Aug. 28, 2020 [dkt. no. 150] at 1 ("There is no provision permitting the disclosure requested by Mr. Donziger, and he cites to none."); Vindictive Pros. Order at 24 ("Indeed, Mr. Donziger's moving papers point to absolutely nothing--only innuendo and conjecture--that would entitle him to

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than federal civil discovery."[539] Under those rules, Mr.Donziger "is only entitled to disclosure of statements expressly authorized by Rule 16 or otherwise discoverable as exculpatory under Brady, or as impeaching under 18 U.S.C. § 3500."[540] The Court has already reminded Mr. Donziger and his counsel of those legal standards at least three times.[541] Yet, Mr. Donziger's post-trial brief and letter motions have not offered any legal rule applicable in criminal cases--not one--that would entitle Mr. Donziger to the vast swaths of discovery he seeks. The mere fact that Mr. Donziger may very much like to obtain information about a wide variety of topics does not change the governing legal rules. Because Mr. Donziger has not identified any fact

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the vast swath of discovery that he seeks."); Memorandum & Order ("Subpoena Order"), dated May 9, 2021 [dkt. no. 301] at 24-25 ("In short, the lion's share of the Subpoenas' requests are paradigmatic 'fishing expeditions,' and for some Mr. Donziger has brought especially heavy tackle. But because Nixon makes clear that Rule 17(c) cannot be put to that purpose, the Court will not allow Mr. Donziger to use the Subpoenas to end-run around the rules governing discovery in criminal cases." (citation omitted)).)

[539] United States v. Sampson, 898 F.3d 270, 280 (2d Cir. 2018).

[540] United States v. Souza, No. 06-CR-806 (SLT), 2008 WL 753736, at *2 (E.D.N.Y. Mar. 19, 2008); see also United States v. Miranda, 526 F.2d 1319, 1324 (2d Cir. 1975) ("In a criminal case, the Government plainly has the obligation to make available to the defense evidentiary material in its possession which is disclosable under the due process safeguards of Brady v. Maryland, or the requirements of Fed. R. Crim. P. 16 or the Jencks Act." (citations omitted)).

[541] (See, e.g., Pretrial Motion Order at 24; Discovery Order at 1; Subpoena Order at 25 n.12.)

or legal authority that the Court overlooked in its prior discovery orders, the Court adheres to its prior rulings.[542]

5. Judge Kaplan's Alleged Animosity

Mr. Donziger maintains that Judge Kaplan "has expressed disdain for Mr. Donziger and praise for Chevron," which necessitates dismissal of the charges.[543] Less than a month before trial, Mr. Donziger raised that same argument in a motion to dismiss on the grounds of vindictive and selective prosecution.[544] That motion pointed to many of the same news articles and other out-of-court statements by attorneys--which have not been admitted into evidence and which are obviously hearsay statements that cannot be considered for their truth[545]--that Mr. Donziger now relies upon in his post- trial briefing.[546] The Court rejected his argument, finding that

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[542] See Shrader, 70 F.3d at 257.

[543] (Def. I/II/III Br. at 2; see also id. at 5 ¶ 2 ("Judge Kaplan, who initiated this proceeding after the regular Federal prosecutor refused to prosecute Mr. Donziger, has maintained a hostile attitude toward Mr. Donziger for years. Irrespective of whether the hostility is factually-grounded or derived from impressions internal or external to the legal matters over which he presided, Judge Kaplan's hostility itself is plain and has been evident to numerous independent observers.").)

[544] (See Vindictive Pros. Notice at 1; see also Vindictive Pros. MTD at 5-7 (outlining what Mr. Donziger maintained was Judge Kaplan's animus towards him).)

[545] See FED. R. EVID. 802.

[546] (Compare Def. I/II/III Br. at 5 n.4 (citing, among other things, two news articles and a statement by Mr. Donziger's former counsel) with Vindictive Pros. MTD at 5, 6 nn.1-2 (citing that same statement and those same articles).)

Mr. Donziger's "assertions of vindictiveness and selectivity" condensed simply "to his disagreement with several of Judge Kaplan's decisions (or comments) in the underlying civil proceedings."[547] Because Mr. Donziger points to no legal authority or facts supported by admissible evidence that the Court overlooked in its order denying his motion to dismiss on the grounds of vindictive or selective prosecution, the Court adheres to that prior ruling.[548]

Mr. Donziger also claims that Judge Kaplan's refusal to recuse himself from the case warrants dismissal.[549] But, as the Court has already held at least once, Judge Kaplan was under no requirement to recuse himself from this case because Rule 42 only mandates recusal where the "contempt involves disrespect or criticism of a judge,"[550] not where "the charges flow from an allegedly willful disobedience of court orders."[551] Again, because Mr. Donziger points to no facts or law that the Court overlooked in reaching that conclusion, the Court adheres to its prior ruling.[552]

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[547] (Vindictive Pros. Order at 17.)

[548] See Shrader, 70 F.3d at 257.

[549] (See Def. I/II/III Br. at 2.)

[550] (Pretrial Motion Order at 11 (quoting FED. R. CRIM. P. 42(a)(3)).)

[551] (Pretrial Motion Order at 11 (citing Goldfine v. United States, 268 F.2d 941, 947 (1st Cir. 1959)).)

[552] See Shrader, 70 F.3d at 257.

6. The "Uniqueness" of This Case

Penultimately, Mr. Donziger suggests that he "is the only lawyer in U.S. history to be prosecuted for criminal contempt after inviting the court to impose a civil contempt so he could have a direct appeal of a discovery order," a path he claims, without factual citation, that "[h]undreds" or "even thousands of lawyers" take each year.[553] Mr. Donziger also posits that he is "the only lawyer in U.S. history to be charged with criminal contempt after completely complying with a civil order upon which it is based" and that this case is the first criminal prosecution by a private prosecutor in the history of the Southern District of New York.[554]

Mr. Donziger fails to offer any legal rule that so much as suggests that the supposed "uniqueness" of this case somehow provides a ground for dismissal. The Court is aware of no such authority either. Additionally, the key assumption undergirding Mr. Donziger's theory--that thousands of contemnors annually invite civil contempt to obtain review of challenged discovery orders--runs counter to binding precedent from the Court of Appeals. That authority recognizes that, in the mine run of disputes involving discovery orders, merely going into civil contempt is not enough to obtain appellate review. That is so because "a party to a pending proceeding"--as Mr. Donziger was in the civil case before Judge Kaplan--"may not appeal

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[553] (Def. I/II/III Br. at 3; see also June 3 Letter MTD at 2 ("Prior to trial, the defense made allegations that there has never been a case like this in the entire history of the United States." (emphasis omitted)).)

[554] (Def. I/II/III Br. at 3.)

from an order of civil contempt except as part of an appeal from a final judgment."[555] By contrast, only an "order of criminal contempt" is immediately appealable.[556] In other words, the only way for a party to obtain pre-compliance appellate review of an ordinary discovery order is to suffer a criminal contempt sanction.

In short, Mr. Donziger is not entitled to dismissal of the criminal contempt charges based on the putative "uniqueness" of this case.

7. The Court's Recusal

Finally, in his June 3 Letter Motion, Mr. Donziger again requests that the Court recuse itself from this case, primarily based (1) on how the case arrived before the Court, (2) the Court's supposed "personal involvement" with the Special Prosecutors (and presumably Ms. Glavin in particular), and (3) its rulings denying Mr. Donziger access to various forms of discovery.[557] The Court already has entertained at least four such requests for its recusal, several of which raised these very arguments.[558] For three reasons, the Court will not reconsider its prior recusal rulings.

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[555] United States v. Johnson, 801 F.2d 597, 599 (2d Cir. 1986).

[556] Dinler v. City of New York (In re City of New York), 607 F.3d 923, 934 (2d Cir. 2010).

[557] (See June 3 Letter MTD at 1-2.)

[558] (See Def. Pretrial Motions at 15-16; Letter Motion to Recuse Judge Preska, dated Sept. 14, 2020 [dkt. no. 171]; Vindictive Pros. Notice at 1; Letter Motion, dated Apr. 19, 2021 [dkt. no 267] at 3.)

First, the Court already rejected how Mr. Donziger's case came before the Court as a basis for recusal for two reasons: (1) the S.D.N.Y. Rules for the Division of Business Among District Judges ("RDB") do not vest any rights in litigants; and (2) there was nothing improper about Judge Kaplan's transferring this case to the Court under RDB 14.[559] Second, the Court already rejected--citing both Canon 4 of the Code of Conduct of United States Judges and several cases--Mr. Donziger's argument that its involvement with the FLAA Board, of which Ms. Glavin is also one of more than 100 members, provides any basis whatsoever for recusal.[560] And third, although Mr. Donziger accuses the Court of suppressing facts critical to his defense,[561] the Court merely has refused, as has been shown above, to sanction Mr. Donziger's proposed discovery fishing expedition because he has no legal entitlement to that discovery. In that sense, Mr. Donziger's last contention merely condenses to his disagreement with several of the Court's rulings, which the Court has already found is not a proper basis for recusal.[562]

Like Mr. Donziger's other "structural" arguments, Mr. Donziger has not pointed to any facts or legal authority the Court overlooked in its prior recusal decisions such

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[559] (See Pretrial Motion Order at 10-12 & n.3.)

[560] (See Vindictive Pros. Order at 25.)

[561] (June 3 Letter MTD at 2.)

[562] (See 9/16/20 Order at 2 ("It is black letter law, however, that a party's unhappiness with the judge's decisions is not a basis for recusal.").)

that reconsideration is warranted.[563] The Court will not give Mr. Donziger a second (or third or fourth or fifth) bite at this apple.

8. Conclusion

In sum, the Court has already considered, and rejected, all of these arguments. The actual evidence received at trial does not convince the Court that reconsideration of its prior rulings is warranted. The Court, of course, understands that Mr. Donziger disagrees with its conclusions, but that is insufficient to merit reconsideration.[564] Mr. Donziger may pick any bone he likes with the Court of Appeals. To the extent any of Mr. Donziger's "structural" arguments has not been raised and rejected before, the Court finds them to be meritless. Accordingly, the Court will not dismiss the contempt charges against Mr. Donziger, and Mr. Donziger's two post-trial letter motions to dismiss the charges are denied.

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[563] See Shrader, 70 F.3d at 257.

[564] See United States v. Lisi, No. 15 Cr. 457 (KPF), 2020 WL 1331955, at *2 (S.D.N.Y. Mar. 23, 2020) ("The Second Circuit has made clear that a motion for reconsideration 'is not a vehicle for relitigating old issues, presenting the case under new theories . . . or otherwise taking a second bite at the apple.'" (quoting Analytical Survs., Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012)).

b. Collateral Bar Rule

Next, the Court addresses Mr. Donziger's argument that the Court improperly applied the collateral bar rule at trial.

1. Legal Standards

The collateral bar rule flows from the "basic proposition that all orders and judgments of courts must be complied with promptly."[565] The Supreme Court has long established a clear baseline rule regarding litigants' obligations to obey court orders:

> If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.[566]

Based on those principles, "[i]t is well established that a defendant generally is barred from collaterally

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[565] Maness v. Meyers, 419 U.S. 449, 458 (1975).

[566] Maness, 419 U.S. at 458 (emphasis added).

attacking the constitutionality of a court order as a defense to his criminal contempt prosecution."[567] Instead, the proper course of action is to "move to vacate or modify the order, or seek relief in" the Court of Appeals.[568]

The Court of Appeals has recognized two exceptions to the collateral bar rule: a contemnor may challenge the legality of the disobeyed order in the ensuing criminal contempt case if (1) the order was "transparently invalid" or (2) it "exceeded the district court's jurisdiction."[569] The "transparently invalid" exception is exceedingly narrow, encompassing only those orders that are "so far in excess of the court's authority that it had no right to expect compliance."[570] Moreover, to avail oneself of that exception, the contemnor "must make some good faith effort to seek emergency relief from the appellate court or show compelling circumstances, such as a need to act immediately, excusing the decision not to seek some kind of emergency relief."[571]

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[567] Terry, 17 F.3d at 579; see also Walker, 388 U.S. at 320 ("[N]o person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree. . . .").

[568] United States v. Cutler, 58 F.3d 825, 832 (2d Cir. 1995).

[569] Cutler, 58 F.3d at 832.

[570] Terry, 17 F.3d at 579 (cleaned up).

[571] Cutler, 58 F.3d at 832 (cleaned up).

In addition to these exceptions, United States v. Ryan appears to endorse an avenue to obtain pre-compliance review of an order to produce information--most quintessentially, a subpoena duces tecum--whereby a litigant "may refuse to comply" with a court order and litigate the lawfulness of that order "in the event that contempt or similar proceedings are brought against him."[572] Other circuits have relied on Ryan and its progeny (most notably Maness) to fashion exceptions to the collateral bar rule for orders where (1) the contemnor had no "adequate and effective remedies" for obtaining "orderly review of the challenged ruling" or (2) complying with an order would "require an irretrievable surrender of constitutional guarantees" or other protected rights or privileges.[573] Although the Second

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[572] United States v. Ryan, 402 U.S. 530, 532 (1971); see also Maness, 419 U.S. at 460 ("We have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." (alteration omitted)).

[573] E.g., In re Novak, 932 F.2d 1397, 1401 & n.7 (11th Cir. 1991) (citing, inter alia, Maness, 419 U.S. at 460); United States v. Dickinson, 465 F.2d 496, 511 (5th Cir. 1972)). Other courts have expressly declined to extend Maness beyond its facts. See In re Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 728–29 (9th Cir. 1989) (refusing to extend Maness, a Fifth Amendment self-incrimination case, to a contempt case where the order to be challenged allegedly violated the Fourth Amendment); see also Fid. Mortg. Invs. v. Camelia Builders, Inc., 550 F.2d 47, 58 (2d Cir. 1976) ("[T]he Maness decision specifically affirmed that

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Circuit does not appear expressly to have adopted or rejected those exceptions, Ryan distinguished Walker--the Supreme Court's seminal case on the collateral bar rule--because appellate review of the claims in Walker was available "at an earlier stage" of the litigation.[574]

2. Discussion

Before trial, the Special Prosecutors moved in limine to preclude Mr. Donziger from collaterally attacking the validity and lawfulness of Judge Kaplan's orders underlying the criminal contempt charges.[575] Crediting Mr. Donziger's position advanced in his opposition to the motion,[576] the Court "agree[d] that the appropriate course [wa]s to defer ruling on the

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lawyers can be cited for contempt for advising clients to disregard court orders. The Maness decision does carve out an exception to this rule in certain cases raising fifth amendment issues. However, there are no such fifth amendment interests involved in this case and, thus, Attorney Hubbard has no basis for resisting the contempt citation on the authority of Maness." (citation omitted)).

[574] Ryan, 402 U.S. at 532 n.4 (emphasis added); see also Walker, 388 U.S. at 320 ("[N]o person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree. . . .").

[575] (See Government's Motions in Limine, dated July 15, 2021 [dkt. no. 105] at 22-25.)

[576] (See Opposition to Motion in Limine ("Limine Opp."), dated Aug. 8, 2020 [dkt. no. 110] at 5 ("The exceptions to the collateral bar rule are largely fact-based and dependent on factual context. . . . The prosecution's motion should be denied without prejudice to its ability to raise these arguments at trial.").)

collateral bar issue until trial, when the Court w[ould] have the benefit of a fuller factual record."[577]

In his opposition to the Special Prosecutors' motion in limine, Mr. Donziger indicated that "[b]efore or during trial [he] w[ould] present a trial brief outlining his view of the collateral bar doctrine and how it does and does not apply to the facts of his case."[578] On April 30, 2021, the Court directed Mr. Donziger's counsel, to the extent Mr. Donziger still wished to file such a brief, to "inform the Court no later than May 3 at noon"--in advance of the May 10 trial date--"when such briefing w[ould] be filed."[579] Mr. Donziger never informed the Court that he intended to file a brief, and he did not file or request to file a brief either before trial or at trial. In the interim, on March 4, 2021, the Court of Appeals disposed of Mr. Donziger's appeals of several of Judge Kaplan's orders, including the Contempt Order.[580] Because Mr. Donziger failed to challenge the Protocol or the Passport Order in that appeal, and thus they were not altered by the Court of Appeals, the entire collateral bar argument is largely academic.

In his post-trial briefing, Mr. Donziger makes two collateral-bar-related arguments: (1) the Court improperly applied the collateral bar rule at trial; and (2) if the Court had not applied the collateral bar rule,

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[577] (Order, dated Oct. 24, 2020 [dkt. no. 191] at 2.)

[578] (Limine Opp. At 10.)

[579] (Order, dated Apr. 30, 2021 [dkt. no. 276] at 1.)

[580] See Donziger, 990 F.3d at 192 (disposing of Appeal Nos. 18-855, 18-2191, and 19-1584).

the evidence that would have been admitted would have shown that the Protocol and the Passport Order were unlawful.[581] The Court will address each in turn.

A. Application of the Collateral Bar Rule

Mr. Donziger avers that the Court erroneously imposed the collateral bar rule to limit cross-examination related to facts surrounding his decision to pursue appellate review "by way of 'contempt jurisdiction' (or token or symbolic contempt)."[582] For that reason, that argument necessarily applies only to Counts I, II, and III.[583] In order to challenge the validity of the orders underlying those counts--i.e., the Protocol and the Passport Order--Mr. Donziger must show that one of the exceptions to the collateral bar rule applies. Although Mr. Donziger does not explain in his post-trial briefing exactly what he believes was erroneous about the Court's application of the collateral bar rule, Mr. Donziger asserted three primary collateral-bar-rule arguments at trial: (1) Mr. Donziger's pending appeal of the Contempt Order relieved him of his obligation to

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[581] (See Def. I/II/III Br. at 18-23 ¶ 14.)

[582] (Def. I/II/III Br. at 18 ¶ 14.)

[583] Counts IV, V, and VI relate to potential contempt of the RICO Judgment, which was affirmed in full by the Court of Appeals. (See GX 1914 at 127 ("We have considered all of the arguments of Donziger and the LAP Representatives on this appeal and have found in them no basis for dismissal or reversal.").) The Supreme Court denied Mr. Donziger's petition for certiorari. See Donziger, 137 S. Ct. at 2268.

comply with the Protocol and the Passport Order;[584] (2) the Protocol and the Passport Order were transparently invalid because the post-judgment discovery proceedings were based solely on an invalid theory under the RICO Judgment;[585] and (3) several cases that Mr. Donziger cited in a previous motion to dismiss, namely Ryan and Maness, support his argument that the collateral bar rule does not prevent him from challenging the validity of the Protocol and the Passport Order in this case.[586]

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[584] (See, e.g., Trial Tr. at 526:1-8 ("THE COURT: Counsel, give me an example -- by the way, is it your position that the collateral -- that Mr. Donziger was excused from following Judge Kaplan's orders because he had filed a notice of appeal and had an appeal pending? Is that your position? MS. TRIVEDI: In addition -- THE COURT: Is that your position? MS. TRIVEDI: Yes.").)

[585] (See, e.g., Trial Tr. at 526:19-24 ("MS. TRIVEDI: Your Honor, if the entire discovery campaign was based on an invalid theory of filing the RICO judgment, which the Second Circuit has -- THE COURT: Let's just say, I think you're arguing the transparently invalid exception, which of course was talked about in Teran and in the Providence Journal case.").)

[586] (See Trial Tr. at 523:24-524:11 ("In December, the defense filed a motion to dismiss Counts I, II, and III, based exactly on the case law that is relevant to your Honor's inquiry, which are cases that deal specifically with the obligations on a litigant in the post-judgment discovery context. And those cases -- your Honor may disagree with the legal argument we made for dismissal at that time, but I do not think your Honor can disagree that those cases say that in the post-judgment discovery context, if a litigant wishes not to ring an unringable bell -- and disclosure is an unringable bell -- that they should seek a contempt finding that is reviewable on appeal. That is exactly the thing that Mr. Donziger sought."); see also Memorandum of Law in Support of Steven Donziger's Motion to Dismiss Counts 1, 2, and 3 of the Court's July 31, 2019 Order to Show Cause, dated Dec. 16, 2020 [dkt. no. 225-1] at 3-5 (invoking, inter alia, Ryan and Maness).)

Mr. Donziger's first position is wholly undercut by governing Supreme Court precedent. Maness makes crystal clear that "[i]f a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."[587] Here, the evidence received at trial shows that Mr. Donziger's obligations to comply with the Protocol and the Passport Order were not stayed by either Judge Kaplan or the Court of Appeals.[588] The fact that Mr. Donziger noticed an appeal, therefore, did not in any way discharge his obligation to comply with those orders.[589] The Court properly rejected this contention.[590]

The Court also correctly found that Mr. Donziger could not rely on the "transparently invalid" exception.[591] To avail oneself of that exception, the Court of Appeals requires the would-be contemnor to "make some good faith effort to seek emergency relief

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[587] Maness, 419 U.S. at 458.

