UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

United States of America,

v. 19-cr-561 (LAP)

Steven Donziger

Defendant.

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

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INTRODUCTION[1]

On March 19, 2018, some four years after entry of the NY Judgment and subsequent Stay/Clarification Order, Chevron sought a contempt finding and attendant discovery purportedly to vindicate alleged violations by Mr. Donziger of the constructive trust and anti-monetization tenets of the NY Judgment — the exact tenets for which the Court issued clarification in their April 25, 2014 Stay/Clarification Order. The Stay/Clarification Order was issued in a manner unrelated to the procedural vehicle before the court (a motion for a stay pending appeal) and as an obvious companion to the NY Judgment; if the NY Judgment imposed certain prohibitions — for example, on holding property owed to Chevron pursuant to the constructive trust or profiting from specific interests in the Ecuador Judgment — the Stay/Clarification Order appeared, by any reasonable interpretation, to articulate and define the scope of the permissions.

Chevron sought its contempt finding and attendant discovery on the basis that the NY Judgment, regardless of the Stay/Clarification Order, prohibited Mr. Donziger from selling the interests of any interest-holder in the Ecuador Judgment in exchange for funds to pay litigation and advocacy expenses — the means by which Mr. Donziger had previously earned the retainer owed to him by his clients. Mr. Donziger, relying upon the plain and unambiguous permissions of the Stay/Clarification Order — "[n]othing in the NY Judgment prevents Donziger from continuing to work on the Lago Agrio case. Period" and "the NY Judgment would not prevent Donziger from being paid, *just as he has been paid…over the past nine or ten years*" to cite a few — opposed the contempt motion and attendant discovery orders and asserted in defense attorney-client privilege and the First Amendment associational rights of Ecuador supporters vulnerable to Chevron's *modus operandi* of litigation by harassment, intimidation and attrition.

[1] For a full chronology of the facts and circumstances underlying Counts 1, 2, and 3, *see* Declaration of Rhidaya Trivedi at ¶¶ 1-79.

Five contempt motions, two motions to compel, and one evidentiary hearing later, at which point Mr. Donziger could resist the production orders no more, he stated his willingness to invite a civil contempt finding such that he might seek appellate review; such that some member of the judiciary might clarify the prohibitions upon him, and the rights conferred upon Chevron to seek contempt and discovery as a result.

Mr. Donziger relied upon precedent more than a century old when he did so. He did what countless others had done before him: resist compliance as condition precedent to appellate review, in full anticipation of compliance if the appeal was lost. To Mr. Donziger's lawful resistance, however, the Court responded with lawless retaliation. Indeed, while Mr. Donziger's appeal from the civil contempt order was pending, the Court took the unprecedented, unfounded, and inappropriate step of charging him with six counts of criminal contempt, three of which derived from Mr. Donziger's attempt to seek appellate relief the very production orders in question.

Mr. Donziger is not the first subject of a production order to fear an unringable bell. But he is the first to face recrimination — charges of criminal contempt — for his attempt to vindicate those fears. In this, Mr. Donziger's case makes clear that when a party elects to risk civil contempt in order to seek appellate relief from an order of production, restraint with respect to the criminal contempt power is not only appropriate; it is compulsory.

There is a parable about two fish, swimming along. One says to the other, "Why, the water sure is nice!", to which the other fish says in reply, "What's water?" Indeed, the existence of some realities — some rules of law — long precedes their acknowledgement. Mr. Donziger's case makes explicit a rule of law so implicitly respected – so taken for granted — it has never been stated: 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. Counts 1, 2 and 3 of the Court's July 31, 2019 Order to Show Cause must thus be dismissed.

ARGUMENT

I. A party who is willing to risk civil contempt to seek appellate review of a production order — an order compelling affirmative, irreversible disclosure — cannot be held in criminal contempt pending that appellate review.

Mr. Donziger, comes now, seeking dismissal of Counts 1, 2, and 3 — all of which seek to punish him for his failure to comply with Chevron's April 16, 2018 Production and Information Requests. He invokes a rule of law that a) recognizes that production orders are unique, in form and in consequence, and as such, confer certain rights and responsibilities upon litigants, b) is the direct consequence of a jurisprudence more than a century old, and c) warrants specific application to his own facts and circumstances.

a. Production orders compel affirmative, irreversible acts and are unique under law.

