UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, -against- STEVEN R. DONZIGER, et al., Defendants.	Case No. 11 Civ. 0691 (LAK)

CHEVRON CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ITS EIGHTH CLAIM FOR RELIEF (VIOLATION OF NEW YORK JUDICIARY LAW § 487)

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

The following abbreviations and defined terms will be used in Chevron Corporation's Motion for Summary Judgment on Its Eighth Claim for Relief (Violation of New York Judiciary Law § 487):

Defendants	All Defendants to this action generally.
Lago Agrio Litigation	*Maria Aguinda et al. v. Chevron-Texaco*, the litigation brought by the LAPs in Lago Agrio, Ecuador.
LAPs	The plaintiffs in the Lago Agrio Litigation, including appearing defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje.
Donziger	Defendants Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates PLLC.
Stratus	Defendants Stratus Consulting, Inc., Douglas Beltman, and Ann Maest.
Fajardo	Defendant Pablo Fajardo Mendoza.
Yanza	Defendant Luis Yanza.
Stratus 1782	*Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047-MSK-MEH (D. Colo.).
Berlinger 1782	*In re Chevron Corp.*, No. 19-ML-1119 (S.D.N.Y.)
Donziger 1782	*In re Chevron Corp.*, No. 10-mc-00002-LAK (S.D.N.Y.)
St. __	Chevron's Local Rule 56.1 Statement of Material Facts on Motion for Summary Judgment (all citations are by paragraph number).
Decl. __	Exhibits to the Declaration of Randy M. Mastro.

PRELIMINARY STATEMENT

As Chevron has extensively documented, Defendant Steven Donziger and his co-conspirators have engaged in a pattern of deception and fraud to procure a fraudulent $18.2 billion judgment. *See, e.g.*, Dkt. 397. And over the course of several years, Donziger and his hand-picked team of U.S. lawyers repeatedly lied to multiple U.S. courts—including this Court. In particular, Donziger and his co-counsel lied about the nature of their relationship with Ecuadorian court expert and "Special Master" Richard Stalin Cabrera Vega. They claimed that Cabrera was "neutral" and "independent," and that a meeting between the Defendants and a member of Cabrera's team captured on video was "innocuous" and of "no relevance to anything." But as the *Crude* outtakes confirmed, and as Donziger has since admitted, Defendants exercised complete control over Cabrera, whose report in the Lago Agrio Litigation was ghostwritten by the Defendants' lawyers and environmental consultants. That report was crucial to the outcome of the Lago Agrio Litigation, being both directly and indirectly relied upon as support for the $19 billion judgment. And while Chevron ultimately obtained evidence revealing the truth about Cabrera, this required Chevron to incur substantial costs in U.S. discovery proceedings—which Donziger and his team opposed and made more costly by implementing their strategy of deception and delay.

New York Judiciary Law Section 487 imposes liability on lawyers, like Donziger, who engage in or consent to deceit in legal proceedings. It was designed precisely for what has occurred here. In his role as a lawyer for the LAPs, Donziger engaged in acts of deceit, or consented to acts of deceit committed by the legal team he assembled and oversaw, in multiple proceedings before courts in New York. And this deceit caused harm to Chevron, which was forced to combat a legal strategy that was premised on falsehoods.

Because the undisputed evidence, largely consisting of Donziger's own admissions, es-

tablishes that he, as counsel for the LAPs, violated Section 487 and his special obligation as an attorney by directly engaging in or condoning a pattern of deceit designed to prevent the revelation of his and his co-conspirators' misconduct, Chevron is entitled to summary judgment on its Section 487 claim against Donziger.[1]

FACTUAL BACKGROUND

As this Court has recognized, Steven Donziger, a New York-licensed lawyer, "effectively masterminded the Lago Agrio litigation" and has "long [acted as] chief U.S. counsel for the LAPs." Dkt. 571 at 2 & n.5. Indeed, Donziger has admitted that his "role is to be the lawyer and manage the Ecuadorian legal team," and that he "play[s] in [sic] integral role is [sic] designing the trial strategy and working closely with the local team of lawyers." Dkt. 9-9 at 20, 21. Donziger has also emphasized his responsibility for bringing together and managing the constituent players in the scheme: "I am the person primarily responsible for putting this team together and supervising it." *Id.* at 2.