[588] (See GX 2254 at 3 (denying Mr. Donziger's motion for a stay pending appeal "in all other respects" and clarifying that Mr. Donziger "remain[ed] obligated to comply fully with paragraphs 4 and 5 of the Protocol and to surrender his passport(s) to the Clerk as previously directed").)

[589] See Maness, 419 U.S. at 458.

[590] (See Trial Tr. at 526:9-10 ("THE COURT: OK. Denied. That is insufficient to avoid the obligation to follow the orders.").)

[591] (See Trial Tr. at 527:4-10 ("Even if that's what Mr. Donziger is arguing, the Second Circuit in the Cutler case says that a defendant may not avail himself of the transparently invalid exception without some, quote, good-faith effort to seek emergency relief from the appellate court, close quote. That did not happen here, so he is not entitled to rely on the transparently invalid exception.").)

relief from the appellate court or show compelling circumstances, such as a need to act immediately, excusing the decision not to seek some kind of emergency relief."[592] The evidence shows that Mr. Donziger did not seek any emergency relief from the Court of Appeals--whether in the form of a stay pending appeal, a petition for a writ of mandamus, or even a request for expedited briefing[593]--and he also has not offered a valid excuse for why he could not seek such relief.[594] Nor could he. Even if Mr. Donziger "might have been unlikely to obtain a writ of mandamus" or a stay pending appeal, that "does not mean he should not have tried."[595]

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[592] Cutler, 58 F.3d at 832 (cleaned up).

[593] (See GX 7 (observing no docket entries seeking such relief); GX 8 (same); GX 9 (same); see also Trial Tr. at 654:1120 ("Q. And in the time period that I had focused you on during the course of your direct, which would be February 28th of 2018 to September 30th of 2019, did Mr. Donziger ever seek a stay in the Second Circuit? A. No, he did not. Q. Did he ever seek mandamus relief in that time period in the Second Circuit? A. No, he did not. Q. Did he ever seek expedited briefing in the Second Circuit? A. No, he did not.").)

[594] The only potential excuse to which Mr. Donziger's counsel even alluded was that asking for such relief would be futile. (See Trial Tr. at 727:8-14 ("I just want to know whether this witness is aware of any case where that's actually happened in the Second Circuit. THE COURT: I'm aware that's the question. What's the relevance? MR. KUBY: The relevance is, in fact, if the answer is no, that would tend to suggest it would be futile for Mr. Donziger to make that request. . . .").)

[595] Cutler, 58 F.3d at 833.

As for Mr. Donziger's Ryan-and-Maness-based contention, that too misses the mark. In contrast to caselaw from other circuits,[596] the Court of Appeals has not explicitly interpreted Ryan and Maness to establish an exception to the collateral bar rule. But even assuming that those cases do establish such an exception applicable in this context,[597] that exception plainly would operate to ensure that a litigant can obtain pre-compliance appellate review of an otherwise unappealable order.[598] Mr. Donziger's counsel recognized as much at trial.[599] Mr. Donziger unquestionably had the opportunity to obtain such review from the Court of

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[596] See, e.g., Novak, 932 F.2d at 1401 & n. 7.

[597] That is far from clear based on the thin caselaw, especially because Mr. Donziger has not asserted that he refused to comply with the Protocol or Passport Order on Fifth Amendment self-incrimination grounds. See Fid. Mortg. Invs., 550 F.2d at 58 ("[T]here are no such fifth amendment interests involved in this case and, thus, Attorney Hubbard has no basis for resisting the contempt citation on the authority of Maness." (citation omitted)).

[598] See Maness, 419 U.S. at 460 ("[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." (emphasis added)); Ryan, 402 U.S. at 532–33 (same).

[599] (See Trial Tr. at 520:17-19 ("But, your Honor, Walker is about review; it is about seeking review of the orders that have been imposed on you by a judge.").)

Appeals following the Contempt Order.[600] Yet, when confronted with the opportunity to obtain the very appellate review he claimed to have "relentlessly sought" in order to protect his and his client's rights,[601] Mr. Donziger passed.[602] Whether that was by strategic choice or for some other reason is unclear, but it does not matter. As a result of that choice, the Court of Appeals expressly affirmed all of Judge Kaplan's contempt findings, save for the finding regarding Mr. Donziger's selling interests in the Ecuadorian Judgment other than his own contingent fee interests.[603] Mr. Donziger's failure to challenge the Protocol and the Passport Order in his already-decided appeal of the

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[600] See, e.g., Latino Officers Ass'n City of New York, Inc. v. City of New York, 558 F.3d 159, 163 (2d Cir. 2009) ("[W]here, as in this case, civil contempt proceedings are instituted after the conclusion of the principal action rather than during the pendency of the action, the order disposing of the contempt proceedings is appealable as a final decision of a district court under 28 U.S.C. § 1291." (quotation marks omitted)).

[601] (GX 2184 at 11.)

[602] In briefing to the Court of Appeals, Mr. Donziger elected not to challenge the validity or foundation of either the Protocol or the Passport Order. (See GX 317 at 8 (statement of the issues); id. at 9-31 (substantive arguments); see also Trial Tr. at 650:2-653:10 (describing some of the issues that Mr. Donziger did and did not challenge on appeal).)

[603] See Donziger, 990 F.3d at 214; see also id. at 212-13 ("Nor does it question in any way the district court's conclusions that Donziger acted in contempt of the Injunction that resulted from the RICO Judgment in numerous ways. Indeed, except with respect to the very specific alleged violation of the Injunction discussed in this Opinion, Donziger does not even attempt to challenge the district court's findings of his contumacious conduct.").

Contempt Order precludes his attacking the validity of those orders in this proceeding.

B. The Protocol & the Passport Order

More fundamentally, even if Mr. Donziger's case did fit within one of the exceptions to the collateral bar rule, he still would have to establish that the Protocol and the Passport Order actually were legally infirm. Mr. Donziger's argument regarding the unlawfulness of the Protocol and the Passport Order proceeds in two steps.[604] First, the Protocol "was expressly designed to force the production of documents relevant to what Judge Kaplan called the 'judgment compliance' claims,'" i.e., Chevron's assertions that Mr. Donziger had violated the RICO Judgment.[605] And second, because the Court of Appeals determined that Judge Kaplan's contempt finding regarding Mr. Donziger's selling interests in the Ecuadorian Judgment other than his own was not sufficiently definite to merit a civil contempt sanction, discovery in furtherance of that finding and related coercive contempt sanctions must also have been unlawful.[606]

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[604] (See Def. I/II/III Br. at 18-20 ¶ 14(a).)

[605] (See Def. I/II/III Br. at 18 ¶ 14(a)(i).)

[606] (See Def. I/II/III Br. at 20 ¶ 14(a)(ii) ("Because Judge Kaplan's contempt finding regarding 'judgment compliance' was unlawful as a matter of law, discovery orders in furtherance of that finding were also unlawful."); id. at 24 ¶ 16 ("The Passport Order was intended, expressly and exclusively, to coerce compliance with paragraph 5 of the March 5 Order prior to completion of the appellate review that Mr. Donziger permissibly

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Mr. Donziger trips at the first step because he incorrectly suggests that the Protocol was relevant only to Mr. Donziger's alleged noncompliance with the RICO Judgment. Rather, the post- judgment discovery proceedings, from which the Protocol and the Passport Order spawned, encompassed discovery requests both (1) related to RICO Judgment compliance and (2) in aid Chevron's enforcing the Money Judgment.[607] Federal Rule of Civil Procedure 69 and New York Civil Law & Practice Rules Section 5223 authorized Chevron to seek a wide variety of information--from various sources, including third parties--related to Mr. Donziger's assets, sources of income, financial dealings, etc. in aid of enforcing the Money Judgment.[608] Judge Kaplan was justified in rejecting Mr. Donziger's

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sought by way of voluntary civil contempt. Because Mr. Donziger's decision to seek this review was not unlawful or contemptuous, the effort to coerce compliance was inappropriate and/or unlawful." (citation omitted)).)

[607] The Document Requests and the Information Subpoena were both issued in aid of enforcing the Money Judgment. (See GX 1989-1A at 1-2; GX 1989-1B at 1-2; see also GX 2009 at 1 (observing that, "[i]n the main, the discovery requests are directed to identifying assets with respect to which the judgment may be enforced and related matters" but noting that "[s]ome requests, however, seek information with respect to whether Donziger has violated paragraph 5 of the March 4, 2014 judgment in this case").)

[608] Rule 69 provides that "[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). New York law similarly provides that "the judgment creditor may compel disclosure of all matter relevant to

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arguments to the contrary.[609] Put simply, the Money Judgment provided a legitimate basis for post-judgment discovery, including the Protocol. A fortiori, Mr. Donziger's alleged noncompliance with the Protocol serves as a permissible basis for the Passport Order's coercive sanctions.[610]

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the satisfaction of the judgment" through "serving upon any person a subpoena." N.Y. C.P.L.R. 5223 (emphasis added). One leading treatise describes Section 5223 as "a broad criterion authorizing investigation through any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts." DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 509 (6th ed. 2021) (emphasis added). Applying those rules, the Court of Appeals has recognized "that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts" and that it would not be uncommon for those proceedings to involve requests for "discovery from third parties" or "related to assets held outside the jurisdiction of the court where the discovery request is made." EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207-08 (2d Cir. 2012).

[609] (See GX 2009 at 2 ("Donziger's suggestion that Chevron is entitled to nothing more than 'a short summary of [his] financial condition and assets, backed up by supporting documents' is without merit. As the record in this case discloses, millions of dollars have passed through Donziger's hands over the years. Much of it is unaccounted for. He has had years in which to move assets around. . . . Thus, there already is a record of willingness on the part of Donziger to shift assets in which he has an interest into foreign locations to avoid what he may regard as judicial 'interference.'" (citation and footnote omitted)).)

[610] The Court finds persuasive the Seventh Circuit's recognition that requiring the surrender of a passport is a permissible civil contempt sanction. See Herbstein v. Bruetman, 241 F.3d 586, 589 (7th Cir. 2001).

Finally, Mr. Donziger also avers that implementation of the Protocol would have resulted in irreparable harm to him and others, principally because Chevron would have "essentially unlimited access to Mr. Donziger's documents" even though many of the documents were protected from disclosure by attorney- client privilege or the First Amendment.[611] That argument appears more relevant to whether the collateral bar rule applies than to whether the order to be challenged is unlawful.[612] Nevertheless, to the extent Mr. Donziger challenges the validity of the Protocol or post-judgment discovery proceedings on those grounds, the Court rejects his arguments.

Mr. Donziger's assertion that the Protocol would grant Chevron unfettered access to his documents is contradicted by the Protocol's text in several ways. First, the Protocol made clear that Chevron's Forensic Expert was, "[a]t no time," to have access to Mr. Donziger's original devices or accounts "absent further Court Order."[613] Second, before Mr. Krehel produced any information to Chevron's Forensic Expert, he was to create a "Person/Entity Report," which Mr. Donziger could then review and designate any person or entity appearing therein as "Highly Confidential and Personal."[614] Third, after Mr. Krehel ran the search

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[611] (Def. I/II/III Br. at 21-23 ¶ 14(b).)

[612] See, e.g., Novak, 932 F.2d at 1401 (outlining exceptions to the collateral bar rule for orders where (1) "adequate and effective remedies" do not "exist for orderly review of the challenged ruling or (2) the order "require[s] an irretrievable surrender of constitutional guarantees").

[613] (GX 2172 at 2 ¶ 5.)

[614] (See GX 2172 at 3-4 ¶ 6.)

terms, he would log any responsive documents designated as "Highly Confidential and Personal" and provide that log to Chevron and Mr. Donziger, who would then have an opportunity to object to those documents being subject to further review.[615] Fourth, although some (but not all) information would then be provided to Chevron's Forensic Expert for review,[616] Judge Kaplan established a supervision protocol under which Chevron's Forensic Expert was to conduct large portions of that review:

> Supervision for purposes of this tasks and others in this Protocol that call for the same requires the following. First, Chevron's Forensic Expert shall not access or search the Donziger images at any time in any manner without the Neutral Forensic Expert's oversight. This oversight may take place either locally or on an electronic discovery platform. The methodology of review of searches conducted by Chevron's Forensic Expert shall be recorded in a detailed log (the "Search Log") along with a description of what files were reviewed or searched and when that review or search occurred. A copy of the Search Log shall be provided to Donziger. The Neutral Forensic Expert and Chevron's Forensic Expert shall retain their own copies of the Search Log.[617]

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[615] (See GX 2172 at 4 ¶ 7(b).)

[616] (See GX 2172 at 5 ¶ 7(d); id. at 6 ¶ 7(e).)

[617] (GX 2172 at 5-6 ¶ 7(d)(i).)

Fifth, any pre-production coding for responsiveness Chevron's counsel was ordered to complete was directed to "be conducted on an 'attorney's eyes only' basis."[618] And sixth, after Mr. Krehel made a document production to Chevron and Mr. Donziger, the documents would remain confidential for fourteen days,[619] which was to afford Mr. Donziger the opportunity (1) to designate any documents produced as "confidential" and (2) to claw back any information produced in error or that was not otherwise responsive.[620] In short, although the Protocol would have permitted Chevron and its Forensic Expert to access a variety of Mr. Donziger's documents[621]--which is hardly shocking given "that

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[618] (GX 2172 at 6 ¶ 7(e).)

[619] (See GX 2172 at 6 ¶ 7(e) ("The Document Production(s) will be treated as 'confidential' pursuant to the Protective Order for a period of fourteen (14) calendar days.").)

[620] (See GX 2172 at 7 ¶ 8(a)-(b).)

[621] The Court heard testimony at trial both about Ms. Champion's and Mr. Krehel's understandings of how certain portions of the Protocol, most notably Paragraphs Six through Ten, would operate. (See Trial Tr. 319:19-320:1 (Ms. Champion); id. at 810:2-824:18, 830:12-23 (Mr. Krehel).) For at least two reasons, the Court does not credit either Ms. Champion's or Mr. Krehel's testimony on that point. First, as is clear from the discussion above, the Protocol is in evidence. (See generally GX 2172). The Court is perfectly capable of reading the Protocol for itself and determining what it requires. And second, Mr. Krehel never had the opportunity to produce any information to Chevron under the protocol. (See Trial Tr. at 803:6-13 ("Q. Okay. And with respect to paragraph six, did you ever get to the stage where you would perform the duties set forth in paragraph six? A. No. Q. With respect to paragraph seven did you ever get to the stage where you would perform the duties set forth in paragraph seven? A. No.").)

broad post-judgment discovery in aid of execution is the norm in federal . . . courts"[622]--in no sense would that access be "unlimited" or provide Mr. Donziger with no recourse to lodge legitimate objections.[623]

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[622] EM Ltd., 695 F.3d at 207.

[623] Mr. Donziger's counsel also asserted that some of Ms. Champion's testimony regarding the Protocol was "patently false." (Trial Tr. at 826:24-25.) The Court is not convinced that is so. As best the Court can discern, the portion of Ms. Champion's testimony with which Mr. Donziger's counsel took issue was the following exchange regarding what information the Protocol would ultimately allow to be communicated to Chevron:

> Q. Now, Ms. Champion, did Judge Kaplan's forensic protocol, which is Government Exhibit 2172, allow Chevron to get control of Mr. Donziger's electronic devices in any way or at any point?
>
> A. No.
>
> Q. Did the forensic protocol allow Chevron to have full access to the images taken of Mr. Donziger's electronic devices?
>
> A. No.

(Trial Tr. 319:19-320:1.)

Regarding the first response, the Protocol does not appear to authorize Chevron to "get control of" Mr. Donziger's devices. Paragraph Five of the Protocol provides, in relevant part, that "[a]t no time shall Chevron's Forensic Expert have access to the original Devices or to live Media accounts absent further Court order." (GX 2172 at 3 ¶ 5.) Rather, any information to be shared with Chevron would come from Mr. Krehel's mirror images of Mr. Donziger's devices. As for the second answer, Paragraphs Six, Seven, and Eight make clear that Chevron would have access only to certain subsets of the images taken from Mr. Donziger's devices, not the whole enchilada so to speak. (See id. ¶¶ 6-8.) While the Court can

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As for Mr. Donziger's privilege and First Amendment contentions related to the Protocol, the Court sees no reason to disturb Judge Kaplan's relevant rulings from which the Protocol emerged. Judge Kaplan was entirely within his discretion in finding that Mr. Donziger, by repeatedly failing to produce a privilege log, waived or forfeited any claim of attorney-client privilege over documents responsive to the Document Requests and Information Subpoena.[624] After all, the Local Rules are clear that privilege logs "shall"--not "should" or "may" or "can"--"be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the Court."[625] And Judge Kaplan's rulings rejecting Mr. Donziger's various First-Amendment-premised arguments, which essentially attempted to assert the associational rights

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understand Mr. Donziger's disagreement with Ms. Champion's characterization of the Protocol, this is not a case of false testimony. And, as explained above, the Court does not rely on Ms. Champion's characterization as to how the Protocol would have operated had things progressed that far.

[624] (See GX 2108 at 2 ("As Donziger has failed to comply with Fed. R. Civ. P. 26(b)(5) and S.D.N.Y. Civ. R. 26.2--and as (a) this is not the first time he has ignored the requirements or those rules, and (b) Donziger failed to comply even after Chevron asserted that his prior failure should result in waiver of any otherwise applicable privileges--the Court holds that Donziger has waived or forfeited any claim of privilege to responsive documents that otherwise might have applied." (citations omitted)); see also Trial Tr. at 269:11-17 ("Q. And had Mr. Donziger produced any privilege log to you at least as of his deposition on June 25th, 2018? A. No. Q. Did Mr. Donziger ever produce a privilege log to Chevron with respect to documents he was withholding on privilege grounds? A. No.").)

[625] S.D.N.Y LOCAL CIV. R. 26.2(b) (emphasis added).

of any third party "allies and supporters of the cause of environmental justice in the Ecuadorian Amazon,"[626] are sound and grounded in the governing caselaw.[627]

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[626] (Def. I/II/III Br. at 22 ¶ 14(b)(ii).)

[627] Two points, each of which is independently sufficient to reject Mr. Donziger's position, are especially strong.

First, Judge Kaplan was within his discretion to find that Mr. Donziger waived or forfeited his First Amendment objection to Chevron's discovery requests. (See GX 2045 at 21-22.) Chevron served those requests on April 16, 2018, (see GX 1989-1A at 18; GX 1989-1B at 16), but Mr. Donziger did not raise his First Amendment argument until two months later when he moved for a protective order, (see GX 119 at DONZIGER_103547; GX 2026 at 23-24). In the interim, Mr. Donziger objected at least twice to Chevron's requests with nary a mention of the First Amendment. (See generally GX 112 (objections to opposing counsel); GX 2002 (opposition to Chevron's motion to compel).) "[S]tructural constitutional claims"--like other non-jurisdictional claims--"have no special entitlement to review," i.e., they can be waived or forfeited. Freytag, 501 U.S. at 893 (Scalia, J., concurring in part and concurring in the judgment); see also Yakus, 321 U.S. at 444 ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

And second, Judge Kaplan reasonably concluded that Mr. Donziger lacked standing to assert the First Amendment rights of third parties. (See GX 2045 at 22-23, 32-33.) "In the absence of a claim of privilege[,] a party usually does not have standing to object to a subpoena directed to a non-party witness." Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1126 (2d Cir. 1975). Even though Mr. Donziger would have liked to prevent Chevron from obtaining information from third parties, he did not have standing to contest subpoenas issued to those third parties unless he had some personal interest in the information sought. Moreover, although the Supreme Court has recognized than an organization may have standing to assert the rights of its members, see, e.g.,

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3. Conclusion

In sum, Mr. Donziger has not established that an exception to the collateral bar rule authorizes him to challenge the lawfulness of the Protocol or the Passport Order in this criminal contempt proceeding. And even if Mr. Donziger could somehow evade the collateral bar rule, the evidence he proffers would not have established that those orders were unlawful anyway. Mr. Donziger's suggestion that Judge Kaplan "could have simply stayed [the] proceedings and sought Mr. Donziger's compliance, if appropriate, upon conclusion of the appeal" does not change that calculus.[628] And, in any event, the appeal has been decided, and Mr. Donziger still has not complied with

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United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc., 517 U.S. 544, 551–52 (1996), that authority is inapposite. Mr. Donziger is plainly not "an organization," and the facially amorphous group of persons on whose behalf he purported to assert First Amendment rights is an undefined array of supporters, not a discrete membership. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459–60 (1958) (finding associational standing where organization "and its members [we]re in every practical sense identical" and there was a "reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production [wa]s compelled").

[628] (Def. I/II/III Br. at 23 ¶ 15.)

some of Judge Kaplan's orders,[629] notwithstanding his representation that he would do so.[630]

c. The Criminal Contempt Charges

Finally, the Court considers whether the Special Prosecutors have sustained their burden of proof on the criminal contempt charges.