Mr. Donziger does not dispute the basic proposition that all orders and judgments of courts must be complied with promptly. *Howat v. State of Kansas*, 258 U.S. 181, 185 (1922). Mr. Donziger instead, relies upon a more than century-old exception for litigants facing orders to produce.

In *Alexander v. United States,* 201 U.S. 117 (1904), witnesses were directed to appear and produce documents before a special examiner designated by the circuit court to hear testimony in a suit brought by the United States to enforce the Sherman Law. Upon refusal to submit the documents called for in the subpoena, the United States petitioned the circuit court for an order requiring compliance. *Id.* The petition was granted, and appeals were then allowed to the Supreme Court of the United States; they were dismissed for want of jurisdiction. The grounds of the decision are best indicated in the language of the opinion:

> In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. *Let the court go farther, 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. This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him*.
>
> [201 U.S. 121, 122 (*emphasis added*).]

See also, Cobbledick v. United States, 309 U.S. 323 (1940) (same). In *United States v. Ryan*, respondent was served with a subpoena duces tecum commanding him to produce before a federal grand jury all books, records, and documents of five companies doing business in Kenya. 402 U.S. 530, 530 (1971). The Court wrote, citing, in part, *Alexander*,

> compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the even that contempt or other similar proceedings are brought against him. Should his contentions be rejected…they will then be ripe for appellate review… respondent is free to refuse compliance and, as we have noted, in such event he may obtain full review of his claims *before undertaking any burden of compliance with the subpoena*.
>
> [*Id.* at 531 (*emphasis added*).]

In *Maness v. Myers*, building on *Ryan*, the Supreme Court of the United States wrote,

> [w]hen a court during trial orders a witness to reveal information, however, *a different situation may be presented*. Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations, we have indicated the person to whom such an order is directed has an alternative…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*.
>
> [*Maness v. Meyers*, 419 U.S. 449, 460 (1975) (*emphasis added*) (internal citations omitted).]

Alexander-Cobbledick-Ryan-Maness stand for the proposition that production orders are unique — they compel affirmative, irreversible acts. *See also, In re C.B.S., Inc*., 570 F. Supp. 578, 584-85 (E.D. La. 1983) (production orders, unlike injunctions, are not immediately appealable…[they] are thus very different from ordinary injunctions which must be obeyed even if unconstitutional."); *In re Establishment Inspection of Hern Iron Works, Inc.,* 881 F.2d 722, 727 n. 15 (9th Cir. 1989) ("There is a strain in our law that runs contrary to the general proposition that court orders must always be obeyed. In the limited area of civil discovery, we permit aggrieved parties to disobey certain orders and seek immediate review by contempt proceedings or otherwise.").

Unlike injunctions — compliance with which can be given, and taketh away, *see, e.g. Walker v. City of Birmingham*, 388 U.S. 307 (1967) — production orders present the harrowing question of the unringable bell; of litigants, jurors and courts seeing that which they cannot unsee and hearing that which they cannot unhear. The Supreme Court of the United States has thus *four times* articulated a pathway whereby a litigant facing a production order is given the option of refusal and, if adjudicated in contempt, appeal specifically such that *relief* from the underlying order may be sought. As discussed *infra,* these cases contemplate civil contempt, and civil contempt only.

b. Those who risk contempt to seek appellate relief risk only civil contempt for the purposes of appeal and while the appeal is pending.

The Second Circuit has repeatedly held, based on *Alexander-Cobbledick-Ryan-Maness*, that "[t]o obtain appellate review, the subpoenaed party must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under § 1291." *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 468 (2d Cir. 1996) (citing *Ryan* and *Cobbledick*). A discovery order contemnor "may appeal from an order holding