Donziger and the team of lawyers that he assembled engaged in an intentional campaign of deception regarding the independence and neutrality of court expert Richard Cabrera in multiple court proceedings in the United States, including in New York, in an attempt to frustrate Chevron's efforts to uncover the truth about the Defendants' misconduct.

I. Defendants Colluded With the "Neutral" and "Independent" Court Expert Cabrera

When it became clear that an impartial process based upon valid scientific testing would not support the LAPs' claims against Chevron in the Lago Agrio Litigation, Donziger and his co-

1 Chevron has incurred substantial damages in the form of attorneys' fees as the result of Donziger's violations of Section 487, but in order to streamline consideration of this motion it here seeks only an award of nominal damages for Donziger's violation of that statute. In the event that the Court declines to enter summary judgment on this claim in its entirety, however, Chevron reserves the right to seek the full amount of actual damages on this claim at trial.

conspirators set out to take over that process. During the initial judicial-inspection phase of the trial, Donziger advised one of the LAPs' technical consultants that "the lawyers will control the scope [of the process], not the science people," Decl. 2820, and further "instructed" the LAPs' nominated experts to find contamination. Dkt. 31-21 at 52:13-18. The pressure and control exerted by Donziger and other lawyers led the technical coordinator, Edison Camino Castro, to warn in an internal email that "[w]ith so much psychological pressure, an Expert may react by making an accusation to the Court about the abuses, the coercion, the distortion of scientific methods, intellectual harassment, lack of security, systematic degradation of morals and ethics, intervention under threat into technical matters by people that are not educated in engineering, etc." Decl. 2821. Notwithstanding this manipulation, in the first (and only) site examined by the court-appointed settling experts, Sacha-53, five independent experts concluded that the LAPs' expert had failed to substantiate his claims of contamination; that there was "[l]ow" health risk to humans from oil; and that the two pits remediated by TexPet contained contaminants "lower than the allowable limits." St. 4.

Donziger and his co-conspirators resolved to abandon the judicial-inspection process altogether. In its stead, they conspired to obtain the appointment of Richard Cabrera to serve as a supposedly "neutral" and "independent" expert, but one who would, in Donziger's words, "totally play ball with us and let us take the lead while projecting the image that he is working for the court." *See* Dkt. 397 at 1-2; St. 14. To achieve this goal, Defendants engaged in pressure tactics, including a string of *ex parte* meetings with presiding Judge Yánez, and the drafting and private brandishing of a civil complaint against him. St. 7. In January 2007, the Lago Agrio court acceded to Defendants' threats and announced that it would appoint a global assessment expert. St. 11. In secret, Defendants were further lobbying the judge to appoint someone under their con-

trol. St. 15. Donziger wrote, "I asked Pablo if he was 100% sure the judge would appoint Richard [Cabrera] and not Echeverria, and he said yes. But given that this is the most important decision of the case thus far, there is simply no margin for error." *Id*. As another lawyer working for Donziger put it, "Pablo's a clever character and in [sic] pretty in with the judge, right, so I'm sure some solution will come up." *Id*. After Cabrera was appointed, Donziger characterized it as a "HUGE VICTORY" stating that "[the judge] never would have done [it] had we not really pushed him." St. 15, 17. As this Court has previously noted, there is no dispute that "the decisions to terminate judicial inspections, to pursue the global assessment, and to select Cabrera as the global expert were tainted by the duress and coercion applied to [Judge Yánez] by Fajardo, Donziger, and perhaps others in *ex parte* meetings." Dkt. 550 at 90.