1. Legal Standards

Mr. Donziger is charged with six counts of criminal contempt in violation of 18 U.S.C. § 401(3), which gives a federal court the power to impose criminal sanctions for "[d]isobedience or resistance to its lawful writ, process, rule, decree, or command." "To secure a conviction for criminal contempt of a court order," the Special Prosecutors "must prove (1) the

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[629] (See Trial Tr. at 803:23-804:6 ("Q. Did Mr. Donziger ever surrender any devices to you, Mr. Krehel, for imaging? A. No. Q. He didn't do it in June? A. No. Q. Didn't do it in July? A. Correct. Q. And as you sit here today, has that happened? A. Did not happen."); id. at 566:16-24 ("Q. Was there any other record indicating that Mr. Donziger had ever surrendered his passport to the Clerk of the Court at any point in time after June 11th of 2019, as directed by the court order? A. After June 13th or -- Q. After June 11th, the date of the order, at any point in time? A. I did not see any indication that a passport was received by the clerk's office.").)

[630] (See GX 133 at DONZIGER_101980 ("At some point Judge Kaplan will find me in contempt and I will appeal. As I have also made clear to Chevron and the court, if the appellate court ultimately affirms Judge Kaplan's merits ruling on the authorizing motion and his overall handling of the post-judgment proceedings, then I will cooperate with the order of the court as is my obligation as a citizen and resident of New York.").)

issuance of the order, (2) the defendant's disobedience or disregard of the order, and (3) the defendant's knowledge and willfulness in in disobeying the order."[631] Those elements must be proven "beyond a reasonable doubt,"[632] not "beyond all possible doubt."[633]

Regarding the first element, "[a] defendant cannot be held in contempt absent a definite and specific order of which he had notice."[634] "[T]he clarity of an order must be evaluated by a

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[631] United States v. Vezina, 165 F.3d 176, 178 (2d Cir. 1999). Occasionally, the caselaw prescribes four elements: "(1) the court entered a reasonably specific order; (2) defendant knew of that order; (3) defendant violated that order; and (4) his violation was willful." Cutler, 58 F.3d at 834. Under either test, the facts that must be proven are identical.

[632] Cutler, 58 F.3d at 834.

[633] 1A KEVIN F. O'MALLEY, JAY E. GRENIG, & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 12:10 (6th ed. 2021). The Court of Appeals has repeatedly approved of this treatise's instruction on the definition of reasonable doubt. See, e.g., United States v. Delibac, 925 F.2d 610, 614 (2d Cir. 1991) (per curiam) ("Once again, a district court has failed to heed our repeated warnings against embellishing upon the standard instruction recommended in 1 Devitt & Blackmar, Federal Jury Practice and Instructions . . . ."); United States v. Gatzonis, 805 F.2d 72, 74 (2d Cir. 1986) (per curiam) ("[A]s we have previously stated, trial judges 'would be exceedingly well advised to use [the model instruction in 1 Devitt & Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977)] rather than improvise variations upon it.'").

[634] Cutler, 58 F.3d at 834 (quotation marks omitted); see also United States v. Int'l Brotherhood of Teamsters, 899 F.2d 143, 146 (2d Cir. 1990) ("An unclear order provides insufficient notice to justify a sanction as harsh as contempt.").

reasonableness standard, considering both the context in which it was entered and the audience to which it was addressed."[635] When assessing an order's clarity, courts require a lower degree of specificity for orders directed at lawyers than for those directed at laypersons.[636]

"The willfulness element of the offense requires proof of 'a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.'"[637] That standard does not require proof of bad intent in order to prove willfulness."[638] In the "context of criminal contempt, "[w]illfulness merely requires a specific intent to consciously disregard an order of the court," and "[e]ven godly motivation does not cancel this intent."[639] Again, the Court of Appeals "hold[s] attorneys to a higher standard of conduct than . . . lay persons," permitting an inference of "willfulness from [a lawyer's] reckless disregard for his professional

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[635] Cutler, 58 F.3d at 835.

[636] See, e.g., Cutler, 58 F.3d at 835 (noting that "courts can expect lawyers to comply with less specific orders than laymen"); United States v. Turner, 812 F.2d 1552, 1565 (11th Cir. 1987) ("[I]t may well be necessary that the specificity of orders directed at laypersons be greater than that of orders to lawyers.").

[637] Rojas v. United States, 55 F.3d 61, 63 (2d Cir. 1995) (per curiam) (quoting United States v. Greyhound Corp., 508 F.2d 529, 531-32 (7th Cir. 1974)).

[638] United States v. Remini, 967 F.2d 754, 758 (2d Cir. 1992).

[639] United States v. Lynch, 162 F.3d 732, 735 (2d Cir. 1998).

duty."[640] "Willfulness for criminal contempt may, as in other areas of criminal law, be inferred from the facts and circumstances in proof."[641]

2. Issuance of Orders

As discussed above, three orders are relevant to the criminal contempt charges: (1) the RICO Judgment; (2) the Protocol; and (3) the Passport Order.[642] To satisfy the first element of a criminal contempt charge, the Special Prosecutors must prove three things: (1) the issuance of those orders, (2) that Mr. Donziger had notice of those orders, and (3) that the orders were reasonably definite and specific.[643] The Special Prosecutors have proven the first two sub-elements beyond any doubt. Judge Kaplan issued the RICO Judgment, the Protocol, and the Passport Order to the public docket in the underlying civil case.[644] By doing so, Mr. Donziger, who had filed a notice of appearance in the underlying civil case,[645] received a

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[640] Cutler, 58 F.3d at 837 (quotation marks omitted).

[641] Greyhound, 508 F.2d at 532; see also United States v. Hall, 346 F.2d 875, 881 (2d Cir. 1965) ("The requirement of willfulness was satisfied despite lack of direct proof that the defendants actually knew the order was signed, for in those cases, as in Hall's, there was a multiple strand of cumulated circumstantial evidence to establish mens rea.").

[642] (See Order to Show Cause at 1-10 ¶¶ 1-21.)

[643] See Cutler, 58 F.3d at 834.

[644] Each order's exhibit number corresponds to the relevant docket entry in 11-CV-691. (See GX. 1875; GX 2172; GX 2232.)

[645] (See GX 1147 at 1.)

notification that those orders had been issued.[646] Moreover, Mr. Donziger filed numerous pro se motions and letters related to each of those orders, which conclusively evidences his awareness of their existence.[647] The Court will address the specificity sub-element on an order-by-order basis.

A. Counts IV & V

Counts IV and V charge Mr. Donziger with two violations of Paragraph One of the RICO Judgment related to his failure to transfer the 2011 Contingent Fee and the 2017 Contingent Fee.[648] Recall that Paragraph One of the RICO Judgment provides that:

> The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real,

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[646] (See Trial Tr. at 80:22-:81:2 ("Q. And when an attorney enters a notice of appearance on a docket in a case, what, if anything, does that mean in terms of an attorney receiving any filings in that case? A. From that point, the attorney would receive ECF notifications, electronic case filing system automatic notifications of anything that gets posted to the docket.").)

[647] (See generally, e.g., GX 123 (Donziger email sending certain assignment forms related to the 2011 Contingent Fee and Amazonia shares); GX 1986 (Donziger opposition to Chevron's contempt application); GX 1986-1 (Donziger letter to Chevron's counsel indicating that he would not transfer his Amazonia shares); GX 2018 (Donziger motion for declaratory relief related to Paragraph Five of RICO Judgment); GX 2051 (Donziger response related to transfer of 2017 Contingent Fee); GX 2184 (Donziger opposition to Chevron's Protocol-based contempt application); GX 2234 (Donziger motion to stay coercive contempt sanctions, including those imposed by Passport Order).)

[648] (See Order to Show Cause at 6-9 ¶¶ 10-18.)

> tangible or intangible, vested or contingent, that Donziger has received, or hereafter may receive, directly or indirectly, or to which Donziger now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world including, without limitation, all rights to any contingent fee under the Retainer Agreement and all stock in Amazonia. Donziger shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.[649]

Although Paragraph One's language would encompass a wide variety of property interests, the Court finds that it is sufficiently definite and specific in the context of the 2011 Contingent Fee and the 2017 Contingent Fee.

When evaluating the clarity of a court order, the Court must apply "a reasonableness standard, considering both the context in which it was entered and the audience to which it was addressed."[650] The context here shows that a reasonable litigant would have understood Paragraph One to require the assignment of the 2011 Contingent Fee and the 2017 Contingent Fee. For one, although Paragraph One's language is broad, it expressly enumerates "all rights to any contingent fee under the [2011] Retainer" as an example of the very

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[649] (GX 1875 at 1-2 ¶ 1.)

[650] Cutler, 58 F.3d at 835.

property that Mr. Donziger was required to "transfer and forthwith assign."[651] Moreover, the RICO Opinion—issued alongside the RICO Judgment—explained that Mr. Donziger's "right to a contingent fee and the fee itself are property subject to execution and attachment and certainly to the imposition of a constructive trust."[652] Mr. Donziger, a Harvard-educated attorney,[653] cannot credibly suggest that the 2011 Contingent Fee and 2017 Contingent Fee were not clearly subject to Paragraph One's constructive trust.[654]

Mr. Donziger maintains that the Special Prosecutors "failed to prove beyond a reasonable doubt that [Paragraph One of] the RICO Injunction was sufficiently clear and unambiguous as to leave no doubt in [his] mind that he was required to take unilateral action" to transfer the 2011 Contingent Fee and the

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[651] (GX 1875 at 2 ¶ 1.)

[652] (GX 1874 at 477 (footnote omitted); see also id. at 475-77 ("The imposition of a constructive trust on Donziger's right to a contingent fee, among other property traceable to the Judgment, and the other defendants' rights to recovery fits this mold to a tee. . . . [T]he Judgment is the indispensable predicate of his right to collect a contingent fee with respect to the Lago Agrio case. That Judgment is the direct result of fraud by Donziger.").)

[653] (See Trial Tr. at 653:22-25 ("Are you aware of statements by Mr. Donziger in his briefs or testimony in connection with the civil litigation that he is a graduate of Harvard Law School? A. I'm familiar with such statements, yes.").)

[654] See Cutler, 58 F.3d at 835 (noting that "courts can expect lawyers to comply with less specific orders than laymen").

2017 Contingent Fee.[655] The Court disagrees for two reasons. First, the Special Prosecutors only had to prove beyond a reasonable doubt that Paragraph One was reasonably definite and specific; the Special Prosecutors need not have proven the clarity of Paragraph One beyond all doubt.[656] For the reasons set forth above, they have done so. And second, Mr. Donziger's contention runs counter to Paragraph One's plain text, which instructed that "Donziger shall transfer and forthwith assign to Chevron" any property subject to the constructive trust.[657] Paragraph One does not require Chevron to do anything at all; the onus for compliance was squarely and exclusively on Mr. Donziger. That command would have been reasonably clear to any litigant, let alone to an attorney. Judge Kaplan's refusal to require Mr. Donziger to sign an assignment "with respect to unidentified, undescribed property" does not alter that conclusion.[658] Nor does Judge Kaplan's suggestion that Mr. Donziger would "be compelled, if necessary, to comply with" his obligation to transfer to Chevron property subject to Paragraph One's constructive trust.[659] Thus, the

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[655] (Def. IV/V/VI Br. at 3 ¶ 11, 5 ¶ 18.)

[656] See Cutler, 58 F.3d at 835 ("[T]he clarity of an order must be evaluated by a reasonableness standard . . . .").

[657] (GX 1875 at 2 ¶ 1 (emphasis added).)

[658] (GX 2072 at 9.) Specifically, Judge Kaplan did not see the point in the execution of such a broad assignment when "such an instrument would leave entirely unclear what had been transferred and assigned." (Id.)

[659] (GX 2072 at 9 (emphasis added).)

Special Prosecutors have proven beyond a reasonable doubt that Paragraph One of the RICO Judgment is reasonably definite and specific.

B. Count VI

Count VI charges Mr. Donziger with violating Paragraph Five of the RICO Judgment by pledging a portion of his interest in the Ecuadorian Judgment to David Zelman in exchange for personal services.[660] Paragraph Five of the RICO Judgment orders as follows:

> Donziger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein.[661]

Like Paragraph One, even though its language is also quite broad, Paragraph Five is sufficiently definite and specific in the context of Mr. Donziger's personal interest in the Ecuadorian Judgment. While Paragraph Five expressly bars Mr. Donziger from taking any action to profit from the Ecuadorian Judgment, it also lists several examples of conduct that would violate its terms, including, most relevantly, "pledging" any interest.[662]

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[660] (See Order to Show Cause at 9-10 ¶¶ 19-21.)

[661] (GX 1875 at 3 ¶ 5.)

[662] (GX 1875 at 3 ¶ 5.)

The RICO Opinion contemporaneously solidified Paragraph Five's thrust:

> The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.[663]

Paragraph Five certainly forbade Mr. Donziger from taking any action to benefit personally from the Ecuadorian Judgment.

Mr. Donziger maintains that the Special Prosecutors have not proven that Paragraph Five was "sufficiently clear and unambiguous as to leave no doubt in [his] mind that [the] alleged conduct was enjoined" because the Stay Order introduced ambiguity into what conduct the RICO Judgment proscribed.[664] The Court disagrees. To the extent the Stay Order introduced ambiguity as to Paragraph Five's reach, that ambiguity certainly did not relate to Mr. Donziger's ability to sell, assign, pledge, or otherwise encumber his own interest in the Ecuadorian Judgment. The Stay Order confirmed as much:

> The point of paragraph 5 . . . was to prevent Donziger and the LAP Representatives from avoiding the effect of the constructive trust imposed on assets in their hands that otherwise would have been direct proceeds of the Judgment by selling, assigning, or

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[663] (GX 1874 at 485 (emphasis added).)

[664] (Def. IV/V/VI Br. at 7 ¶ 23.)

> borrowing on their interests in the Lago Agrio Judgment . . . .[665]

Instead, as the Court of Appeals aptly recognized, "[t]o a reasonable reader, that statement [ ] would confirm what [Judge Kaplan] said was the point of this portion of the [RICO Judgment]: to prohibit Donziger from monetizing his contingent fee interest in the judgment."[666]

Nevertheless, Mr. Donziger maintains that "the Court erroneously and repeatedly prevented the defense from exploring the implications of the Second Circuit analysis on cross-examination," which would have established "that Chevron and the Gibson Dunn attorneys . . . were aware that Judge Kaplan's 2014 Stay Order limited the anti-monetization paragraph of the RICO Injunction to RICO defendants' treatment of funds received on a 'collection.'"[667] Although it is unclear

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[665] (GX 1901 at 10.)

[666] Donziger, 990 F.3d at 209. Mr. Donziger asserts that "the Second Circuit never squarely addressed the issue of whether the 2014 Stay Order also rendered the purported injunction against Mr. Donziger's monetization of his own interest (outside of a collection context) insufficiently clear and unambiguous for purposes of criminal contempt." (Def. IV/V/VI Br. at 8 ¶ 23.) Strictly speaking, that is true, almost surely because Mr. Donziger did not challenge the Contempt Order's finding regarding the Zelman transaction on appeal. (See GX 317 at 8 (statement of the issues); id. at 9-31 (substantive arguments).) Even so, the Court wholly accepts and agrees with the Court of Appeals' observation that Paragraph Five of the RICO Judgment, even considered in light of the Stay Order, still made clear that Mr. Donziger could not profit from his personal interest in the Ecuadorian Judgment. See Donziger, 990 F.3d at 209.

[667] (Def. IV/V/VI Br. at 7 n.1)

why Chevron's or GDC's interpretation of Paragraph Five is at all relevant, there is a more fundamental problem with Mr. Donziger's argument: His understanding was not that Paragraph Five was limited solely to "collections." Rather, the evidence shows that Mr. Donziger knew that Paragraph Five forbade him from monetizing his own interest in the Ecuadorian Judgment, even absent a collection.[668] Indeed, one of Mr. Donziger's primary arguments against post-judgment discovery regarding his litigation-fundraising efforts was that Chevron had not shown that he was monetizing his own interest in the Ecuadorian Judgment.[669] In other

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[668] (See, e.g., GX 2010 at 18:2-3, 18:23-19:1 ("I am allowed, if I sell the shares of my clients, to get paid for my work on this case. . . . I'm selling, as an intermediary, the points or the aspects of the judgment that are held by my clients. I am not selling my own shares, because that is obviously prohibited by your Honor's RICO judgment." emphasis added)); GX 2018 at 2 ("So long as the litigation finance agreements do not involve Mr. Donziger pledging, assigning, committing, or otherwise collateralizing his specific contingency interest . . . [,] the NY Judgment does not have any impact."); GX 2051 at 2 ("It remains that Chevron has not presented even a scintilla of evidence that I have sold any of my interests in the Ecuador judgment--the only operative factual question at issue that could provide a basis for a contempt finding on the judgment compliance issue.").)

[669] (See GX 2010 at 21:5-7 ("What evidence have they presented to show I have sold a single piece of my interest? Zero. And it hasn't happened. I'll make that representation right now."); id. at 26:3-4 ("I'm not selling my shares; I'm selling my clients' shares."); id. at 31:5-7 ("How do we know he hasn't sold his shares? Well, I'm a lawyer and I'm representing to you as an officer of the court right now I have not sold my shares."); id. at 31:13-14 ("[A]gain, I'm not selling my shares, I'm selling their shares."); id. at 32:18-23 ("But if there's anything that might be arguably legit about what they're seeking, it's something related to the narrow

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words, Mr. Donziger's own statements belie the notion that it was somehow unclear to him that Paragraph Five forbade him from monetizing or profiting--pre- or post-collection--from his own interest in the Ecuadorian Judgment. Accordingly, the Special Prosecutors have proven beyond a reasonable doubt that Paragraph Five of the RICO Judgment is reasonably definite and specific.

C. Count I

Count I charges Mr. Donziger with violating Paragraph Four of the Protocol, between March 8, 2019 and May 28, 2019, by failing to provide Mr. Krehel and Chevron's Forensic expert with sworn lists of his electronic devices and accounts.[670] Paragraph Four of the Protocol provides, in relevant part, that:

> Within three (3) business days of entry of this Protocol, defendant Steven Donziger ("Donziger") shall provide to both the Neutral and Chevron's Forensic Experts via email a representation listing under penalty of perjury all devices he has used to access or store information or for communication since March 4, 2012 – including, but not limited to, personal computers, tablets, phones, and external storage devices, such as external hard drives and thumb drives -- (the "Devices"),

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(continued from previous page)

issue of am I selling my own shares. And if you're not going to accept my representation, I can prove to you that I have not sold my own shares, and that's what it should be limited to.").)

[670] (See Order to Show Cause at 1-3 ¶¶ 1-3.)

> indicating for each of the Devices whether he has possession, custody, or control of the Devices and, if not, stating the reasons why that is so, i.e., whether they were destroyed, lost, etc. and the present location of the Devices. Additionally, Donziger shall produce under penalty of perjury a list of all accounts – including, but not limited to, email accounts (including web-based email accounts); accounts (including web- or cloud-based) related to any document management services, such as Dropbox; and accounts related to any messaging services, such as WhatsApp, Facebook Messenger, instant messages, etc. - Donziger has used since March 4, 2012 (the "Media"), indicating whether he presently has the ability to access those accounts and, if not, stating the reasons why that is so.[671]

The Court finds that Paragraph Four is more than specific enough to put Mr. Donziger on notice of what he was required to do. That Paragraph specified that Mr. Donziger was to provide two lists to Mr. Krehel and Chevron's Forensic Expert--one of his "Devices" and one of his "Media"-- and it provided detailed definitions for both "Devices" and "Media," offering numerous examples of each.[672] Further, Paragraph Four provided

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[671] (GX 2172 at 1-2 ¶ 4.)

[672] Judge Kaplan also included communications accounts that he had understood, from the record in the civil case, Mr. Donziger to have used. (See GX 2172 at 2 ¶ 4(a)-(c).)

detailed instructions for what Mr. Donziger was to do in the event that he no longer had possession, custody, control, or access to any "Devices" or "Media." And finally, Paragraph Four explicitly detailed (1) how the lists were to be provided (i.e., by email), (2) that the lists were to be sworn under penalty of perjury, and (3) that Mr. Donziger had a three-day period to send the lists to Mr. Krehel and Chevron's Forensic Expert. Put plainly, Paragraph Four provides detailed, comprehensive instructions for how Mr. Donziger was to prepare two basic lists. This is hardly rocket science.