him in contempt for his refusal and may, as part of that appeal, challenge the order requiring production." *United States v. Beckerman*, 175 F.3d 1008 (2d Cir. 1999) (unpublished) (citing *Ryan*); *see also Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011) ("a discovery order is not immediately appealable unless the protesting party refuses to perform and is held in contempt" and citing *Ryan* and *Cobbledick*); *Vera v. Republic of Cuba*, 802 F.3d 242 (2d. Cir. 2015) (citing *Cobbledick*); *Application of Am. Tobacco Co.*, 866 F.2d 552, 554 (2d Cir. 1989) (citing *Ryan*); *In re Grand Jury Subpoena Dated Feb. 2, 2012*, 741 F.3d 339 (2d Cir. 2013) (reviewing merits of contemnor's challenge to subpoena without any mention of collateral bar); *In re Three Grand Jury Subpoenas Duces Tecum Dated Jan. 29, 1999*, 191 F.3d 173 (2d Cir. 1999) (same); *In re Grand Jury Subpoena*, 826 F.2d 1166, 1167 (2d Cir. 1987) (same); *In re Doe*, 711 F.2d 1187 (2d Cir. 1983) (same); *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*, 722 F.2d 981 (2d Cir. 1983) (same).[2]

Axiomatic to these cases is a) permission to directly challenge the validity of the underlying order on appeal, b) the possibility of relief from the obligation to comply with the production order, if successful on appeal, and c) the possibility of affirmance of the civil contempt finding, if unsuccessful on appeal.

In contrast, one cannot be relieved of a conviction for criminal contempt even when the validity of the underlying order is rejected on appeal. *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947) ("Violations of an order are punishable as criminal contempt even though the order is set aside on appeal. . .or though the basic action has become moot.") (citation omitted); *United States v. Stewart*, 590 F.3d 93, 111,

[2] In *Int'l Bus. Machines Corp. v. United States*, 493 F.2d 112, 119 (2d Cir. 1973), the Department of Justice, apparently aware of the civil contempt-and-appeal pathway, informed Defendant IBM that "the only way to obtain review of Pretrial Order No. 5 before the end of the case was for IBM or its representative to risk contempt, and thereby demonstrate its good faith and a solid basis of objections." *Id.*

fn. 12 (2d Cir. 2009) ("As a general rule, a party may not violate [a court] order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding."); *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989) (a party will not be relieved of the criminal contempt conviction even when the underlying order is vacated on appeal); *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) ("Invalidity is no defense to criminal contempt.").

Thus, the *Alexander-Cobbledick-Ryan-Maness* and corresponding Second Circuit cases contemplate that the contempt from which appellate review is sought is contempt from which relief can be won — civil contempt, and only civil contempt.[3] It cannot follow that, *while an alleged contemnor is seeking appellate review*, challenging the validity of the order and eager for the possibility of being relieved from the burdens of the production order in question, the alleged contemnor can be charged with criminal contempt for failure to comply with that same production order.

To hold otherwise — to hold that one can seek appellate relief from civil contempt while irreversibly risking criminal contempt — is to interpret *Alexander-Cobbledick-Ryan-Manness* as endorsing a *criminal* course of conduct — a course of conduct

[3] In *Del Carmen Montan v. Am. Airlines, Inc (In re Aircrash at Belle Harbor),* 490 F.3d 99, 104 (2d Cir. 2007) the Second Circuit wrote, "[t]he remedy of the party witness wishing to appeal is to refuse to answer *and subject himself to criminal contempt*; that of the non-party witness is to refuse to answer and subject himself to civil or criminal contempt." (emphasis added) (quoting *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 177 (2d Cir. 1979)). Erroneously, the Second Circuit in *Del Carmen* cited a proposition from cases addressing orders to *testify* — different from orders to produce — in the production order context. It thus does not provide guidance for the questions presented here.

In *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567, 574 (2d Cir. 2005) the Court wrote again, "in 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.") (emphasis added). *Stolt-Nielsen* did not sanction criminal contempt in its result; this dicta is indicative of the Court's inattentiveness to the consequences. If the appeal contemplated by *Alexander* et. al. is to yield relief — relief from the irreversible, unique act that is production — it simply cannot be an appeal from an order charging criminal contempt.

> which rises to the level of an obstruction of and an imminent threat to the administration of justice…accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice.
>
> [*In Re Williams*, 509 F.2d 949, 960 (2d. Cir. 1970) (defining criminal contempt).]

It would give courts issuing disputed production orders the authority to retaliate against a party exercising their right to appeal and to subordinate the vindication of the attorney-client privilege, privilege against self-incrimination, and First Amendment protections to the fear of a criminal conviction that will never be set aside. The well-established notion that a bell that *cannot be* unrung perhaps *should not* be rung prior to appellate clarification, would cease to exist. It would leave litigants "no alternative but to obey or be punished" — the very evil sought to be avoided by *Alexander* et al. *Alexander*, 201 U.S. at 22.