To ensure Cabrera's cooperation, Defendants formally paid Cabrera over $263,000 for work he never performed, and they made tens of thousands of dollars in *secret* payments to him through what they described as "our secret account." St. 36, 35. Regarding one of these payments, they would write: "[Cabrera] is also very uncomfortable (and this is dangerous)," so it was "urgent for money to arrive next week." St. 35.

Secrecy and deceit were essential to Donziger's plan. On March 3, 2007—two weeks before the court appointed Cabrera—Defendants Donziger, Fajardo, and Yanza, along with the consultants that they had hired to ghostwrite Cabrera's report, met with Cabrera in Ecuador. St. 30. At that meeting, Fajardo presented the plan for Cabrera's global expert assessment, stating, "Chevron . . . doesn't know what the hell is going to happen in the global expert examination. . . . I hope none of you tell them, please. [laughter] . . . . [I]t's Chevron's problem." *Id.* Fajardo continued: "[T]he work isn't going to be the expert's. All of us bear the burden." *Id.* When Fajardo stated that Cabrera would "sign the report and review it. But all of us . . . have to

contribute to that report," Defendant Ann Maest of Stratus added, smiling, "[b]ut not Chevron"—and everyone laughed. *Id*.

Defendants' relationship with Cabrera—and Donziger's instructions that this relationship was to be concealed from Chevron, raised concerns among several of Defendants' co-conspirators. For example, the LAPs' consultant Charles Champ told Donziger, "I know we have to be totally transparent with Chevron in showing them what we're doing," but Donziger responded, "No, no," and stated, "because they will find out everything we do." St. 112. He continued: "Our goal is that they don't know shit . . . and that's why they're so panicked." *Id.* Similarly, when another of the LAPs' consultants, Richard Kamp, expressed unease about the process and commented to Donziger that "[h]aving the perito [Cabrera] there yesterday in retrospect. . . . That was bizarre," Donziger told Kamp "Don't talk about it" and stated "that's the way it works." St. 31. Donziger told the camera crew filming for the documentary *Crude* that was filming the discussion, "[T]hat is off the record." *Id.*

This deceit was necessary because Defendants' plan was to pass off their own work as that of the "independent" expert. As Donziger has admitted, "the general idea" was "that Stratus would draft the report in a form that it could be submitted directly to the Ecuadorian court by Mr. Cabrera." St. 55. Donziger explained to his team that Cabrera was to work "under the most strict control with an extremely limited number of samples. And we'll change the focus of the data at our offices." St. 40. Stratus and its contractors prepared the report in the United States, in English, and Defendants planned how to "attribute" each section to Cabrera or members of his public team, making sure the true author's "name [was] taken off" each section prior to submission to the court. St. 44, 55. Thus, while Cabrera posed as the independent court expert, Defendants ghostwrote his official work plan, were secretly involved in site selection, determined

his sampling protocols, and ultimately drafted his report. St. 40, 42, 55. Indeed, Donziger has admitted that Cabrera filed Defendants' report "pretty much verbatim," and he does not know if Cabrera drafted *or even read* any part of "his" report. St. 55, 61.

On the strength of this evidence, this Court has already concluded, "There is no genuine issue with respect to the facts that the LAP team secretly prepared his work plan, worked closely with him in carrying it out, and drafted most of the report and its annexes. Nor is there any genuine issue regarding the fact that the LAP team then publicly objected to the very report that they, in large part, secretly had drafted as 'unjustly favorable to [Chevron]' and 'too conservative' in its damage assessment. . . . [U]ncontradicted evidence demonstrates that the report and subsequent responses filed in Cabrera's name were tainted by fraud." Dkt. 550 at 90-91.