Mr. Donziger posits that the Special Prosecutors failed to prove that the Protocol "was sufficiently clear and unambiguous (as required by law) as to leave no doubt in [his] mind that he was required to comply with paragraph 4 independently" of Paragraph Five, which he intended to resist.[673] That does not pass the smell test, especially given Mr. Donziger's background as a lawyer.[674] Mr. Donziger's intention to invite contempt on Paragraph Five does not make Paragraph Four's commands any less clear. Moreover, Paragraphs Four and Five of the Protocol plainly order Mr. Donziger to do two distinct things. If Judge Kaplan had entered Paragraph Four and Paragraph Five as two separate orders, under Mr. Donziger's own theory he would unquestionably have been obligated to comply

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[673] (Def. I/II/III Br. at 14-15 ¶ 10.)

[674] See Cutler, 58 F.3d at 835 ("[T]he clarity of an order must be evaluated by a reasonableness standard, considering both the context in which it was entered and the audience to which it was addressed.").

with the separate Paragraph Four order despite his resistance to the separate Paragraph Five order. It borders on the absurd to suggest that Judge Kaplan's deciding to save a few trees by including both directives in the same document somehow mandates a different result. Thus, the Special Prosecutors have proven beyond a reasonable doubt that Paragraph Four of the Protocol is reasonably definite and specific.

D. Count II

Penultimately, Count II charges Mr. Donziger with violating Paragraph Five of the Protocol by refusing to surrender his devices to Mr. Krehel for imaging.[675] Paragraph Five of the Protocol provides, in relevant part:

> The Neutral Forensic Expert shall take possession of Donziger's Devices and have access to his Media for the purpose of making a mirror image of those Devices and Media. The Devices shall be surrendered to the Neutral Forensic Expert at Donziger's address at 245 West 104th Street, #7D, New York, NY 10025. The Neutral Forensic Expert shall take possession, custody, and control of the Devices and transport them directly to its offices for the imaging described herein. The devices shall be surrendered to the Neutral Forensic Expert at 12:00 pm at 245 West 104th Street, #7D, New York, NY 10025 on March 18, 2019.[676]

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[675] (See Order to Show Cause at 3-5 ¶¶ 4-6.)

[676] (GX 2172 at 2 ¶ 5.)

The Court finds that directive to be perfectly straightforward. By its plain text, Paragraph Five informed Mr. Donziger (1) precisely what he was to provide to Mr. Krehel, and (2) the exact date, time, and place at which he was to surrender the "Devices." And, as explained above, Paragraph Four of the Protocol set forth a comprehensive definition of what was included in term "Devices."[677] Based on that, Paragraph Five's directive would been obvious to any litigant, especially a lawyer.[678] Tellingly, Mr. Donziger does not even suggest that Paragraph Five of the Protocol was insufficiently specific.[679] Thus, the Special Prosecutors have proven beyond a reasonable doubt that Paragraph Five of the Protocol is reasonably definite and specific.

E. Count III

Last but not least, Count III charges Mr. Donziger with disobeying the Passport Order by failing to surrender his passport(s) to the Clerk of the Court.[680] The Passport Order provided, in relevant part, that:

> Donziger, on or before June 12, 2019 at 4 p.m., shall surrender to the Clerk of the Court each and every passport issued to him by each and every nation to have

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[677] (See GX 2172 at 1-2 ¶ 4 (defining the term and listing numerous examples).)

[678] See Cutler, 58 F.3d at 835 (noting that "courts can expect lawyers to comply with less specific orders than laymen").

[679] (See Def. I/II/III Br. at 15-24 ¶¶ 11-15 (cataloguing Mr. Donziger's contentions as to Count II).)

[680] (See Order to Show Cause at 6 ¶¶ 7-9.)

> issued a passport to him, the Clerk to retain possession thereof unless and until this Court determines that Donziger has complied fully with paragraphs 4 and 5 of the Protocol.[681]

The Court finds that the Passport Order's text was entirely unambiguous as to what it demanded. The Passport Order, in no uncertain terms, informed Mr. Donziger of (1) exactly what he was required to do, (2) by when he was required to do it, and (3) to whom he was to turn over his passport(s). Mr. Donziger does not even imply otherwise.[682] The Special Prosecutors have proven beyond a reasonable doubt that the Passport Order is reasonably definite and specific.

3. Disobedience

Next, the Court considers whether the Special Prosecutors have proven that Mr. Donziger disobeyed the RICO Judgment, the Protocol, and the Passport Order.

A. Count IV

Count IV charges Mr. Donziger with disobeying Paragraph One of the RICO Judgment between March 4, 2014 and September 3, 2018 by refusing to assign to Chevron the 2011 Contingent Fee.[683] Paragraph One plainly required Mr. Donziger to assign that interest

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[681] (GX 2232 at 2.)

[682] (See Def. I/II/III Br. at 24-25 ¶¶ 16-18 (laying out Mr. Donziger's contentions as to Count III).)

[683] (See Order to Show Cause at 6-8 ¶¶ 10-14.)

"forthwith," i.e., immediately following the RICO Judgment's entry on March 4, 2014.[684] Mr. Donziger unquestionably did not do so, despite the RICO Judgment's and the RICO Opinion's clear holding that the 2011 Contingent Fee was a property interest subject to Paragraph One's constructive trust.[685] Instead, the evidence shows that more than four years passed before Mr. Donziger executed an assignment of any kind.[686] But even then, that assignment did not comport with Judge Kaplan's subsequent order--entered following extensive efforts to secure Mr. Donziger's long-overdue compliance--outlining a specific process by which Mr. Donziger was to complete the transfer. That order mandated that Mr. Donziger execute and send two sets of original assignment forms by overnight courier: (1) an unnotarized set by August 22, 2018 and (2) a

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[684] (GX 1875 at 2 ¶ 1.)

[685] (See GX 1875 at 1-2 ¶ 1 ("The Court hereby imposes a constructive trust for the benefit of Chevron on all property, . . . including, without limitation, all rights to any contingent fee under the Retainer Agreement . . . ." (emphasis added)); GX 1874 at 477 ("[Mr. Donziger's] right to a contingent fee and the fee itself are property subject to execution and attachment and certainly to the imposition of a constructive trust." (footnote omitted)); see also id. at 475-77 ("The imposition of a constructive trust on Donziger's right to a contingent fee, among other property traceable to the Judgment, and the other defendants' rights to recovery fits this mold to a tee. . . . [T]he Judgment is the indispensable predicate of his right to collect a contingent fee with respect to the Lago Agrio case. That Judgment is the direct result of fraud by Donziger.").)

[686] Mr. Donziger did not execute any assignment of the 2011 Contingent Fee until August 22, 2018. (See GX 123 at DONZIGER_106017-18 (email and executed form).)

notarized set by August 29, 2018.[687] Although Mr. Donziger sent the unnotarized set by August 22, he sent it by email rather than overnight courier, i.e., he did not send the originals as ordered.[688] And Mr. Donziger did not complete and send the notarized forms until September 4, days after the deadline.[689] The Special Prosecutors have proven beyond a reasonable doubt Mr. Donziger's disobedience of Paragraph One of the RICO Judgment with respect to the 2011 Contingent Fee.

B. Count V

Count V alleges a similar violation of Paragraph One of the RICO Judgment, this time related to Mr. Donziger's refusal, between November 1, 2017 and May 27, 2019, to assign to Chevron the 2017 Contingent Fee.[690] Paragraph One required Mr. Donziger to assign that interest, which he acquired after the issuance of the RICO Judgment, "forthwith," i.e., without delay following its acquisition.[691] Yet, despite its being obvious that a contingent fee interest in the Ecuadorian

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[687] (See GX 2079 at 5-6.)

[688] (See GX 123 at DONZIGER_ 106017-18 (email and executed form); see also id. at DONZIGER_106021 ("Again, . . . originals will be provided as soon as possible as practicable, but no later than September 4, 2018." (emphasis added)).)

[689] (See GX 2085-1 at 1-2 (executed form); see also GX 123 at DONZIGER_106021 ("Again, notarized versions . . . will be provided as soon as possible as practicable, but no later than September 4, 2018." (emphasis added)).)

[690] (See Order to Show Cause at 8-9 ¶¶ 15-18.)

[691] (GX 1875 at 2 ¶ 1.)

Judgment was subject to Paragraph One's constructive trust,[692] Mr. Donziger did not assign that interest until May 28, 2019, more than eighteen months later.[693] It took Judge Kaplan's finding Mr. Donziger to be in civil contempt and imposing a series of coercive fines to spur Mr. Donziger to action;[694] a February 21, 2019 order directing him to assign the 2017 Contingent Fee by February 28, 2019 did not do the trick.[695] The Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger disobeyed Paragraph One of the RICO Judgment by refusing to assign to Chevron the 2017 Contingent Fee until May 28, 2019.

Mr. Donziger counters that he is not guilty of Count V because his assignment of the 2011 Contingent Fee encompassed any interest he received under the 2017 Retainer.[696] Not so. To support his contention, Mr. Donziger points to language in his August 22, 2018 assignment form, which states that

[692] In addition to Judge Kaplan's helpful explanations in the RICO Judgment and RICO Opinion regarding what property was subject to Paragraph One's constructive trust, (see GX 1875 at 1-2 ¶ 1; GX 1874 at 475-77), throughout much of the alleged period of noncompliance Mr. Donziger was also litigating his obligation to transfer the 2011 Contingent Fee. On August 7, 2018--before Mr. Donziger assigned the 2011 Contingent Fee--Judge Kaplan put Mr. Donziger on notice that Chevron could move to hold him in contempt for failing to assign the 2017 Contingent Fee. (See GX 2064 at 2.) To suggest that Mr. Donziger was somehow unaware of his obligation to assign to Chevron the 2017 Contingent Fee strains credulity.

[693] (See GX 2216-1 at 1.)

[694] (See GX 2209 at 69-70.)

[695] (See GX 2165 at 3.)

[696] (See Def. IV/V/VI Br. at 4-5 ¶¶ 14-16.)

the assignment encompasses "all right, title, and interest . . . to any contingent fee under that certain Retainer Agreement, dated as of January 5, 2011, . . . together with its successors and assigns and all successors to and predecessors of the Retainer Agreement."[697] But the text of the 2011 Retainer and 2017 Retainer, which were between different parties,[698] shows that 2017 Retainer is not a successor agreement. Under the 2011 Retainer, Mr. Donziger's law firm (Donziger & Associates, PLLC) was entitled to receive a contingent fee from the LAPs.[699] By contrast, the 2017 Retainer entitled Mr. Donziger personally to receive a contingent fee from ADF.[700] The two agreements differ in one of their most central obligations: who was liable to pay a contingent fee and who was entitled to receive it. That matters.

More fundamentally, even if Mr. Donziger were correct that the 2017 Retainer was a successor agreement, it does not follow that he did not disobey the RICO Judgment. Mr. Donziger entered into the 2017 Retainer as of November 1, 2017,[701] yet he did not assign the 2011 Contingent Fee until, at the absolute earliest, August 22, 2018.[702] Under no circumstance was

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[697] (GX 123 at DONZIGER_106018 (emphasis added).)

[698] The 2011 Retainer was between the LAPs, ADF, ADAPT, and Donziger & Associates PLLC. (See GX 1978-6 at 1.) The 2017 Retainer was between only ADF and Mr. Donziger personally. (See GX 120 at DONZIGER_107415.)

[699] (See GX 1978-6 at 1, 3-4.)

[700] (See GX 120 at DONZIGER_ 107415, 107417.)

[701] (See GX 120 at DONZIGER_ 107417.)

[702] (See GX 123 at DONZIGER_ 106017-18 (email and executed form).)

that assignment, made nearly a year later, completed "forthwith" as Paragraph One required.[703] Thus, the Special Prosecutors have proven beyond a reasonable doubt Mr. Donziger's disobedience of Paragraph One of the RICO Judgment with respect to the 2017 Contingent Fee.

C. Count VI

The Special Prosecutors have proven beyond a reasonable doubt Mr. Donziger's disobedience of Paragraph Five of the RICO Judgment related to the Zelman transaction. The communications between Mr. Donziger and Mr. Zelman confirm it:

> In exchange for you providing me with $11,000 worth of such services, I pledge to you an interest in the Ecuador judgment from my fees should they be collected. The amount pledged is based on a pro rata proportion of the latest investment round in the case, which values a $250,000 investment as one-eighth of a point in the total claim won by villagers against Chevron. Your interest thus will be valued equally with this round based on an investment of $11,000. The actual amount that will be paid to you will be based on the total amount collected. To be more specific, your amount under this agreement will be

[703] (GX 1875 at 2 ¶ 1.)

> 11/250 of an eighth of a point of whatever is recovered of the total claim.[704]

Mr. Zelman testified that he hoped that Mr. Donziger would be paid his fees from the Ecuadorian Judgment,[705] even though he understood the likelihood of recovery to be a "long shot."[706] And Mr. Zelman confirmed that this agreement was not merely illusory or a matter of charity: He did not provide (or even offer) any services to Mr. Donziger for free.[707] Although Mr. Zelman understandably may have been hoping not to create any difficulties for Mr. Donziger, that does not alter the substance of the agreement that they reached. Nor does Mr. Zelman's acknowledgement that he understood that the RICO Judgment might one day be set aside.[708]

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[704] (GX 110 at DONZIGER_ 013102 (emphasis added); see also GX 105 at DONZIGER_013098 (using nearly identical language in an earlier message).)

[705] (See Trial Tr. 620:15-18 ("Q. And isn't it true, Mr. Zelman, that you were hoping that Mr. Donziger would get paid his fees from the Ecuadorian judgment so that you would get paid; isn't that true? A. Yes.").)

[706] (Trial Tr. at 617:18-19 ("Q. Fair to say that it was a long shot, Mr. Zelman? A. Absolutely.").)

[707] (See Trial Tr. 620:2-9 ("Q. Okay. You did not do this services [sic] with Mr. Donziger for free; isn't that correct? A. That's correct. Q. And isn't it true that you never offered to Mr. Donziger to give him your services for free; isn't that correct? A. That is correct. Q. Your answer is that is correct? A. Yes.").)

[708] (See Trial Tr. at 625:20-22 ("Q. And was it your understanding that the RICO judgment might be set aside one day? A. Yes.").)

Mr. Donziger suggested, when opposing Chevron's motion to hold him in contempt in the underlying civil case, "that neither Mr. Zelman nor [he] ever understood the agreement to be legally binding, but rather an expression of the sentiment that his generosity in providing services to me pro bono at a critical transition point in my professional life would be matched with generosity by me in the event I received a significant monetary recovery."[709] In light of Mr. Zelman's testimony, that theory is not credible for at least two reasons. First, Mr. Zelman did not, in fact, provide his services pro bono: Mr. Donziger paid him $2,000 cash in addition to pledging his interest.[710] And second, if there was never any binding legal agreement, there would have been absolutely no need to cancel it. Yet, that's precisely what Mr. Zelman did after Mr. Donziger informed him that the agreement could pose a problem.[711]

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[709] (GX 2184 at 7-8; see also supra note 707.)

[710] (See Trial Tr. at 576:4-8 ("Q. Was there a cash component of your agreement as well? A. Yes. Q. What was that, the cash component of your agreement with Mr. Donziger? A. Steven paid me 2,000 cash of the $14,000.").)

[711] (See GX 135 at DONZIGER_ 119100 ("Due to all the complications regarding our financial arrangement, I am cancelling our deal. Therefore, we have NO agreement going forward from this date."); Trial Tr. at 591:1-10 ("Q. So what were the -- I've asked you to explain what prompted you to send this email. A. He told me there was a problem that might result in something like this. And I said that was never the intent, and let's just cancel the agreement. Q. And you meant that was -- when you just said that was never the intent, what did you mean by that? A. I don't think either one of us had an idea that the agreement that we entered into somehow would create a problem of this nature.").)

Mr. Donziger also argues that the Special Prosecutors failed to prove that Mr. Zelman provided him with "personal services"--as opposed to "professional" ones--which Mr. Donziger claims was "an element of the crime as charged."[712] Mr. Donziger slices things far too finely. The "personal services" language used in the Order to Show Cause did not alter the elements that the Special Prosecutors had to prove,[713] and Paragraph Five of the RICO Judgment forbid Mr. Donziger from monetizing his interest in the Ecuadorian Judgment for any reason, whether personal or professional.[714] In any event, even if Mr. Zelman's services were targeted at helping Mr. Donziger in his professional affairs, those services were undoubtedly provided to Mr. Donziger personally.[715] That Mr.

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[712] (Def. IV/V/VI Br. at 7 ¶¶ 21-22.)3

[713] To establish as violation of 18 U.S.C. 401(3), the Special Prosecutors "must prove (1) the issuance of the order, (2) the defendant's disobedience or disregard of the order, and (3) the defendant's knowledge and willfulness in disobeying the order." Vezina, 165 F.3d at 178. That's it.

[714] (See GX 1875 at 3 ¶ 5 ("Donziger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein." (emphasis added)).)

[715] Mr. Zelman provided the services to Mr. Donziger in the form of one-on-one sessions, consistent with the Transitions Process plan. (See Trial Tr. at 570:7-11 ("What does The Transitions Process consist of that you offer? A. Typically, it's four sessions, each approximately a month apart. Each session consists of client."); id.

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Zelman's coaching services may have been targeted at improving Mr. Donziger's professional skills does not change the fact that it was Mr. Donziger who personally benefitted.[716]

Mr. Donziger also argues that his agreement with Mr. Zelman "was not prohibited by the RICO injunction" because what Mr. Donziger actually pledged was a contingent interest predicated on "the setting aside of the RICO judgment by way of Rule 60 motion for relief from a Judgment or Order."[717] That argument is betrayed by the evidence for two reasons.

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at 577:5-9 ("Did Mr. Donziger complete other modules of the transitions program? I think you referred to the first module. A. He completed sessions one through three in the four-hour segments. And the fourth session was sort of spread out over a number of smaller sessions.").)

[716] (Cf., e.g., Trial Tr. at 610:1-6 ("Q. Mr. Zelman, isn't it true that the services you provided Mr. Donziger were solely in furtherance of the enforcement of the Ecuador judgment? A. The range of topics that we covered were many but I would say that the intent was always to further his ability to function in that way."); id. at 613:6-14 ("Q. Isn't it true, Mr. Zelman, that your feedback was directed at the success of the enforcement effort? . . . A. I'm not trying to make split hairs in the background. That's always the intent. And in the foreground, it's just to communicate for effectively."); id. at 613:19-24 ("Q. Me too. Mr. Zelman, isn't true that you at times would encourage Mr. Donziger to move away from a personal narrative and more towards a more professional one? A. I actually don't remember the specifics of those conversations but that would be the kind of thing I might offer.").)

[717] (Def. IV/V/VI Br. at 10 ¶¶ 26-27.)

First, Mr. Donziger's communications with Mr. Zelman indicate that the amounts Mr. Donziger pledged were "based on a pro rata proportion of the latest investment round in the case, which values a $250,000 investment as one-eighth of a point in the total claim won by villagers against Chevron."[718] Of course, Mr. Donziger was not selling what he describes in his post-trial briefing as "Rule 60-contingent future interest[s]" to outside investors.[719] Instead, he was fundraising using his clients' non-restrained interests in the Ecuadorian Judgment,[720] and those investors could be paid with collections from foreign judgment-enforcement proceedings should any prove successful.[721] It simply does not make any sense for Mr. Zelman's "Rule 60-contingent future interest"--if that were really what it

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[718] (GX 105 at DONZIGER_ 013098 (emphasis added); GX 110 at DONZIGER_013102 (emphasis added).)

[719] (Def. IV/V/VI Br. at 11 ¶ 29.)

[720] Mr. Donziger admitted to such fundraising at a hearing before Judge Kaplan on May 8, 2018. (See GX 2010 at 18:23-24 ("I'm selling, as an intermediary, the points or the aspects of the judgment that are held by my clients."); see also id. at 26:3-4 ("I'm not selling my shares; I'm selling my clients' shares."); id. at 31:13-14 ("[A]gain, I'm not selling my shares, I'm selling their shares.").)

[721] The RICO Judgment only enjoined Mr. Donziger and the two LAPs who appeared in the underlying civil suit; it did not forbid the other LAPs from monetizing or profiting from the Ecuadorian Judgment. (See GX 1875 at 3 ¶ 5.) Moreover, nothing in the RICO Judgment "enjoin[ed], restrain[ed] or otherwise prohibit[ed] Donziger, the LAP Representatives, or any of them, from . . . filing or prosecuting any action for recognition or enforcement of the Judgment or any New Judgment, or any for prejudgment seizure or attachment of assets based in courts outside the United States." (Id. at 3 ¶ 6 (emphasis added).)

was-- to be priced at the same value as investment-grade interests in the Ecuadorian Judgment. Instead, the logical and reasonable inference is that Mr. Donziger pledged to Mr. Zelman a garden-variety portion of his contingent fee interest in the Ecuadorian Judgment, whose value would naturally coincide with the shares of the Ecuadorian Judgment offered for sale to outside investors.