This prohibition on charging a litigant, allegedly in civil contempt, with criminal contempt while appellate review of the lawfulness of the underlying production order is pending has always been the law. This much is apparent from the fact that Mr. Donziger is the first attorney, known to the defense, to ever be charged with criminal contempt while traveling the path established by the *Alexander-Cobbledick-Ryan-Manness* line.[4] As demonstrated *infra*, because Mr. Donziger availed

[4] The prosecution, in prior filings disputing the validity of the civil contempt-and-appeal pathway relied upon *herein*, notably failed to cite a single case, in this Circuit or any other, where a lawyer who transparently availed herself of the option to seek relief by way of temporary refusal to comply with a production order was subjected to criminal contempt. *See* Dkt. 2525. As indicated, this case would be the first. *See Maness v. Meyers*, 419 U.S. 449 (1975); *see also, In re Irving,* 600 F.2d 1027 (2d Cir. 1979) (vacating criminal contempt order for lawyer appealing from civil and criminal contempt orders imposed after principled refusal to comply with production order); *People v. Endress*, 245 N.E.2d 26 (Ill. App. Ct. 1969) (treating contempt order as civil for prosecutor refusing to comply with pre-trial discovery order as to challenge the scope of pre-trial criminal discovery, and thus ordering that the contempt order be vacated upon a determination of compliance); *Conn v. Superior Court*, 196 Cal. App. 3d 774 (California Ct. App. 1987); *c.f. State v. Davis*, 266 Kan. 638 (Sup. Ct. Kansas 1999) (finding that a prosecutor's refusal to comply with pre-trial discovery order constituted criminal contempt in part because the prosecutor refused to explain his non-compliance despite being given multiple opportunities to do so); *Reda v. Advocate Health Care*, 199 Ill. 2d 47 (Ill. Sup. Ct. 2002) (it is well settled that a contempt proceeding is an appropriate method for testing the correctness of a discovery order.).

himself of the civil contempt-and-appeal pathway in the manner and circumstances contemplated by the Supreme Court of the United States, Counts 1, 2, and 3 must be dismissed.

c. Mr. Donziger feared the consequences of disclosure, expressed willingness to risk contempt, and sought appeal at every opportunity; while those appeals were pending the Court impermissibly charged him with criminal contempt.

From the moment Chevron served on Mr. Donziger its April 16, 2018 Production Requests, Mr. Donziger refused to comply, asserting reliance upon the Stay/Clarification Order, *discussed infra*,[5] or specifying his objections. *See* Trivedi Decl. at ¶¶ 13, 14 (asserting attorney-client, work product doctrine, and common interest doctrine privileges), 18 (arguing that the discovery demands were unduly burdensome), 19 (expressing willingness to disclose non-privileged documents), 26, 29, 30 (asserting First Amendment associational rights of Ecuador supporters), 40 (re-stating First Amendment concerns), 44, 45, 47 (arguing that the demands were intrusive, unreasonable, and unfounded), 56 (arguing that the demands implicated privileged documents and that the discovery process was overbroad and unduly burdensome), 58, 59 (asserting ethical responsibilities not to cooperate with Chevron's demands), 64 (arguing privilege and confidentiality, asserting First Amendment protections, and characterizing the demands as overbroad), 67, 73 (overbroad and overly burdensome).

On May 17, 2018, the Court ordered full compliance with Chevron's 49 Production and Information Requests, which sought information as to every facet of Mr. Donziger's financial existence, as well as any information, broadly speaking, related to the financing of foreign enforcement efforts of the Ecuador Judgment. Trivedi Decl. at ¶¶ 11, 22. The Court would later

[5] As described at length, *infra* at 11, it would be the Court's very refusal to issue the requested explanation of the scope of the Stay/Clarification Order that would leave Mr. Donziger in the dark, with no real choice but to seek civil contempt sanctions and appeal. Even prior to the civil contempt sanctions, Mr. Donziger would attempt to secure appellate review on an "impliedly modified injunction" theory of appellate jurisdiction. *See* Trivedi Decl. at ¶ 43.

order compliance with specifically enumerated requests, themselves boundless and breathtaking in scope. Trivedi Decl. at ¶¶ 23 (requiring production of "ALL DOCUMENTS evidencing or relating to any communication between YOU and any PERSON or ENTITY since March 4, 2014, concerning the ECUADOR JUDGMENT or any attempts by anyone, successful or not, to monetize or profit from it", among other requests), 41 (adding a requirement to produce "All DOCUMENTS evidencing or relating to any financing provided to YOU, INCLUDING all promissory notes, security agreements, and UCC-1 financing statements. This REQUEST INCLUDES documents sufficient to show the original amount of the financing, the PERSON or ENTITY to whom due, balance owing, payments, maturity and collateral, and any other DOCUMENTS relating to any such debt.").