And second, although Mr. Zelman testified that his agreement with Mr. Donziger was "contingent" on future events, the evidence shows that the contingency to which Mr. Zelman referred related to Mr. Donziger's collecting his fees, not to the RICO Judgment possibly being set aside pursuant to a Rule 60 motion.[722] Mr. Donziger's communications with Mr. Zelman simply refer to an uncertainty of future collection and indicate that any recovery of Mr. Zelman's fees would necessarily depend on Mr. Donziger's recouping his.[723] Nowhere in any communications with Mr. Zelman did Mr. Donziger so much as reference Rule 60 or explain that it would be necessary for the RICO Judgment to be set aside for Mr. Zelman ever to recover any fees. Given that, it is entirely

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[722] (See, e.g., Trial Tr. at 589:8-12 ("What did I understand him to mean. There was a judgment for, I don't know, $9.5 billion, that I know that he was attempting to collect that. And if so, then there would be some fees that he would receive as part of that, but that was just my understanding.").)

[723] (See, e.g., GX 105 at DONZIGER_013098 ("Should my personal fees not be recovered from the Ecuador case, you will not be entitled to any recovery of the $14,000. Should a proportion of my fees be recovered, but not the full amount, your recovery will be decreased on a pro rata basis equal to the overall decrease affecting my fees."); GX 110 at (similar).)

unsurprising that Mr. Zelman did not know, at the time he agreed to provide the executive-coaching services, that Mr. Donziger was barred by the RICO Judgment from collecting fees.[724] All of this suggests that, at the time the agreement was formed, the parties understood that what Mr. Donziger had pledged was a standard contingency interest tied to the recovery of the Ecuadorian Judgment, not some nebulous, "highly contingent interest[]" for which "the market . . . is typically non-existent."[725]

For these reasons, the Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger disobeyed Paragraph Five of the RICO Judgment by pledging a portion of his own interest in the Ecuadorian Judgment to Mr. Zelman in exchange for executive-coaching services.

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[724] Mr. Zelman testified to that fact on both direct and cross examination. (See Trial Tr. at 587:16-23 ("Q. Prior to Mr. Donziger sending you this email on March 27, 2018, had Mr. Donziger told you that he was barred by court order from collecting fees on the matter? A. I don't think he ever used that language. Q. And when you say you don't think he ever used that language, had he ever indicated to you that a court order prevented him from collecting the fees, his fees? A. I don't believe so. I don't believe so."); id. at 617:20-618:5 ("Q. Mr. Zelman, did there come a time when Mr. Donziger informed you that he was barred by court order from collecting fees on this matter? A. I saw an e-mail between himself and myself. I don't know what the date was but, yes. Q. But you knew that prior to that e-mail, didn't you, Mr. Zelman? A. That -- sorry. What did I know? Q. That there had been a court order related to Mr. Donziger's ability to collect fees in this matter? A. I don't think I knew that prior to that email.").)

[725] (Def IV/V/VI Br. at 11 ¶ 29.)

D. Count I

The Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger disobeyed Paragraph Four of the Protocol between March 8, 2019 and May 28, 2019. Despite Paragraph Four's clear command to provide sworn lists of his "Devices" and "Media" to Mr. Krehel and Chevron's Forensic Expert within three business days of the Protocol's entry,[726] Mr. Donziger did not provide any sworn list until nearly three months later.[727] Mr. Donziger did not disclose to Mr. Krehel that he even had any devices until March 18, 2019, at that point only informing Mr. Krehel orally that he used a MacBook Air and an iPhone.[728] In an email on March 11, 2019 and an April

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[726] (See GX 2172 at 1 ¶ 4.)

[727] (See GX 138 at DONZIGER 105038-40; see also Trial Tr. at 792:22-793:5 ("Q. And Mr. Krehel, with respect to this list that Mr. Donziger was directed to provide to you of his devices and accounts within three business days of entry of this protocol, did that occur? A. No. Q. You did not receive a list from Mr. Donziger of his devices and/or his accounts within three days of the business days of entry of the protocol? A. That is correct, I did not."); id. at 806:2-5 ("Before you received this email from Mr. Donziger on May 29, of 2019, had you received from Mr. Donziger any list of his electronic devices or accounts? A. No.").)

[728] (See Trial Tr. at 800:2-8 ("Q. And did Mr. Donziger give you a response? A. Yes, he did. Q. What do you recall him saying to you? A. To my recollection he mentioned that he has an iPhone and MacBook Air and potentially he might have had some other devices but he mentioned that they would not be related matter. They would be more like a storage devices."); GX 134 at DONZIGER_101970 ("Verbally, when asked, Mr. Donziger provided list of devices: one iPhone and one MacBook Air system.".); see also Trial Tr. at 806:6-10 ("Q. Was the only information that you received from Mr. Donziger

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8, 2019 filing with the Court, Mr. Donziger indicated that he was planning to invite contempt sanctions in order to obtain appellate review of the Protocol.[729] Although Mr. Donziger changed his mind at some point regarding his intent to resist Paragraph Four,[730] he still did not produce a sworn list of his devices until May 29, 2019,[731] i.e., after Judge Kaplan had already found him to be in civil contempt and after coercive fines began to run.[732] It would be an understatement to

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prior to this May 29, 2019 email about Mr. Donziger's devices, what Mr. Donziger told you in the lobby of the apartment building on March 18 of 2019? A. That is correct.").)

[729] (See GX 133 at DONZIGER_101980 ("I clearly have stated that I will voluntarily go into civil contempt of the legally unfounded orders in order to obtain proper appellate review."); GX 2184 at 4-5 ("[A]s I have made clear, my responses have been limited by the fact that it is my intention to go into voluntary contempt as a matter of principle rather than submit to the review process prior to achieving any appellate review.").)

[730] (See GX 2352 at 7:21-24 ("I have a draft affidavit that I sent in good faith to Chevron to work with them to get in compliance. I intend to get in compliance on paragraph 4.").)

[731] (See GX 138 at DONZIGER_105038-40.) Mr. Donziger ultimately had to supplement that declaration and did so on June 5, 2019. (See GX 140 at DONZIGER_105028-31.)

[732] (See GX 2209 at 70 ("[Mr. Donziger] shall pay a coercive civil fine to the Clerk of Court with respect to May 28, 2019 and each subsequent day from that date until the date on which he fully purges himself of this contempt by doing so.").) Contrary to his suggestion in his post-trial briefing, Mr. Donziger did not "come into compliance with paragraph 4 of the March 5 Order . . . within the time allotted by Judge Kaplan in the Contempt Opinion." (Def. I/II/III Br. at 14 ¶ 10.)

say that Mr. Donziger's disobedience of Paragraph Four of the Protocol was patent.

E. Count II

The Special Prosecutors have proven beyond any shadow of a doubt that Mr. Donziger disobeyed Paragraph Five of the Protocol by refusing to surrender his electronic devices to Mr. Krehel at 12:00 pm onMarch 18, 2019.[733] Mr. Krehel's testimony established not only that Mr. Donziger did not surrender his devices at the time Judge Kaplan specified[734] but also that Mr. Donziger had still not surrendered the devices as of the date of trial,[735] notwithstanding that the Court of Appeals' decision on which he hung his hat was rendered some two months

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[733] (See GX 2172 at 2 ¶ 5.)

[734] Mr. Krehel arrived at Mr. Donziger's apartment, as scheduled, before 12:00 p.m., but Mr. Donziger was not there. (See Trial Tr. at 796:8-798:3; GX 134 at DONZIGER_101970.) Mr. Krehel remained in the lobby until around 1:00 p.m. when Mr. Donziger showed up carrying a cup of coffee. (See Trial Tr. at 798:4-13.) At that time, Mr. Donziger told Mr. Krehel that he would not surrender any devices for imaging. (See id. at 798:14-17 ("Q. Can you tell us what he said to you and you said to him. A. From my recollection, Mr. Donziger told me that he will not surrender any devices, and that basically we will not receive any devices that day from him."); GX 134 at DONZIGER_101970 ("Mr[.] Donziger met LIFARS Forensic Team in the building lobby, and did not provide LIFARS Forensic Team any devices.").)

[735] (See Trial Tr. at 803:23-804:6 ("Q. Did Mr. Donziger ever surrender any devices to you, Mr. Krehel, for imaging? A. No. Q. He didn't do it in June? A. No. Q. Didn't do it in July? A. Correct. Q. And as you sit here today, has that happened? A. Did not happen.").)

before trial.[736] That testimony is wholly consistent with Mr. Donziger's repeated insistence that he would invite a contempt sanction in order to seek appellate review of the Protocol.[737]

Of course, to invoke what Mr. Donziger terms "contempt jurisdiction"--even if only intending to invite a civil contempt sanction--disobedience of the order to be challenged is an indispensable prerequisite.[738] Any desire on Mr. Donziger's part to seek appellate review could bear only on whether his disobedience was willful, not whether it occurred at all. The Court will consider the extensive proof of Mr. Donziger's willfulness in detail below.

F. Count III

The evidence unequivocally establishes Mr. Donziger's disobedience of the Passport Order beyond any doubt whatsoever. As explained above, the Passport

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[736] See Donziger, 990 F.3d at 192 (deciding appeal on March 4, 2021).

[737] (See, e.g., GX 133 at DONZIGER_101980 ("I clearly have stated that I will voluntarily go into civil contempt of the legally unfounded orders in order to obtain proper appellate review."); GX 2184 at 4-5 ("[A]s I have made clear, my responses have been limited by the fact that it is my intention to go into voluntary contempt as a matter of principle rather than submit to the review process prior to achieving any appellate review.").)

[738] See, e.g., Maness, 419 U.S. at 460 ("We have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." (alteration omitted).)

Order's directive was crystal clear: Mr. Donziger was to surrender any passport in his possession to the Clerk of Court by June 12, 2019 at 4:00 p.m.[739] Yet, despite stating on June 10, 2019 that he would "voluntarily surrender [his] passport until [he] c[ould] deal with it at the Second Circuit,"[740] Mr. Donziger did not do so.[741] In lieu of complying, Mr. Donziger instead moved for an emergency stay of the Passport Order's sanctions.[742] Yet, even after Judge Kaplan denied the motion in relevant part[743]--and despite Mr. Donziger's informing Judge Kaplan that he was "immediately turning to the task of preparing an emergency stay to the Circuit"[744]--Mr. Donziger never sought any relief from the Court of Appeals.[745] Mr. Donziger (who has vigorously maintained that he is not a flight risk) even requested that this Court

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[739] (See GX 2232 at 2.)

[740] (GX 2352 at 16:8-9.)

[741] As Mr. Ng confirmed at trial, the Clerk's Office's records indicate that Mr. Donziger never surrendered his passports to the Clerk of the Court. (See Trial Tr. at 566:16-24 ("Q. Was there any other record indicating that Mr. Donziger had ever surrendered his passport to the Clerk of the Court at any point in time after June 11th of 2019, as directed by the court order? A. After June 13th or -- Q. After June 11th, the date of the order, at any point in time? A. I did not see any indication that a passport was received by the clerk's office.").)

[742] (See GX 2234 at 15 n.6.)

[743] (See GX 2254 at 4.)

[744] (GX 2234 at 15 n.6.)

[745] (See Trial Tr. at 657:3-9 ("Q. Did Mr. Donziger notice an appeal of this order with the Second Circuit? A. No, he did not. Q. Did he seek a stay of this order with the Second Circuit? A. No, he did not. Q. Did he seek mandamus relief with the circuit? A. No, he did not.").)

permit him to keep his passport--Notwithstanding the Passport Order--at his initial appearance to answer the criminal contempt charges.[746] The upshot? Mr. Donziger did not comply with the Passport Order. Full stop.

Mr. Donziger disagrees, averring that he "is innocent" of Count III because the Special Prosecutors did not prove that his "failure to turn over his passport caused any harm or obstructed, disrupted or interfered with the administration of justice in any way."[747] He is wrong. The Special Prosecutors did not have to prove harm to sustain the criminal contempt charges under 18 U.S.C. § 401(3). As the Court has already stated several times, "[t]o secure a conviction for criminal contempt of a court order," the Special Prosecutors need only "prove (1) the issuance of the order, (2) the defendant's disobedience or disregard of the order, and (3) the defendant's knowledge and willfulness in disobeying the order."[748] The cases that Mr. Donziger cites are inapposite because they involve contempt

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[746] (See Trial Tr. at 831:22-832:3 ("But what I would propose, because I don't think this is a normal kind of case, given the long history of my particular role in this case, is to allow me to keep my passport for me to propose when I want to travel to another place that I would inform the Court or inform pretrial services or whatever the process is, get permission to go for a certain period of time and be allowed to return.").)

[747] (Def. I/II/III Br. at 24-25 ¶ 17.)

[748] Vezina, 165 F.3d at 178 (emphasis added).

occurring in the presence of the court,[749] which is governed by a different statutory provision.[750] Whether Mr. Donziger's noncompliance with the Passport Order caused harm or interfered with the administration of justice is entirely irrelevant. Accordingly, the Special Prosecutors have proven beyond a reasonable doubt Mr. Donziger's disobedience of the Passport Order.

4. Willfulness

Finally, the Court takes up whether the Special Prosecutors have established the willfulness of Mr. Donziger's disobedience of the RICO Judgment, the Protocol, and the Passport Order.

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[749] In re Williams, 509 F.2d 949, 960 (2d Cir. 1975) (considering contempt case involving alleged in-court misbehavior); In re Kirk, 641 F.2d 684, 687-88 (9th Cir. 1981) (noting that the facts underlying the two contempt convictions involved conduct occurring before two different judges); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) (considering a § 401(1) prosecution). Indeed, Mr. Donziger's counsel left out of his quotation of Kirk a relevant citation to 18 U.S.C. § 401(1), the provision governing contempts in the presence of a court. See Kirk, 641 F.2d at 687 ("Moreover, there can be no conviction for criminal contempt under 18 U.S.C. § 401 or 28 U.S.C. § 636(d) unless there has been such a '[m]isbehavior . . . as to obstruct the administration of justice' (§ 401(1)), a 'material disruption or obstruction' of justice . . . ." (emphasis added)).

[750] See 18 U.S.C. § 401(1) ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.")

A. Counts IV & V

The Special Prosecutors have proven beyond a reasonable doubt the willfulness of Mr. Donziger's disobedience of Paragraph One of the RICO Judgment. As the Court has already found above, the RICO Judgment and the RICO Opinion made clear to Mr. Donziger that the 2011 Contingent Fee and the 2017 Contingent Fee were property subject to the constructive trust. Yet, as shown above, Mr. Donziger did not assign those interests forthwith, instead doing so only after years of litigation. Why? The evidence suggests one obvious reason: Mr. Donziger did not want to forfeit his right to receive a nine-figure payday should efforts to enforce the Ecuadorian Judgment prove successful in other jurisdictions.[751] Mr. Donziger essentially admitted as much when he declined, despite Judge Kaplan's order to the contrary, to transfer his Amazonia shares to the Clerk of the Court pending his appeal of the RICO Judgment:

> The upshot is that a simple transfer to the clerk's office of my Amazonia shares would in practice mean the complete divestiture--and potentially irretrievable loss--of more than two decades of labor on the part of me and some of my colleagues . . . .[752]

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[751] Simple arithmetic shows that Mr. Donziger's 6.3% share of the $8.6 billion Ecuadorian judgment, if collected in full, would have entitled him to a fee of more than $540 million.

[752] (GX 1986-1 at 2 (emphasis added); see also GX 2051 at 2 ("Holding the status quo seeks to prevent forfeiture (dissipation) of my interest entirely--a result that Chevron itself should be wary of, given that it claims ownership of my interest through this Court's judgment." (emphasis added)).)

As the Court has already observed,[753] Mr. Donziger's conduct related to the Amazonia shares is relevant because Judge Kaplan, Chevron, and Mr. Donziger grouped and equated the Amazonia shares together with the 2011 Contingent Fee.

Over the ensuing years, Mr. Donziger repeatedly refused to transfer his shares in Amazonia, the 2011 Contingent Fee, and the 2017 Contingent Fee, despite several subsequent orders from Judge Kaplan. Consider the following examples:

- On February 28, 2018, Judge Kaplan observed that Mr. Donziger "arguably [wa]s in contempt of the final judgment of permanent injunction" for failing to transfer his shares in Amazonia.[754] Notwithstanding that warning, Mr. Donziger did not even attempt to transfer his Amazonia shares for months.

- In May 2018, despite his previous assertion that Chevron's pursuit of the Amazonia shares was "a fake issue,"[755] Mr. Donziger included an "Addendum of Understandings" to his first assignment of the Amazonia shares, stating, inter alia, that the share transfer form was being executed (1) "upon the specific threat of imposition of 'contempt of

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[753] (See supra note 109.)

[754] (See GX 1963 at 17.)

[755] (GX 2010 at 29:14.)

court' sanctions" and (2) in violation of Amazonia's Articles of Association.[756] Judge Kaplan found that Addendum to have been targeted at negating the transfer.[757]

- On May 16, 2018, Judge Kaplan indicated that Chevron had raised a new possible basis for contempt: Mr. Donziger's failure to assign the 2011 Contingent Fee.[758] Despite that heads up, Mr. Donziger still did not transfer the 2011 Contingent Fee.[759]

- Following a motion to compel filed by Chevron,[760] Judge Kaplan ordered Mr. Donziger to execute a notarized assignment of the 2011 Contingent Fee by August 21, 2018.[761] Because Mr. Donziger was traveling, Judge Kaplan extended the time to comply and instead required Mr. Donziger to

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[756] (GX 2003-3 at 1.)

[757] (See GX 2006 at 12.)

[758] (See GX 2006 at 14-15.)

[759] (See Trial Tr. at 150:20-151:2 ("And after Judge Kaplan issued that opinion, that May 16th opinion, did Mr. Donziger execute an assignment to Chevron of his right to the contingent fee as granted in the 2011 retainer agreement? A. Not immediately, no. Q. And in the next four or five weeks after that opinion, did he execute an assignment of his contingent fee interest? A. No.").)

[760] (See generally GX 2047.)

[761] (See GX 2072 at 9.)

complete two sets of assignment forms, one notarized and one not.[762] Although Mr. Donziger did ultimately execute those forms, he did not do so consistently with Judge Kaplan's instructions.[763]

- After exhausting his appeals of the RICO Judgment, Mr. Donziger nevertheless entered into the 2017 Retainer.[764] But Mr. Donziger did not disclose the existence of that agreement until he appeared for a deposition on June 25, 2018.[765] Mr. Donziger also did not assign that interest to Chevron until May 28, 2019,[766] despite Judge Kaplan's February 21, 2019 order directing him to do so by February 28, 2019.[767]

Collectively, that evidence easily proves beyond a reasonable doubt that Mr. Donziger "consciously disregard[ed]" Paragraph One of the RICO Judgment by

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[762] (See GX 2079 at 5-6.)

[763] (See GX 123 at DONZIGER_106017-18 (sending executed form by email rather than overnight courier); GX 2085-1 at 1-2 (executing notarized form as of September 4, 2018 despite being ordered to do so by August 29, 2018).)

[764] (See GX 120 at DONZIGER_ 107417.)

[765] (See GX 201 at 28:22-29:5 ("Are you familiar with this document, Mr. Donziger, your retainer agreement from January 5th of 2011? A. Yes. Q. Is this agreement still operative? A. I think there has been a subsequent agreement.").)

[766] (See GX 2216-1 at 1.)

[767] (See GX 2165 at 3.)

refusing to assign to Chevron the 2011 Contingent Fee and the 2017 Contingent Fee.[768]

Mr. Donziger argues that he is not guilty of Count IV because "the scope and terms" of his "obligation to transfer or assign the contractual rights were the subject of bona fide, good faith dispute, negotiation, and litigation."[769] Not so. As the Court has already recognized, Paragraph One placed the onus for compliance on Mr. Donziger; it did not order Chevron to do anything.[770] Contrary to what Mr. Donziger necessarily suggests,[771] Chevron was under no obligation to request that Mr. Donziger transfer the 2011 Contingent Fee or to propose any specific form(s) of assignment. Nor did Judge Kaplan's declining to force Mr. Donziger to sign an assignment form with respect to unidentified and undescribed property excuse Mr. Donziger's failure to assign the 2011 Contingent Fee, a discrete and identified property interest.[772] And even though Mr. Donziger is correct that Judge Kaplan did not direct him to complete specific transfer forms until August 15, 2018,[773] Mr.

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[768] Lynch, 162 F.3d at 735.

[769] (Def. IV/V/VI Br. at 2 ¶ 2.)

[770] (See GX 1875 at 1-2 ¶ 1.)

[771] (See Def. IV/V/VI Br. at 2 ¶ 3.)

[772] (See Def. IV/V/VI Br. at 2 ¶ 4 (arguing that "Mr. Donziger prevailed on the 'scope' issue as reflected in Judge Kaplan's Order dated August 15, 2018" (emphasis omitted)).)

[773] (See Def. IV/V/VI Br. at 3 ¶ 5; see also GX 2072 at 9 (ordering Mr. Donziger to complete specific transfer forms related to the Amazonia shares and the 2011 Contingent Fee).)

Donziger fails to acknowledge that he did not even comply timely with that order.[774] Mr. Donziger's attempts to pass the buck for Paragraph One compliance to Chevron do not negate the other evidence proving his conscious disregard of Paragraph One as well as Judge Kaplan's subsequent orders.

As for Count V, Mr. Donziger maintains that he is not guilty because "the need for and propriety of a transfer of rights to the November 1 Agreement was also the subject of bona fide litigation."[775] Again, the Court disagrees. Mr. Donziger's assertion that the 2017 Retainer did not grant him a new interest is inconsistent with both (1) the language of the 2011 Retainer and the 2017 Retainer[776] and (2) his June 25, 2018 deposition testimony confirming that the 2017 Retainer granted him "a percentage interest" in the Ecuadorian Judgment.[777] Moreover, as the Court

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[774] (See Def. IV/V/VI Br. at 3 ¶¶ 6-10.)

[775] (Def. IV/V/VI Br. at 5 ¶ 19.)

[776] As noted above, those agreements were among different parties and differed in what persons or entities were liable to pay a contingent fee and what persons or entities were entitled to receive such a fee. (Compare GX 1978-6 at 1, 3-4 (entitling Donziger & Associates PLLC to contingent fee from the LAPs), with GX 120 at DONZIGER_107415, 107417 (entitling Mr. Donziger personally to contingent fee from ADF).)

[777] (GX 201 at 59:12-22 ("Q. Does the agreement that you signed with the FDA in the last couple of years, the retainer agreement, give you a percentage interest in the judgment, the Ecuadorian judgment? A. Yes. Q. What is that percentage interest in the FDA retainer? A. It's the same percentage interest that I have always had, to the best of my knowledge, 6.3 percent.").)

recognized above, (1) Mr. Donziger's assignment of the 2011 Contingent Fee did not encompass the 2017 Contingent Fee,[778] and (2) even if it did, Mr. Donziger still disobeyed the RICO Judgment between when he signed the 2017 Retainer and, at the earliest, August 22, 2018.[779] And ultimately, Judge Kaplan resolved any questions surrounding the 2017 Contingent Fee by directly ordering Mr. Donziger to assign that interest to Chevron by February 28, 2019.[780] Yet, Mr. Donziger did not do so until May 28, 2019,[781] and then only after Judge Kaplan found him to be in civil contempt and imposed a series of coercive fines.[782] If that does not prove willfulness, it is hard to imagine what would.

In sum, the Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger willfully disobeyed Paragraph One of the RICO Judgment by (1) refusing between March 4, 2014 and September 3, 2018 to assign to Chevron the 2011 Contingent Fee and (2) refusing between November 1, 2017 and May 27, 2019 to assign to Chevron the 2017 Contingent Fee.

B. Count VI

The Special Prosecutors have also proven beyond a reasonable doubt that Mr. Donziger's disobedience of Paragraph Five of the RICO Judgment was willful. The

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[778] (See supra notes 696 to 700 and accompanying text.)

[779] (See supra notes 701 to 703 and accompanying text.)

[780] (See GX 2165 at 3.)

[781] (See GX 2216-1 at 1.)

[782] (See GX 2209 at 69-70.)

record is replete with evidence that Mr. Donziger knew that he was forbidden to profit from the Ecuadorian Judgment.[783] Cognizant of that fact, Mr. Donziger represented to Judge Kaplan, when attempting to prevent post-judgment discovery, that he was "not selling [his] own shares, because that obviously [wa]s prohibited by your Honor's RICO judgment."[784] Mr. Donziger made that representation despite having pledged a portion of his contingency fee interest in the Ecuadorian Judgment to Mr. Zelman.[785] Then, notwithstanding Chevron's moving on March 19, 2018

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[783] (See, e.g., GX 2018 at 2 ("So long as the litigation finance agreements do not involve Mr. Donziger pledging, assigning, committing, or otherwise collateralizing his specific contingency interest . . . [,] the NY Judgment does not have any impact."); GX 2051 at 2 ("It remains that Chevron has not presented even a scintilla of evidence that I have sold any of my interests in the Ecuador judgment--the only operative factual question at issue that could provide a basis for a contempt finding on the judgment compliance issue.").)

[784] (GX 2010 at 18:24-19:1 (emphasis added); see also id. at 21:5-7 ("What evidence have they presented to show I have sold a single piece of my interest? Zero. And it hasn't happened. I'll make that representation right now."); id. at 26:3-4 ("I'm not selling my shares; I'm selling my clients' shares."); id. at 31:5-7 ("How do we know he hasn't sold his shares? Well, I'm a lawyer and I'm representing to you as an officer of the court right now I have not sold my shares."); id. at 31:13-14 ("[A]gain, I'm not selling my shares, I'm selling their shares."); id. at 32:18-23 ("But if there's anything that might be arguably legit about what they're seeking, it's something related to the narrow issue of am I selling my own shares. And if you're not going to accept my representation, I can prove to you that I have not sold my own shares, and that's what it should be limited to.").)

[785] (See GX 105 at DONZIGER_013098; GX 110 at DONZIGER_013102.)

to hold him in contempt for allegedly monetizing the Ecuadorian Judgment related to litigation fundraising,[786] Mr. Donziger agreed on March 26, 2018 to pledge a further interest to Mr. Zelman in consideration for $2,000 of additional executive-coaching services.[787]

Almost immediately thereafter, Mr. Donziger informed Mr. Zelman out of the blue for the first time that he was "barred by court order in the U.S. from collecting fees on the matter."[788] For three months after that, Mr. Donziger did not produce to Chevron his communications with Mr. Zelman,[789] even though (1)

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[786] (See GX 1966 at 14-16; see also GX 1968 at 2 (ordering Chevron to serve its ex parte motion on Mr. Donziger).)

[787] (See GX 110 at DONZIGER_013102 ("You and I agree that consistent with the terms below, I have delivered an additional $2000 worth of consulting services which entitles me to 2/250 of an eighth of a point of whatever is collected of the total claim."); id. ("Let me confirm the calculation. Agree in concept. Thanks!").)

[788] (GX 111 at DONZIGER_013103.)

[789] (See Trial Tr. at 355:8-11 ("Q. These exhibits -- 105, 106, 109, 110, 111 -- were they provided to you at any point by Steve Donziger in the discovery process? A. No."); id. at 583:1-14 ("Q. So Mr. Zelman, this particular email, you received a subpoena from Gibson Dunn for some documents; correct? A. Yeah. Q. And this is one of the documents that you produced; is that correct? A. I would suppose so. Q. And when you collected documents to provide to Gibson Dunn, did you review your emails and print them out? A. Yes. Q. Okay. And this would have been one of the emails that you've printed out or viewed; correct? A. Yes. Q. And provided to Gibson Dunn; correct? A. Correct.").)

(continued on following page)

those communications were responsive to Document Request No. 30[790] and (2) Judge Kaplan had ordered him to comply with that request by June 15, 2018.[791] In direct contravention of Judge Kaplan's order, Mr. Donziger claimed the Request No. 30 "appear[ed] to be a Compliance Request."[792] Nevertheless, Mr. Donziger represented that he had "not attempted nor completed any sale or assignment of [his] interest in the Ecuador

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(continued from previous page)

Mr. Donziger was not Mr. Zelman's attorney, and "Mr. Zelman was not and never has been an investor in the [Lago Agrio] case." (GX 2184 at 7.) No claim of privilege would pertain to those documents, and Mr. Donziger's First Amendment objection--which he tied to Chevron's discovery of litigation funders--would be similarly inapplicable. At base, there was no principled reason for Mr. Donziger to have withheld those documents other than his not wanting to turn them over to Chevron.

[790] (See GX 1989-1A at 15 ¶ 30 ("ALL DOCUMENTS evidencing or relating to any attempted or completed sale, assignment, or transfer of rights, title, claims or interest of any proceeds or other interest held by YOU, whether directly or indirectly, in the ECUADOR JUDGEMNT or the ECUADOR ENFORCEMENT ACTIONS, whether or not such attempt was successful.").)

[791] (See GX 2009 at 1 n.1 ("The specific document requests that the Court characterizes as Money Judgment Discovery are Requests 1 through 17 19, 23 through 28 and 30."); id. at 3 ("The Donziger Defendants, on or before June 15, 2018, shall comply fully with all of the Money Judgment Requests, as modified by this order, that are contained in Chevron's First Set of Requests for Production of Documents in Aid of the Supplemental Judgment ('the RFP'). Full compliance includes, but is not limited to, production of all responsive documents within their possession, custody or control.").)

[792] (GX 119 at DONZINGER_103461.)

Judgment at any point since March 4, 2014."[793] Collectively, the evidence proves that (1) Mr. Donziger pledged a portion of his contingency fee interest to Mr. Zelman, (2) even though he knew that doing so contravened Paragraph Five of the RICO Judgment, and (3) he subsequently did not produce to Chevron documents evidencing the transaction despite being ordered to do so by Judge Kaplan. The Special Prosecutors have met their burden of proof beyond a reasonable doubt.

Even assuming, arguendo, that Mr. Donziger may have lacked foresight into the possible consequences of his actions--given his suggestions that his agreement with Mr. Zelman was de minimis[794]--the Court rejects any notion that Mr. Donziger thought that pledging a portion of his interest in the Ecuadorian Judgment was somehow permissible under the RICO Judgment. Judge Kaplan had made crystal clear to Mr. Donziger that he "may not be allowed to benefit from [the Ecuadorian Judgment] in any way,"[795] and Paragraph Five of the RICO Judgment explicitly forbade Mr. Donziger from "pledging . . . any interest" in the Ecuadorian Judgment

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[793] (GX 119 at DONZINGER_103461.)

[794] (GX 2184 at 8 ("The Zelman issue is obviously de minimis."); see also id. at 7 ("I understand how the agreement with Mr. Zelman can be seen as a monetization of my interest in the Ecuador Judgment arguably in conflict with the Court's interpretation of the terms of the RICO Judgment, although to be clear I do not concede that it is in conflict. I did not fully appreciate this at the time these services were provided, for reasons I do not specifically recall . . . .").)

[795] (GX 1874 at 485.)

for any reason.[796] Yet, Mr. Donziger received more than $14,000 worth of services from Mr. Zelman,[797] and he offered consideration for those services in the form of $2,000 in cash coupled with a portion of his contingent fee interest.[798] If Mr. Donziger was ignorant of Paragraph Five's strictures, he was willfully so. That undoubtedly shows "conscious[ ] disregard" of Paragraph Five of the RICO Judgment,[799] especially considering that the Court of Appeals "hold[s] attorneys to a higher standard of conduct than . . . lay persons."[800]

C. Counts I & II

The Court finds that the Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger's disobedience of Paragraphs Four and Five

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[796] (GX 1875 at 3 ¶ 5.)

[797] (See Trial Tr. at 581:12-15 ("So over the period of several months, we had several meetings which would have extended past the four hours that the fourth session was already contracted for. So that's what was being represented in this email.").)

[798] (See GX 105 at DONZIGER_013098 ("In exchange for you providing me with $14,000 worth of such services, I pledge to you an interest in the Ecuador judgment from my fees should they be collected."); GX 110 at DONZIGER_013102 ("You and I agree that consistent with the terms below, I have delivered an additional $2000 worth of consulting services which entitles me to 2/250 of an eighth of a point of whatever is collected of the total claim."); Trial Tr. at 576:4-8 ("Q. Was there a cash component of your agreement as well? A. Yes. Q. What was that, the cash component of your agreement with Mr. Donziger? A. Steven paid me 2,000 cash of the $14,000.").)

[799] Lynch, 162 F.3d at 735.

[800] Cutler, 58 F.3d at 837.

of the Protocol was willful. After the Protocol was issued, Mr. Donziger repeatedly, and almost immediately, broadcast his intent not to comply. For example, in an email Mr. Donziger sent less than a week after the Protocol was entered, Mr. Donziger did not pull punches:

> I have explained this to Judge Kaplan on repeated occasions beginning almost one year ago. . . . I clearly have stated that I will voluntarily go into civil contempt of the legally unfounded orders in order to obtain proper appellate review. Judge Kaplan and Chevron have known this long before starting the pointless process of having you appointed and crafting a review protocol, etc. So I hope you have not cleared your schedule to work on this matter, because, as Chevron knows, I will not be producing documents until my due process rights are respected.[801]

Less than a month later, Mr. Donziger again did not beat around the bush:

> This has already been briefed to some extent, although as I have made clear, my responses have been limited by the fact that it is my intention to go into voluntary contempt as a matter of principle rather than submit to the review process prior to achieving any appellate review.

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[801] (GX 133 at DONZIGER_101980 (emphasis added).)

> Accordingly, I have not dedicated my limited time and resources to articulating challenges to the bewilderingly and unnecessarily complex review protocol drafted by Chevron and ordered, in essentially the same form, by the Court. Nor can I dedicate much additional time to the issue here, in light of the limited time available to respond to the motions. I will nonetheless observe that, on account of a number of unavoidable facts, the review protocol, for all its supposed protections, merely disguises a de facto authorization for Chevron to rifle through my files largely as it wishes.[802]

Those statements carried forward Mr. Donziger's repeated efforts to stave off discovery based on attorney-client privilege and the First Amendment,[803] which Judge Kaplan had squarely rejected more

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[802] (GX 2184 at 4-5.)

[803] (See, e.g., GX 2067 at 1 (arguing that Judge Kaplan's "refusal to offer protective and/or injunctive relief necessary to protect the associational rights of myself and others under the First Amendment is unconstitutional"); GX 2118 at 1, 3 n.1 (informing Judge Kaplan that "I will be unable to comply with the order dated October 18, 2018 directing me to produce a potentially massive quantity of confidential and privileged documents and communications to Chevron" and also suggesting that the discovery requests "work[] a clear violation of the First Amendment right to association"); GX 2131 at 2 ("I am not ethically able to comply with the Court's order to produce mountains of confidential and privileged material to Chevron under a wholly improper purported privilege waiver ruling and before the Court has even ruled on the core issue in Chevron's original contempt motion.").)

than once[804] and which, ironically, had necessitated the entry of the Protocol in the first place.[805] In essence, despite knowing that his obligation to comply with Paragraphs Four and Five of the Protocol was not stayed pending appeal,[806] Mr. Donziger openly admitted that he had absolutely no intention of complying until he could assert his objections to the Court of Appeals, which he thereafter either failed to do or did unsuccessfully. The law put Mr. Donziger to the choice of complying with the Protocol or resisting with the

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[804] (See, e.g., GX 2045 at 20-35 (rejecting First Amendment arguments for protective order); GX 2108 at 2 (finding waiver of attorney-client privilege due to repeated failures to produce a privilege log as required by Federal Rules of Civil Procedure and the Local Rules); GX 2352 at 18:25-19:8 (rejecting attempt to relitigate foundational objections to post-judgment discovery).)

[805] (See GX 2171 at 2 ("Above all, however, it is necessary to bear in mind that the imaging and examination of Donziger's electronic devices has been necessitated only by his obdurate refusal to make any serious, good faith effort to produce documents he has been ordered to produce. He has brought this on himself.").)

[806] (See GX 2149 at 13:24-14:1 ("I know you have an appeal pending in the Second Circuit. I know their brief is due sometime in March. That's the way it goes. You don't have a stay." (emphasis added)).) Mr. Donziger never sought emergency relief from the Court of Appeals. (See GX 7 (no docket entries seeking emergency relief); GX 8 (same); GX 9 (same); see also Trial Tr. at 654:11-20 ("Q. And in the time period that I had focused you on during the course of your direct, which would be February 28th of 2018 to September 30th of 2019, did Mr. Donziger ever seek a stay in the Second Circuit? A. No, he did not. Q. Did he ever seek mandamus relief in that time period in the Second Circuit? A. No, he did not. Q. Did he ever seek expedited briefing in the Second Circuit? A. No, he did not.").)

"concomitant possibility of an adjudication of contempt."[807] He made that choice willfully and deliberately.

Mr. Donziger argues that his disobedience of the Protocol was not willful because "he was seeking appellate review of the lawfulness of the entire order at the time," pursuant to what describes as "well-trodden" path to obtain pre-compliance review of a discovery order.[808] Mr. Donziger suggests that the Special Prosecutors "have failed to prove beyond a reasonable doubt that any of Mr. Donziger's resistance to the March 5 Order was willful disobedience as opposed to an effort to comply via a legally available pathway that included appellate review."[809] Mr. Donziger's conduct, he avers, "was consistent with a reasonable interpretation of the court's order (albeit an interpretation different from the one applied by the court imposing the contempt) or at worst a good faith pursuit of a plausible though mistaken alternative."[810] Finally, Mr. Donziger suggests that "[t]he permissibility of [his] seeking appellate review of discovery orders in a post-judgment context by way of 'contempt jurisdiction' (or token or symbolic contempt) without incurring criminal contempt liability is clear as a matter of law."[811] The Court disagrees for at least three reasons.

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[807] Maness, 419 U.S. at 460.

[808] (Def. I/II/III Br. at 15 ¶ 10.)

[809] (Def. I/II/III Br. at 17 ¶ 13.)

[810] (Def. I/II/III Br. at 17 ¶ 13 (quotation marks and footnotes omitted).)

[811] (Def. I/II/III Br. at 18 ¶ 14.)

First, Mr. Donziger is wrong that a litigant can invoke "contempt jurisdiction" without the possibility of of facing criminal sanctions. It is well-established that the same "conduct can amount to both civil and criminal contempt"[812] and that "the choice of sanctions--civil or criminal--is vested in the discretion of the District Court," not the would-be contemnor.[813] In reality, it is ordinarily necessary for a party seeking to obtain pre-compliance review of a discovery order to suffer a criminal contempt sanction.[814] The Court is aware of no authority to the contrary.[815]

Second, the Court rejects Mr. Donziger's assertion that his conduct was "consistent with a reasonable interpretation" of Paragraphs Four and Five of the Protocol. Paragraph Four and Paragraph Five ordered Mr. Donziger to do two distinct things. It

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[812] United States v. United Mine Workers of Am., 330 U.S. 258, 299 (1947).

[813] Dinler, 607 F.3d at 934.

[814] See, e.g., Dinler, 607 F.3d at 934 (observing that a party "can only appeal a civil contempt sanction after a final judgment").

[815] In fact, although the Supreme Court did not explicitly state as much, the contempt charged in Maness--which Mr. Donziger invoked in his collateral-bar-rule arguments--appears to have been of the criminal variety. See Maness, 419 U.S. at 455, 457 (noting that the trial court "fixed punishment . . . at 10 days' confinement and a $200 fine" and that "the penalty" was later changed "to a $500 fine with no confinement" (emphasis added)); see also Bagwell, 512 U.S. at 828-29 (stating that "a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience" and observing a similar rule for "flat, unconditional fine[s]" (quotation marks omitted)).

is not reasonable to interpret Paragraph Four and Paragraph Five somehow not to require compliance with their plain directives. Likewise, the Court does not accept Mr. Donziger's assertion that his conduct constituted a "good faith pursuit of a plausible though mistaken alternative."[816] Almost definitionally, defying a court order to seek appellate review of that order is making a conscious choice not to comply, not undertaking a good faith effort to do so. Indeed, based on the evidence, the Court finds it obvious that Mr. Donziger's goal was to avoid ever having to comply with the Protocol (or at least with Paragraph Five).

And third, Mr. Donziger's argument has a more fundamental problem. Even if Mr. Donziger's intentions in disobeying the Protocol were pure,[817] or "[e]ven godly," that does not matter.[818] The Special Prosecutors did not have to prove Mr. Donziger's "bad intent in order to prove willfulness."[819] The law of criminal contempt provides no safe harbor for conscientious objectors. All that the Special Prosecutors had to prove beyond a

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[816] Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co., 62 B.R. 723, 731 n.6 (S.D.N.Y. 1986) (alteration omitted).

[817] It is not at all clear that Mr. Donziger was refusing to comply with Paragraphs Four and Five of the Protocol in order to obtain appellate review, as opposed to merely attempting to stonewall discovery. After all, when he was afforded the opportunity to obtain the very appellate review of the Protocol that he purportedly sought, Mr. Donziger elected not to challenge the validity of the Protocol or Judge Kaplan's related contempt findings. (See GX 317 at 8 (statement of the issues); id. at 9-31 (substantive arguments).) Sometimes, actions speak louder than words.

[818] Lynch, 162 F.3d at 735.

[819] Remini, 967 F.2d at 758.

reasonable doubt to prove willfulness was Mr. Donziger's "specific intent to consciously disregard" Paragraphs Four and Five of the Protocol.[820] They have done that in spades.

In short, the Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger willfully disobeyed Paragraphs Four and Five of the Protocol, even if his reason for doing so was to pursue (ultimately unsuccessfully) appellate review.