In light of Mr. Donziger's opposition to the bulk of Chevron's demands for over four months, Chevron moved in August 2018 for the forensic imaging of Mr. Donziger's devices, for preservation purposes. Trivedi Decl. at ¶ 47. Again, Mr. Donziger opposed, asserting privilege and the unduly burdensome nature of the requests. Trivedi Decl. at ¶ 47. The Court would grant Chevron's request, dramatically expanding the scope of forensic imaging to include a thorough search for all documents responsive to Chevron's requests. Trivedi Decl. at ¶¶ 47, 53, 54, 57, 63, 64, 65, 66. The imposition of the coercive requirement that Mr. Donziger turn over his passport, was solely derivative of non-compliance with the Forensic Protocol. Trivedi Decl. at ¶ 73, 74.

Mr. Donziger thus made clear his willingness to risk civil contempt, in order to secure appellate review of the roving discovery granted to Chevron by the Court. Trivedi Decl. at ¶ 57, 59, 64. He made clear that, if he were to lose on appeal, he would immediately comply. Trivedi Decl. at ¶¶ 67, 69.

Accordingly, at every moment from which appellate relief could theoretically be sought, Mr. Donziger sought it. Most specifically, when the Court granted Chevron's five motions for contempt on May 23, 2019, Mr. Donziger filed his notice of appeal within days. Trivedi Decl. at ¶ 72. This appeal challenged the Forensic Protocol, inasmuch as it challenged the entire discovery process – concluding with the Forensic Protocol and Mr. Donziger's refusal to cooperate with it — which was authorized as a result of Chevron's specious contempt allegation. This appeal sought relief from the very production orders the Forensic Protocol was designed to effectuate. Pursuant to 28 U.S.C. § 1291, the Second Circuit Court of Appeals has jurisdiction over the "district court's…final order imposing contempt sanctions, and the orders preceding it." *See In re Air Crash at Belle Harbor*, 490 F.3d 99, 104–05 (2d Cir. 2007); *Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir. 2002) ("Generally, ... this Court interprets an appeal from a specific order disposing of the case as an appeal from the final judgment, which incorporates all previous interlocutory judgments in that case and permits their review on appeal.").[6]

Mr. Donziger's appeals have remained pending as of May 27, 2019. Trivedi Decl. at ¶ 72. The Court's Order to Show Cause, issued July 31, 2019 and charging Mr. Donziger with three counts of criminal contempt for failure to abide by the Forensic Protocol, was thus issued while his appeal of the civil contempt order was pending. They must be dismissed.

d. The prohibition on charging an appellant challenging a civil contempt order with criminal contempt during the pendency of the appeal is made more applicable to Mr. Donziger given the pretextual justifications provided for the authorized discovery in this case and the Court's denial and subsequent abandonment of the plain language of the Stay/Clarification Order.

[6] Mr. Donziger additionally appealed the Court's denial of his motion for declaratory judgment, motion for a protective order, and discovery compliance. Trivedi Decl. at ¶ 43. The arguments made in that appeal, consolidated with the appeal of the contempt order, were incorporated by reference in Mr. Donziger's brief on appeal from the May 23, 2019 contempt order. *See* Trivedi Decl. at ¶ 62 (arguing that Chevron's entire discovery campaign should have been disallowed for its overbreadth and unconstitutionality).

Mr. Donziger's shield to charges of criminal contempt while he sought appellate review of Chevron's production orders is further justified by the repeated refusal of the Court to answer the core question at the heart of the parties' discovery debate — whether litigation financing based on others' interests in the Ecuador Judgment violated the NY Judgment — and by the pretextual justifications provided for the authorized discovery.