D. Count III

Finally, the Court finds that the Special Prosecutors have proven beyond a reasonable doubt that Mr. Donziger's disobedience of the Passport Order was willful. On July 12, 2019--despite knowing that he was required to surrender his passports and even after indicating that he would do so voluntarily to seek appellate review[821]--Mr. Donziger elected instead to inform Judge Kaplan that he would not "comply with the Court's deadline of 4 p.m. today in the Passport Order" due to his "pending motion for emergency relief and the severe and irreparable harm as articulated in th[at] motion."[822] Despite Mr. Donziger's representation to Judge Kaplan that he was "immediately turning to the task of preparing an emergency stay to the

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[820] Lynch, 162 F.3d at 735.

[821] (See GX 2352 at 16:8-9 ("I will voluntarily surrender my passport until I can deal with it at the Second Circuit.").)

[822] (GX 2234 at 15 n.6.)

Circuit,"[823] Mr. Donziger never followed through.[824] Even if Mr. Donziger did not disobey the Passport Order with mala fides, the evidence plainly proves beyond a reasonable doubt that he chose to "consciously disregard" that order.[825] That is all the law demands.[826]

5. Young & the Court's Discretion

Throughout his post-trial briefing, Mr. Donziger maintains that this Court should exercise its discretion and decline to impose criminal sanctions because Judge Kaplan's employing the criminal contempt power is inconsistent with Young.[827] In Young, the Supreme Court observed that a court's use of its contempt "authority must be restrained by the principle that only the least possible power adequate to the end proposed should be used in contempt cases."[828] A court's vindicating its authority by punishing past violations

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[823] (GX 2234 at 15 n.6.)

[824] (See Trial Tr. at 657:3-9 ("Q. Did Mr. Donziger notice an appeal of this order with the Second Circuit? A. No, he did not. Q. Did he seek a stay of this order with the Second Circuit? A. No, he did not. Q. Did he seek mandamus relief with the circuit? A. No, he did not.").)

[825] Lynch, 162 F.3d at 735.

[826] See Remini, 967 F.2d at 758 ("[T]he government did not have to show Remini's bad intent in order to prove willfulness in criminal contempt . . . .").

[827] (See Def. I/II/III Br. at 25 ¶ 18; Def. IV/V/VI Br. at 4 ¶ 12, 6 ¶ 20, 11-12 ¶ 30.)

[828] Young, 481 U.S. at 801 (cleaned up) (emphasis added).

of its orders is such a permissible end,[829] however, and it is hornbook law that the same contemptuous act can subject a contemnor to both civil and criminal sanctions.[830] Here, the charges are all directed at Mr. Donziger's extensive and continuous laundry list of past violations of Judge Kaplan's orders, not at securing his future compliance with those orders.[831]

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[829] See, e.g., United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 661 (2d Cir. 1989) ("Criminal contempt, however, serves the much different purpose of vindicating the court's authority. It serves to punish individuals or corporations for past violations of a court order." (citation omitted)).

[830] See, e.g., In re Grand Jury Witness, 835 F.2d 437, 440 (2d Cir. 1987) ("Refusal to obey a court order may subject a person to both civil and criminal contempt for the same acts."); SEC v. Am. Bd. of Trade, Inc., 830 F.2d 431, 439 (2d Cir. 1987) ("When a district court's order has been violated, the court may impose either civil contempt remedies or criminal contempt sanctions, or both."); Universal City Studios, Inc. v. N.Y. Broadway Int'l Corp., 705 F.2d 94, 96 (2d Cir. 1983) ("Though the use of judicial power to secure future compliance with a court order involves civil contempt remedies, the use of such power in the aftermath of past violations can take the form of either civil contempt remedies or criminal contempt punishments, or both." (citations omitted)); In re Weiss, 703 F.2d 653, 664 (2d Cir. 1983) ("If conduct is tantamount to a willful refusal to obey an order of the court, and the contemnor has the power to end his contumacy, a court may impose criminal contempt sanctions, or civil contempt sanctions, or both."); In re Irving, 600 F.2d 1027, 1031 (2d Cir. 1979) ("In responding to a single contemptuous act, a court may well impose both criminal and civil sanctions--wishing to vindicate its authority and to compel compliance.").

[831] (See Order to Show Cause at 2-3 ¶ 3, 5 ¶ 6, 6 ¶ 9, 8 ¶ 14, 9 ¶¶ 18, 21 (each specifying the relevant time period for the contemptuous conduct).)

And, as the Court has already held, "[t]he fact that Mr. Donziger ultimately acquiesced to [some of] Judge Kaplan's orders before he was criminally charged does not mean that Judge Kaplan was then forced to ignore the years of noncompliance up to the purges."[832] Because the Court discerns no abuse of discretion in Judge Kaplan's charging criminal contempt, the Court will not decline to impose criminal sanctions based on Young.

IV. Conclusion

The Court does not question the sincerity of Mr. Donziger's espousal of his clients' cause. Nor does it quarrel with the sincerity of his belief that he has been treated unfairly by Chevron. But "a lawyer, of all people, should know that in the face of a perceived injustice, one may not take the law into his own hands."[833] By repeatedly and willfully defying Judge Kaplan's orders, that is precisely what Mr. Donziger did. It's time to pay the piper.

Because the Special Prosecutors have proven each element of criminal contempt of a court order beyond a reasonable doubt, the Court finds and renders a verdict of GUILTY on each of the six counts of criminal contempt charged in the Order to Show Cause.[834] In addition, Mr. Donziger's two post-trial letter motions seeking dismissal of the criminal contempt charges [dkt. nos. 324 & 330] are DENIED. Contrary to Mr. Donziger's assertion that his conviction was "pre-

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[832] (Order, dated May 7, 2021 [dkt. no. 299] at 9.)

[833] Cutler, 58 F.3d at 840.

[834] (See Order to Show Cause at 1-10 ¶¶ 1-21.)

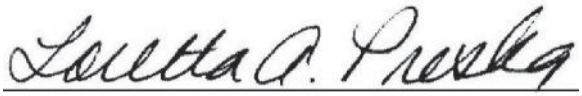
ordained,"[835] the Court finds him guilty on each count for one reason and one reason only: Mr. Donziger did that with which he is charged. Period.

The parties shall confer and indicate their views, by joint letter, regarding: (1) a briefing schedule for any sentencing-related submissions; and (2) counsel's availability for sentencing in this matter. That letter shall be filed no later than three business days from the date of this order's entry. In conferring, the parties should keep in mind Mr. Donziger's repeated requests to be released from pre-trial home confinement, although the length of the pre-trial proceedings was prolonged almost exclusively by Mr. Donziger's requests for trial adjournments.

This opinion is being issued one week after the conclusion of all post-trial briefing on counsel's agreed-upon schedule.

SO ORDERED.

Dated: July 26, 2021
New York, New York



LORETTA A. PRESKA
Senior United States District Judge

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[835] (Def. I/II/III Br. at 8 ¶ 5.)

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	No. 19-CR-561 (LAP)
-against-	No. 11-CV-691 (LAK)
STEVEN DONZIGER,	MEMORANDUM &ORDER

Defendant.

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court is Defendant Steven Donziger's motion for a new trial. (See dkt. no. 351.) The Special Prosecutors opposed the motion, (see dkt. no. 355), and Mr. Donziger replied, (see dkt. no. 361). For the reasons set forth below, the motion is DENIED.

I. Background

Less than a month ago, in its Findings of Fact and Conclusions of Law, the Court catalogued the decades-long history of this case and its underlying civil counterparts.[1] Consequently, the Court will summarize only the history relevant to the instant motion here.

[1] (See dkt. no. 346 at 4-120.) Unless otherwise specified, all docket cites in this order refer to dkt. no. 19-CR-561.

On July 31, 2019, Judge Lewis A. Kaplan--who presides over Chevron Corp. v. Donziger, 11-CV-691 (S.D.N.Y.)--issued an order, pursuant to Federal Rule of Criminal Procedure 42, directing Mr. Donziger to show cause why he should not be held in criminal contempt. (See dkt. no. 1.) That order to show cause, which was made returnable before the undersigned, cited six charges related to Mr. Donziger's violating several of Judge Kaplan's orders in 11-CV-691. (See id. ¶¶ 1-21.) Over the next year and several months, the Special Prosecutors and Mr. Donziger engaged in extensive motion practice, some of which was undertaken pursuant to the Court's deadline of February 27, 2020 for filing pretrial motions. (See dkt. no. 59 at 1 (setting deadline).) At no point during that time did Mr. Donziger raise a challenge based on the Appointments Clause.

On April 2, 2021, William W. Taylor III sent a letter to John. P. Carlin, the then-Acting Deputy Attorney General. (See dkt. no. 302-1.) In that letter, Mr. Taylor did not indicate that he represented Mr. Donziger or that he was writing on behalf of Mr. Donziger or his defense team.[2] In his letter, Mr. Taylor averred that "[t]he constitutionally-required oversight of the special prosecutor in Mr. Donziger's case must come from the Department of Justice." (Id. at 21.) Mr. Taylor concluded his letter with a specific request: That Mr. Carlin "order a review of [Mr. Donziger's] prosecution and, if necessary direct the special prosecutor to seek an indefinite adjournment of the scheduled May 10, 2021 trial until the review can be completed." (Id. at 21-22.)

[2] Mr. Taylor also never filed a notice of appearance in this case or in the underlying civil case before Judge Kaplan.

On April 19, 2021, Mr. Taylor sent a supplemental letter to Mr. Carlin. (See dkt. no. 355-1.) In that letter, Mr. Taylor acknowledged that the Special Prosecutors "ha[d] been deploying Department of Justice personnel, specifically Federal Bureau of Investigation agents, to investigate the criminal contempt charges and support the prosecution team." (Id. at 1.) Mr. Taylor closed by reiterating his view that the Special Prosecutors were "essentially independent from Department of Justice supervision or oversight." (Id.)

On May 7, 2021, Mr. Carlin responded to Mr. Taylor's letters via email. (See dkt. no. 303-1.) Mr. Carlin sent the following message:

> Bill,
>
> The Department has received your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal-court initiated contempt proceedings.
>
> Hope you are well,
>
> John

(Id. at 1 (emphasis added).) That's it. That response was then forwarded to Mr. Donziger, who forwarded it once more to his counsel in this case. (See id.)

On the first day of trial on May 10, 2021, Mr. Donziger's counsel moved, on the record, to dismiss the contempt charges, asserting that the defense had "learned through a letter from the Department of

Justice" that it "was declining to exercise any supervision over the prosecutor in this case." (Dkt. no. 311 at 37:16-19.) In response, the Court instructed counsel that it would "accept your papers when you're ready," directed counsel to confer regarding a briefing schedule, and indicated that it would rule on the motion "when the briefs [we]re in." (Id. at 37:22-25.)

Later that day, Mr. Donziger's counsel filed a three-page letter motion to dismiss, which appended Mr. Taylor's first letter.[3] Mr. Donziger's counsel did not, however, append or otherwise include the letter that he claimed to have received from the Department of Justice. On the record the next day, the Court informed Mr. Donziger and his counsel that it could not rule on the motion until the defense filed the letter that it claimed to have received. (See dkt. no. 313 at 193:3-16.) Two days later, Mr. Donziger's counsel filed a declaration appending Mr. Carlin's email. (See dkt. nos. 303 & 303-1.)

On the record on May 17, 2021, the Court informed Mr. Donziger's counsel of what it saw as a e.g., dkt. no. 319 at 850:25-851:6, 852:1-6), and also noted that the email simply did not say that the Special Prosecutors were not subject to Department of857:3). Mr. Donziger's counsel responded by pointing"double hearsay" problem related to the email, (see, Justice supervision, (see, e.g., id. at 856:2-9, 856:24- to steps the defense had taken to acquire

[3] (See dkt. nos. 302 & 302-1.) Mr. Donziger did not append Mr. Taylor's supplemental letter. That letter was only brought to the Court's attention by the Special Prosecutors in their opposition to the instant motion. (See dkt. no. 355-1.)

more information or to obtain discovery. (See id. at 851:17-20, 852:23-853:7, 855:22-24, 856:13-15, 857:4-6.)

The Court informed Mr. Donziger's counsel that a request for discovery was not a substitute for actual evidence that the Special Prosecutors were not subject to supervision. (See id. at 856:10-12, 857:7-12.) Then, after adhering to its prior rulings that Mr. Donziger was not entitled to the vast discovery he sought, (see id. at 857:21-858:1, 858:15-20), the Court denied the motion to dismiss, finding that Mr. Donziger's "moving papers ha[d] given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch." (Id. at 858:22-25.)

On June 22, 2021, Mr. Donziger filed a post-trial letter motion to dismiss the contempt charges on Appointments Clause grounds, relying heavily on United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021). (See dkt. no. 330.) On July 26, 2021, as part of its Findings of Fact and Conclusions of Law, the Court denied that motion because, inter alia: (1) the motion was untimely, (see dkt. no. 346 at 138-39); (2) the Attorney General possessed the discretion to supervise the Special Prosecutors, (see id. at 141-48); and (3) it was immaterial for Appointments Clause purposes whether the Attorney General had, in fact, exercised that discretion, (see id. at 148-49). That same day, the Court found Mr. Donziger guilty on each of the six counts of criminal contempt with which he was charged. (See id. at 240.)

On August 3, 2021, Mr. Donziger filed this timely motion for a new trial under Federal Rule of Criminal Procedure 33 ("Rule 33"). (See dkt. no. 351.) The motion quarrels with the Court's analysis denying Mr. Donziger's post-trial motion to dismiss, largely raising the same arguments he made in his moving papers. (See id. at 2-6.)

II. Discussion

a. Legal Standard

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a). In bench trials, it is unnecessary to order an entirely new trial: Instead, "the court may take additional testimony and enter a new judgment." Id. Rule 33 "by its terms gives the trial court broad discretion to set aside a . . . verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001) (cleaned up).

Nevertheless, the Court of Appeals instructs that "motions for a new trial are disfavored," United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995), and should be "granted only in extraordinary circumstances," United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009) (quotation marks omitted). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." Ferguson, 246 F.3d at 134. "In other words, there must be a real concern that an innocent person may have been convicted." United States v. Snype, 441 F.3d 119, 140 (2d Cir. 2006) (cleaned up). "The

defendant bears the burden of proving that he is entitled to a new trial under Rule 33 . . . ." McCourty, 562 F.3d at 475.

b. "De Facto" Reconsideration

Mr. Donziger "moves for a new trial . . . on the ground that the Special Prosecutor was not subject to the constitutionally required supervision and direction of a principal officer of the Executive Branch at the time the case came before the Court for trial." (Dkt. no. 351 at 1.) Essentially, Mr. Donziger advances the exact argument he offered in his post-trial letter motion to dismiss based on the Appointments Clause and Arthrex. (See dkt. no. 330.) Mr. Donziger asserts that the Court incorrectly denied that motion because (1) his motion was timely, (see dkt. no. 351 at 2-3), and (2) the Department of Justice declined his request to supervise the Special Prosecutors, (see id. at 4-5). Mr. Donziger chides the Court for denying "his motion to dismiss on two grounds not advanced by the Special Prosecutor[s] in [their] opposition."[4]

Crucially, however, Mr. Donziger does not base his motion on new evidence or on the Court's weighing of the evidence. Instead, Mr. Donziger asserts that "[t]he Court should vacate its Findings of

[4] (Dkt. no. 351 at 1.) As an initial matter, it has long been well-settled that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Court's interpretation of Rule 42 is not in any way constrained by the interpretations advanced by either the Special Prosecutors or Mr. Donziger. Mr. Donziger provides no authority to the contrary.

Fact & Conclusions of Law and its Verdict in the interests of justice because of an incurable constitutional defect in the conduct of the prosecution." (Id. at 6 (emphasis added).) Given that this case was tried by the Court, granting Mr. Donziger's motion would result in the Court's simply "tak[ing] additional testimony and enter[ing] a new judgment" if necessary. FED. R. CRIM. P. 33(a). Yet, Mr. Donziger points to no additional evidence--absolutely none--that he proposes to offer. To the contrary, Mr. Donziger contends that "[t]here is no dispute between the parties about the relevant facts." (Dkt. no. 351 at 5.) That is telling.

The upshot? Mr. Donziger "appears to merely use Rule 33 as a vehicle to relitigate" the Court's denial of his post-trial, Appointments Clause-premised motion to dismiss.[5] Put differently, Mr. Donziger essentially seeks reconsideration of the Court's ruling on that motion, even though the standard for granting a reconsideration motion is rightfully "strict."[6] In light of that, the Court will not allow Mr. Donziger to use Rule 33 to obtain de facto reconsideration of a ruling

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[5] United States v. Flom, 256 F. Supp. 3d 253, 271 (E.D.N.Y. 2017), aff'd, 763 F. App'x 27 (2d Cir. 2019); see also United States v. Trudeau, No. 3:10-CR-00234 (JCH), 2015 WL 7257825, at *3 (D. Conn. Nov. 17, 2015) ("Legal theories are not evidence within the meaning of Rule 33.").

[6] Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. . . ." Id. Because Mr. Donziger identifies no such facts or legal authority in his moving papers, reconsideration plainly is not warranted here.

on a post-trial motion with which he is dissatisfied.[7] That alone is fatal to his motion, especially because this case presents no "concern that an innocent person may have been convicted." Snype, 441 F.3d at 140. Accordingly, Mr. Donziger's motion for a new trial will be denied.

c. The Merits

Although a point-by-point refutation of Mr. Donziger's contentions is unnecessary based on the ruling above, the Court will still address Mr. Donziger's arguments on the merits. Mr. Donziger makes two principal points: (1) his Appointments Clause motion was timely, (see dkt. no. 351 at 2-3); and (2) Mr. Carlin's email shows that the Special Prosecutors were not subject to supervision by the Department of Justice, (see id. at 4-5). The Court will take each in turn.

1. Timeliness

First, Mr. Donziger asserts that his Appointments Clause "challenge before the commencement of trial was timely." (Id. at 2 (emphasis omitted).) For support, Mr. Donziger relies principally

[7] Courts routinely deny Rule 33 motions when they are premised on a court's resolution of a pre-trial motion, such as a motion to suppress. See Flom, 256 F. Supp. 3d at 272 (collecting cases); see also United States v. O'Brien, No. 13-CR-586 (RRM), 2017 WL 2371159, at *12 (E.D.N.Y. May 31, 2017) ("[T]o the extent O'Brien attempts to relitigate issues decided at the suppression hearing, he may not do so through a Rule 33 motion."). Although those cases are not factually identical to Mr. Donziger's case, the Court sees no principled reason why the result should be different here.

on Lucia v. SEC, 138 S. Ct. 2044 (2018), and Ryder v. United States, 515 U.S. 177 (1995), both cases where the Appointments Clause challenges were raised after an initial adjudication. Mr. Donziger also suggests that "Fed. R. Crim. P. 12 did not require [him] to challenge the Special Prosecutor's lack of authority as an unsupervised officer by the February 27, 2020 deadline for pretrial motions" because his challenge alleges "not a defect in instituting the prosecution, but rather a defect in conducting the prosecution." (Id. at 2-3 (quotation marks and footnote omitted).)

The Court disagrees. Mr. Donziger's reliance on Lucia and Ryder is misplaced. Both Lucia and Ryder involved (1) proceedings where the Federal Rules of Criminal Procedure did not apply, and (2) challenges to the officer adjudicating the dispute.[8] Neither characteristic is present here: Mr. Donziger is challenging the appointment of the officer prosecuting his case, and the Federal Rules of Criminal Procedure indisputably govern. Federal Rule of Criminal Procedure 12 requires certain "defenses, objections, and requests" to "be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the

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[8] See Lucia, 138 S. Ct. at 2049 (challenging appointment of SEC's administrative law judges, who were authorized to hear and decide in-house SEC enforcement proceedings); Ryder, 515 U.S. at 179 (challenging appointment of civilian members of Coast Guard Court of Military Review, which was authorized to adjudicate certain appeals of court-martials). By their terms, the Federal Rule of Criminal Procedure apply only to "criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." FED. R. CRIM. P. 1(a)(1).

merits," FED. R. CRIM. P. 12(b)(3), and failure to do so renders such a motion "untimely," id. 12(c)(3). As the seminal treatise on the federal courts recognizes, the motions enumerated in Rule 12(b)(3)(A) and (B) are illustrative, not exhaustive.[9]

In its Findings of Fact and Conclusions of Law, the Court found Mr. Donziger's motion to allege "a defect in instituting the prosecution," FED. R. CRIM. P. 12(b)(3)(A), which meant that Mr. Donziger waived or forfeited his Appointments Clause challenge by failing to raise it before the Court-approved February 27, 2020 deadline for filing pretrial motions, (see dkt. no. 346 at139). Mr. Donziger disagrees, countering that the Appointments Clause challenge did not involve "a defect in instituting the prosecution" because "the Special Prosecutor[s'] lack of supervision by a principal officer is distinct from the lawfulness of [their] initial appointment by the Court." (Dkt. no. 351 at 3.)

While the Court agrees with Mr. Donziger's premise, his conclusion does not follow. Implicit in Mr. Donziger's position is the assumption that the information necessary to make out an Appointments Clause claim based on lack of supervision was

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[9] See 1A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 193 (5th ed.) ("Other types of motions that allege a defect in the initiation of the prosecution are also covered by the rule, even if they are not enumerated in subsection (b)(3), and must be filed pretrial on pain of a sanction for untimeliness."); id. ("Again, the enumerated motions that allege a defect in the indictment or information are not exhaustive, and other claims of a defect in the charging documents can also fall within Rule 12(b)(3) and must be filed prior to trial.").

unavailable at the time of the Special Prosecutors' appointment. Not so. As Arthrex, 141 S. Ct. at 1988, makes clear, "[w]hat matters" for Appointments Clause purposes "is that [a superior officer] have the discretion to review decisions" by the inferior officer. In other words, a legal rule must somehow limit the superior officer's discretion to supervise in order to present an Appointments Clause malady. The legal framework underlying the Special Prosecutors' appointment is the same today as it was on the day they were appointed. That is, if there were any legal rules limiting the Attorney General's control over the Special Prosecutors, those should have been apparent from this case's genesis.[10] In that sense, although appointment and supervision may be distinct concepts under the Appointments Clause, Mr. Donziger's challenge based on unconstitutional supervision still amounts to "a defect in instituting the prosecution." FED. R. CRIM. P. 12(b)(3)(A). Accordingly, Mr. Donziger waived or forfeited that challenge by failing timely to raise it.[11]

At base, Mr. Donziger actively litigated this case for nearly two years--filing numerous motions and

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[10] The real issue for Mr. Donziger is that he has not identified any legal rule that limits the Attorney General's supervisory authority over the Special Prosecutors. More on that shortly.

[11] See United States v. O'Brien, 926 F.3d 57, 83 (2d Cir. 2019) ("If a motion falling within Rule 12(b)(3) is not made before trial (or before such pretrial deadline as may be set by the court for such motions), it is 'untimely.'").

expending considerable court resources in the process--without raising any Appointments Clause challenge. He only raised the issue on the record on the first day of trial, three days after Mr. Carlin responded to Mr. Taylor's letters, which themselves were sent some twenty months after the Special Prosecutors were appointed. To say that Mr. Donziger waited until the last possible minute would be a monumental understatement. Even if Mr. Donziger's claim was meritorious--which, for the reasons below, it is not-his waiting until the waning moments of the eleventh hour to raise it would not entitle him to a judicial rescue before the clock strikes midnight.

2. Supervision

Next, Mr. Donziger takes issue with the Court's deeming "Mr. Carlin's email insufficient to establish the absence of supervision of the Special Prosecutor[s] by a principal officer." (Dkt. no. 351 at 4.) In Mr. Donziger's view, "Mr. Carlin's email declined Mr. Taylor's request to carry out the Department's constitutionally-required oversight, as the Special Prosecutor[s] knew."[12] That email, Mr. Donziger

[12] (Dkt. no. 351 at 5.) Mr. Donziger also points out that the Special Prosecutors, in their opposition to Mr. Donziger's Arthrex-based motion, "did not dispute that [Mr. Carlin's email] meant that the Department was declining to supervise and direct [them]." (Id. at 4.) The Special Prosecutors did attempt to distinguish Arthrex on its facts in their opposition to Mr. Donziger's Appointments Clause motion. (See dkt. no. 338 at 5.) But, again, the Court was not bound to accept the Special Prosecutors' interpretation of the applicable caselaw any more than it was required to credit Mr. Donziger's. And, contrary to Mr. Donziger's claim, in no way whatsoever is the Special Prosecutors' attempt to distinguish Arthrex "a dispositive

suggests, shows that "[t]he problem is not just that the Department of Justice is not actively supervising all or particular decisions by the Special Prosecutor[s], but that the Department . . . viewed supervision requirements as categorically inapplicable to prosecution of a judicially initiated criminal contempt by a special prosecutor." (Id. at 5 (cleaned up).) That argument fails for two reasons.

First, Mr. Carlin's email says nothing of the sort. Again, that email simply states that "the Department declines to intervene in the federal-court initiated contempt proceedings." (Dkt. no. 303-1 at 1.) Nothing more, nothing less. That response was given in response to a specific request from Mr. Taylor: That the Department "order a review of [Mr. Donziger's] prosecution and, if necessary direct the special prosecutor to seek an indefinite adjournment of the scheduled May 10, 2021 trial until the review can be completed." (Dkt. no. 302-1 at21-22.) The Court finds nothing constitutionally problematic with the Department's declining that invitation.[13]

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admission" that they were not "subject to supervision and direction prior to trial." (Dkt. no. 361 at 3.)

[13] It is worth noting, again, that Mr. Taylor did not, in either of his letters, (1) identify himself as Mr. Donziger's counsel or (2) indicate that he was writing on Mr. Donziger's or his defense counsel's behalf. Nor had Mr. Taylor filed a notice of appearance in either this case or 11-CV-691. Given those facts, it would hardly be surprising if the Department thought that it was simply responding to letters from an attorney interested in the case rather than a representative for Mr. Donziger.

And second, contrary to what Mr. Donziger asserts, a statutory limitation on oversight--i.e., a legal rule formally limiting the power of the Executive Branch--is worlds apart from what Mr. Donziger has attempted to glean from between the lines of a two-sentence email. As the Court has already recognized, "Rule 42 does not, in any way, limit the Attorney General's discretion to review the Special Prosecutors' decisions or remove them from their posts."[14] That is as true now as it was when the Special Prosecutors were appointed. In other words, from the outset of this case, the Special Prosecutors were subject to the Attorney General's control. As a matter of law, they were not "free agents" as Mr. Donziger claims. There is nothing further to wring out of Mr. Carlin's message, which, of course, does nothing to alter the governing legal framework.

What, then, is Mr. Donziger left with? At the absolute best, Mr. Carlin's email can suggest only that the Department has not, in fact, exercised close supervisory authority over the Special Prosecutors.[15]

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[14] (Dkt. no. 346 at 148.) Mr. Donziger asserts that "[t]he Court errs in looking in Rule 42 to see if it 'limits' oversight." (Dkt. no. 361at 6 n.2) Mr. Donziger is correct that "Rule 42 does not address principal officer oversight at all." (Id.) But that's exactly the point. No legal rule alters the Executive Branch baseline: The President and the Attorney General have the constitutional authority to oversee line prosecutors like the Special Prosecutors. (See dkt. no. 346 at 147-48.)

[15] Even that seems extremely unlikely given the fact that the Special Prosecutors worked with Department of Justice personnel in investigating this case and preparing for trial.

As the Court has already made clear, however, that is wholly immaterial:

> Mr. Donziger's assertion that this prosecution is constitutionally infirm because the DOJ has not, in fact, actively supervised the Special Prosecutors is meritless. As the Supreme Court made clear mere weeks ago, a superior officer "need not review every decision of" an inferior officer. That is entirely sensible. To require supervision by a principal officer of all decisions by line prosecutors would grind the DOJ to a screeching halt. Instead, "what matters is that [a superior officer] have the discretion to review decisions" by the inferior officer. In the Appointments Clause context, the standard is "cannot," not "did not." As set forth above, Rule 42 does not, in any way, limit the Attorney General's discretion to review the Special Prosecutors' decisions or remove them from their posts. The fact that the DOJ or USAO may not have supervised the Special Prosecutors to Mr. Donziger's satisfaction--or the possibility that DOJ's supervision is simply not visible to Mr. Donziger--is of no moment.

(Dkt. no. 346 at 147-48 (footnotes omitted).) Mr. Donziger offers no legal authority to the contrary.

III. Conclusion

In sum, as the Court already concluded in its Findings of Fact and Conclusions of Law, Mr. Donziger's Appointments Clause challenge is meritless. The Court will not vacate Mr. Donziger's conviction or order a new trial on that basis. Accordingly, Mr. Donziger's motion for a new trial [dkt. no. 351] is DENIED. The Clerk of the Court shall close the open motion. Mr. Donziger is reminded that any sentencing submissions on his behalf shall be filed no later than September 13, 2021.

SO ORDERED.

Dated: August 23, 2021
New York, New York

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District
Judge

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF
AMERICA

-against- No. 11-cv-691 (LAK)

STEVEN DONZIGER,

Defendant.

ORDER TO SHOW CAUSE WHY DEFENDANT STEVEN DONZIGER SHOULD NOT BE HELD IN CRIMINAL CONTEMPT

LEWIS A. KAPLAN, *District Judge.*

Steven Donziger is hereby

ORDERED, pursuant to Fed. R. Crim. P. 42, to show cause at a trial beginning at 9:30 a.m. on September 23, 2019 or such later date as the Court may fix, before the Honorable Loretta A. Preska, District Judge, in the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, New York, New York 10007, Courtroom 12A, why he should not be held in criminal contempt of court, pursuant to 18 U.S.C. §§ 401(3) and 2 and Fed. R. Crim. P. 42, on the following grounds:

COUNT I
(Forensic Inspection Protocol ¶ 4)

1. On or about March 5, 2019, this Court entered an order in Chevron Corporation v. Steven

Donziger, *et al.,* 11-cv-691 (LAK), entitled Forensic Inspection Protocol (the "Protocol").

2. Paragraph 4 of the Protocol provides:

"Within three (3) business days of entry of this Protocol, defendant Steven Donziger (`Donziger') shall provide to both the Neutral and Chevron's Forensic Experts via email a representation listing under penalty of perjury all devices he has used to access or store information or for communication since March 4, 2012 — including, but not limited to, personal computers, tablets, phones, and external storage devices, such as external hard drives and thumb drives — (the `Devices'), indicating for each of the Devices whether he has possession, custody, or control of the Devices and, if not, stating the reasons why that is so, i.e., whether they were destroyed, lost, etc., and the present location of the Devices. Additionally, Donziger shall produce under penalty of perjury a list of all accounts— including, but not limited to, email accounts (including web- based email accounts); accounts (including web- or cloud-based) related to any document management services, such as Dropbox; and accounts related to any messaging services, such as WhatsApp, Facebook Messenger, instant messages, etc. — Donziger has used since March 4, 2012 (the `Media'), indicating whether he presently has the ability to access those accounts and, if not, stating the reasons why that is so. At this time, prior discovery has revealed that Donziger used the following types of accounts to conduct business related to the Ecuadorian judgment:

a) Email addresses, including, but not limited to,

sdonziger@donzigerandassociates.com, stevenrdonziger@gmail.com, steven.donziger@donfordcapital.com, and gringograndote®gmail.com;

b) A Dropbox account; and

c) A WhatsApp account."

3. Donziger, in disobedience of paragraph 4 of the Protocol, knowingly and wilfully failed fully to comply with the requirements thereof for all or part of the period commencing on March 8, 2019 to and including May 28, 2019.

(18 § 401(3))

COUNT II

(Forensic Inspection Protocol ¶ 5)

4. The Court repeats and realleges each of the allegations of paragraphs 1 through 3 hereof.

5. Paragraph 5 of the Protocol provides:

"The Neutral Forensic Expert shall take possession of Donziger's Devices and have access to his Media for the purposes of making a mirror image of those Devices and Media. The Devices shall be surrendered to the Neutral Forensic Expert at Donziger's address at 245 West 104th Street, #7D, New York, NY 10025. The Neutral Forensic Expert shall take possession, custody, and control of the Devices and transport them directly to its offices for the imaging described herein. The devices shall be

surrendered to the Neutral Forensic Expert at 12:00 pm at 245 West 104th Street, #7D, New York, NY 10025 on March 18,2019. At no time shall Chevron's Forensic Expert have access to the original Devices or to live Media accounts absent further Court order.

a) On the date and time specified per the above, Donziger shall turn over all Devices in his possession, custody, or control to the Neutral Forensic Expert. Additionally, to the extent information contained in any of Donziger's accounts/media is not stored on any of Donziger's available Devices, Donziger shall provide the Neutral Forensic. Expert with the information and/or things necessary to access and image his accounts and media. The Devices shall be returned to Donziger without unnecessary delay after the completion of the imaging required herein by the Neutral Forensic Expert.

b) If any user names, passwords, or other information is required to access any of the electronically stored information on any of the produced Devices or Media, Donziger shall provide such usernames, passwords, and other information to the Neutral Forensic Expert at the time of the imaging. Such information shall be kept strictly confidential by the Neutral Forensic Expert.

c) Before beginning any work on the Devices and Media, the Neutral Forensic Expert will utilize a hardware write block device on the Devices and Media in order to protect the integrity of the existing data (or other techniques standard in the industry to protect the integrity of data).

d) The Neutral Forensic Expert will create full forensic images of each Device and Media/Account. The forensic images of each shall include, to the extent possible, allocated, unallocated, and host protected areas. As part of the creation of the forensic images, the Neutral Forensic Expert will record on a log, where applicable: (l) the date and time at which the Device or Media was provided for forensic imaging and the date and time at which the Device or Media was imaged; (2) the time set in the BIOS or system clock at the time of imaging; (3) the "boot order" recorded in the BIOS of the Device or Media at the time of imaging; (4) the make, model, and serial number of the Device; (5) the username associated with any Media; (6) any identifying marks or labels on any Device or Media; (7) the tool and/or method used to create the forensic images; and (8) MD5 and SHA 1 hash values of the data collected from the Device or Media.

e) Upon completion of the imaging, the Neutral Forensic Expert will verify the resulting forensic images by executing the form attached hereto as Exhibit A and return the Devices and Media to Donziger.

f) The Neutral Forensic Expert then will create four (4) identical copies of the images of Donziger's Devices and Media, which shall be written to encrypted drives for security purposes. Within two (2) calendar days of the imaging of Donziger's Devices and Media, one copy shall be provided to Donziger, two copies shall be lodged with the Clerk of Court in a sealed envelope, and one copy shall be retained by the Neutral Forensic Expert. The Neutral Forensic Expert shall maintain the set of images created from Donziger's original Devices and Media unexamined and unaltered until further order from the Court. The Neutral Forensic Expert shall use the copy of the images that it retains for searches and analysis as proscribed by this Protocol."

6. Donziger, in disobedience of paragraph S of the Protocol, knowingly and wilfully failed to comply with the requirements thereof commencing on or about March 18, 2019 to at least on or about May 28, 2019.

(18 U.S.C. § 401(3))

COUNT III

(Passport Surrender Order)

7. On June 11, 2019, this Court entered an order that provided in relevant part that: "Donziger, on or before June 12, 2019 at 4 p.m., shall surrender to the Clerk of the Court each and every passport issued to him by each and every nation to have issued a passport to him, the Clerk to retain possession thereof unless and until this Court determines that Donziger has complied fully with paragraphs 4 and 5 of the Protocol."

8. Said order was served on Donziger electronically on June 11, 2019.

9. Donziger, in disobedience of said order, knowingly and wilfully failed to comply with the requirements thereof by the required time or thereafter.

(18 § 401(3))

COUNT IV

(RICO Judgment ¶ 1 — 2011 Retainer Agreement)

10. On March 4, 2014, this Court entered a judgment (the "RICO Judgment") in Chevron Corporation v. Steven Donziger, *et al,* 11-cv-691 (LAK) against Donziger, among others.

11. The RICO Judgment contained the following definitions, among others:

(a) "'Amazonia' means Amazonia Recovery Limited, an entity registered in

Gibralter, together with its successors and assigns."

(b) "` Donziger Defendants' means Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger Associates PLLC collectively."

(c) "'Donziger' means the Donziger Defendants, and each of them, unless the text hereof otherwise provides."

(d) "'Judgment' means the judgment entered in the Lago Agrio Case on February 14, 2011 as modified by subsequent proceedings." (This Judgment hereinafter is referred to as the "Ecuador Judgment").

(e) "'Lago Agrio Case' means Lawsuit No. 2003-0002, entitled *Maria Aguinda y Otros v. Chevron Corporation,* in the Sucumbios Provincial Court of Justice of the Republic of Ecuador and all appeals with respect to any judgment, order or decree entered therein."

(f) "'Retainer Agreement' means the agreement, dated as of January 5, 2011, between and among (a) each of the individual plaintiffs in the Lago Agrio Case, together with their respective successors and assigns, (b) the ADF, (c) the Assembly, and (d) Donziger & Associates, PLLC, together with its successors and assigns and all successors to and predecessors of the Retainer Agreement."

3. Paragraph 1 of the RICO Judgment provided:

> "The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that Donziger has received, or hereafter may receive, directly or indirectly, or to which Donziger now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world including, without limitation, all rights to any contingent fee under the Retainer Agreement and all stock in Amazonia. Donziger shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain."

12. At all times from March 4, 2014 to and including the date of this order, Donziger owned and controlled Donziger & Associates, PLLC, a/k/a Donziger Associates PLLC, a/k/a Donziger and Associates, PLLC.

13. At all times from March 4, 2014 to and including September 3, 2018, Donziger, directly or indirectly, and Donziger & Associates PLLC had property that was traceable to the Ecuador Judgment.

14. At all times from March 4, 2014 to and including September 3, 2018, Donziger, in disobedience of paragraph 1 of the RICO Judgment, knowingly and wilfully failed and refused to transfer or assign to Chevron property that he then had, directly or indirectly, traceable to the Ecuador Judgment, to wit, contractual rights to a contingent fee under the Retainer Agreement as that

term is defined in the RICO Judgment, and knowingly and wilfully caused Donziger Associates to fail and refuse to transfer said property.

(18 U.S.C. §§ 401(3) and 2)

COUNT V

(RICO Judgment ¶ 1— ADF Contingent Fee Grant)

15. The Court repeats and realleges each of the allegations of paragraphs 10 through 12 above.

16. On or about November 1, 2017, The Frente de Defensa de la Amazonia ("Amazon Defense Front" or "ADF"), the sole beneficiary of a "Judgment," as that term is defined in the RICO Judgment, granted to Donziger a property right traceable to the Ecuador Judgment, to wit, *"an INTEREST in his own right equal to Mr. DONZIGER's existing contractual INTEREST. Such INTEREST, in any case, shall be understood to entitle Mr. DONZIGER to 6.3% of any FUNDS RECOVERED . . ."* in connection with the Lago Agrio Case or the Ecuador Judgment (the "ADF Property Right").

17. Donziger had the ADF Property Right on or about November 1, 2017 and at all times from that date to and including May 27, 2019.

18. At all times from on or about November 1, 2017 to on or about May 27, 2019, Donziger, in disobedience of paragraph 1 of the RICO Judgment, knowingly and wilfully failed and refused to transfer or assign to Chevron property that he then had, to wit, the ADF Property Right.

(18 U.S.C. § 401(3))

COUNT VI

(RICO Judgment 15 Personal Interest)

19. The Court repeats and realleges each of the allegations of paragraphs 10 and11 above.

20. Paragraph 5 of the RICO Judgment provides in relevant part:

"Donziger ... is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein."

21. On or about December 23, 2016, Donziger, in disobedience of paragraph 5 of the RICO Judgment, knowingly and wilfully acted to monetize or profit from the Ecuador Judgment, to wit, by selling, assigning, pledging, transferring or encumbering a portion of his own personal interest in the Ecuador Judgment in exchange for personal services.

(18 U.S.C. § 401(3))

It is further

ORDERED, that the defendant appear personally before the Honorable Loretta A. Preska, District Judge, in the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, New York, New York

10007, Courtroom 12A on August 6, 2019 at 10:00 am for an initial conference.

Dated: July 30, 2019

Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against- 11-cv-0691 (LAK)

STEVEN DONZIGER,

Defendant.

ORDER OF APPOINTMENT

LEWIS A. KAPLAN, *District Judge.*

WHEREAS, the Court by order issued today is directing Steven Donziger to show cause why he should not be held in criminal contempt of court, and

WHEREAS, the Court previously tendered to the United States Attorney for the Southern District of New York the prosecution of Steven Donziger for criminal contempt of court and

WHEREAS, the United States Attorney "respectfully decline[d] on the ground that the matter would require resources that we do not readily have available," it is hereby

ORDERED, pursuant to Fed. R. Crim. P. 42(a)(2) and the inherent power of the Court, that Rita M. Glavin, Brian Maloney, and Sareen Armani are hereby appointed to prosecute Steven Donziger on the charges of criminal contempt of court set forth in

the Order to Show Cause, dated today, and it is further

ORDERED, that these attorneys shall have the same power to investigate, gather evidence and present it to the Court as could any other government prosecutor including, without limitation, the power to issue or procure issuance of subpoenas and apply for and execute or cause the execution of search warrants.

Dated: July 30, 2019

Lewis A. Kaplan
United States District Judge