Discovery was never, as the Court and Chevron would repeatedly suggest, about enforcing Chevron's outstanding $813,602.71 Judgment. Indeed, in Chevron's initial *ex parte* application for contempt and attendant discovery, they *utterly failed to mention their outstanding Money Judgment*. Trivedi Decl. at ¶ 7. The Court unilaterally inserted relevant language into the proposed Order to Show Cause, before issuing it that same day. Trivedi Decl. at ¶ 8 (noting the addition of "to the extent the discovery is sought in aid of enforcement of the monetary portion of the judgment, leave of the court is not required.").

Chevron sought clarification from the Court as to whether "Donziger's attempts to obtain litigation funding in exchange for prospective Ecuadorian judgment proceeds is a matter relevant to enforcement of the monetary provisions of the judgment." Trivedi Decl. at ¶ 9. Though clarification was never given, Chevron and the Court would go on to repeatedly include the Money Judgment as a basis for discovery, treating all litigation financing as in fact, related to the monetary portions of the judgment. *See* Trivedi Decl. at 16 (referencing the Money Judgment in their motion to compel), 22 (describing the discovery dispute as "main[ly]" in service of enforcing the Money Judgment), 23 (referring to the requests as the Money Judgment Requests), 34 (reducing the inquiry to one of money judgment enforcement), 50 (characterizing the discovery process as "aimed at (a) discovering assets to satisfy the outstanding money judgment"), 65 (characterizing

the Forensic Protocol as an instrument necessary to "assist [Chevron] in collecting its money judgment").

Of course, discovery was also "justified" by the alleged need to determine whether Mr. Donziger was in compliance with the judgment. But the only question of non-compliance was whether third-party litigation financing and the potential sale of interests owned by the affected Ecuadorian communities in the Ecuador Judgment violated the NY Judgment — the very question the Court refused, on multiple occasions to answer, all the while authorizing roving, harassing discovery of any person who had previously supported enforcement of the NY Judgement. Chevron was the first to request an answer to the question — Trivedi Decl. at ¶ 9; Mr. Donziger would follow-up with multiple of his own, repeatedly stating his position that the Stay/Clarification Order condoned litigation financing based on the interests of others in service of foreign enforcement actions and pleading with the Court to accept or reject that position. *See* Trivedi Decl. at ¶¶ 13, 18, 26, 27, 29, 30, 38, 40, 44, 45, 56, 58, 59, 64.

It remains unclear whether the Court forgot the contents of the Stay/Clarification Order or whether it was in denial as to its issuance. On at least one occasion, the Court questioned its own language from the order. *See* Trivedi Decl. at ¶ 18 (asking why a retainer payment "wouldn't" be traceable to the Ecuador Judgment). While addressing a separate issue, they offered the very definition of "traceability" that Mr. Donziger expressed concern about in his motion for a stay pending appeal — concern that yielded the Court's explicit reassurances in the Stay/Clarification Order that traceability was far narrower than Mr. Donziger feared. *See* Trivedi Decl. at ¶¶ 4, 46.

What is clear, is that the Court did not make its position — if one can even call it that — known, until May 23, 2019, with its contempt order, in which it found that Chevron had proven by clear and convincing evidence that Mr. Donziger *had* violated the NY Judgment by engaging

in litigation financing efforts that were subsequently used to pay his monthly retainer. The Court did not deem it necessary to find that Mr. Donziger had monetized or profited from his own interest in the Ecuador Judgment, nor did the Court clarify the scope of 'traceability.' Trivedi Decl. at ¶ 71. That Mr. Donziger had hope only for relief on appeal is no wonder; that he had a right to seek it, and while he did, be free from criminal contempt sanctions, is further apparent.

CONCLUSION

The contempt power has, on occasion, been abused. *See, e.g., Bloom v. Illinois,* 391 U.S. 194, 198-207 (1968) (outlining the history of the contempt power, and its abuses); *United States v. Barnett,* 376 U.S. 681, 687 (1964) (same); *Nye v. United States,* 313 U.S. 33, 44-48 (1941) (same). This case presents one instance of such abuse; such a failure to exercise appropriate, and compulsory restraint. Counts 1, 2, and 3 of the Court's July 31, 2019 Order to Show Cause must be dismissed.

Dated: New York, NY
December 16, 2020

Respectfully submitted,

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