II. Donziger, As Counsel for the LAPs, Led a Scheme to Deceive U.S. Courts, Including Courts in New York, Regarding the Neutrality and Independence of Cabrera

Although they exerted complete control over Cabrera, Donziger and the other Defendants had to publicly maintain the fiction that he was a neutral and independent expert. St. 26. In addition to relying on the Cabrera Report in the Lago Agrio Litigation, Defendants promoted it as justification for their attacks on Chevron in the U.S. media, before U.S. government and officials, as the basis for baseless criminal charges they procured against Chevron attorneys in Ecuador, and in U.S. courts. They repeatedly described Cabrera as "independent" and praised his appointment "primarily due to the issue of impartiality . . . because, having not been named by either of the parties, he will be even more objective in his analysis and conclusions." *Id*. Defendants and their agents and co-conspirators, at the direction of or with the consent of Donziger, repeated falsehoods regarding Cabrera's supposed neutrality and independence in proceedings before courts throughout the United States, including in New York.

A. Donziger Convinced Consultant Mark Quarles to Submit a False Declaration Regarding Cabrera's Independence

In September 2007, Donziger and his co-conspirators induced one of the LAPs' consultants, Mark Quarles, to sign a declaration attesting to the independence of Cabrera that was submitted in an action that the Republic of Ecuador and Petroecuador had filed in the Southern District of New York, and that was pending before Judge Sand. Dkt. 48-31 at 3. Quarles's declaration stated that "Mr. Cabrera and his team have acted independently from both the [Lago Agrio] plaintiffs and the defendant at the three (3) Phase II inspections that were witnessed on September 6 – 7, 2007." *Id.* at 3-4.

Donziger was responsible for this falsehood concerning Cabrera's independence, by virtue of his control over the content of Quarles's declaration. On September 16, 2007, Donziger sent Quarles an email attaching Quarles's draft declaration. Dkt. 48-33 at 4-5. Donziger asked Quarles to strengthen language asserting Cabrera's independence, in part based on Donziger's claim that Cabrera had not "entertained suggestions or even met with plaintiffs or their representatives regarding his current work plan." *Id.* at 4. And he told Quarles to delete language suggesting that if any contacts between Cabrera and the LAPs had taken place, "a degree of biasness would have been introduced into the sampling plan." *Id.* at 5. Quarles changed his declaration accordingly, and falsely attested to Cabrera's independence. Dkt. 48-31 at 3.

Quarles later testified that the statement concerning Cabrera's independence in his declaration was based not only on his observation of the global assessment process in 2007, but also on specific false representations by Donziger. Dkt. 48-32 at 115-16, 118-19, 121-22. Quarles further testified that Donziger paid him to conduct his observations and sign the declaration, and that if he had known that Cabrera was working directly with the lawyers for the LAPs, he would not have signed the declaration. *Id.*

B. Donziger Recruited Emery Celli to Represent the LAPs in the United States and to Continue the Deceit

Consistent with his personal control over the scheme, and his admitted responsibility for "putting this team together," Donziger recruited Emery Celli to represent the LAPs in U.S. court proceedings related to the Lago Agrio Litigation. Donziger, on behalf of the LAPs, first hired the firm in the fall of 2009 to bring an action in the Southern District of New York to stay the Bilateral Investment Treaty ("BIT") arbitration that Chevron had initiated against the Republic of Ecuador. Decl. 2801 at 3202:13-17; *see also* Decl. 2800 (Donziger writes, "I proposed to the clients in the meeting in Quito that we contract with the Abady law firm . . . ."). Donziger's decision to retain Emery Celli comes as no surprise given his longstanding personal relationship with one of the principals, Jonathan Abady, as well as Emery Celli's prior representation of the Republic of Ecuador. Abady and Donziger have been friends since college, and Abady attended Donziger's wedding. Decl. 2801 at 3198:24-3199:2 (both attended American University); Decl. 2802 (Donziger describes Abady as a "college friend"); Decl. 2803 (Abady states he has known Donziger for 30 years); Decl. 2801 at 3202:3-10. They traveled to Ecuador together in 1993 or 1994, Decl. 2801 at 3199:5-10, and Abady began to represent the Republic of Ecuador in 1996. *See* Decl. 2804.

The LAPs' initial retainer agreement with Emery Celli was signed by Donziger "in [his] capacity as the [LAPs'] U.S. representative at the time." Decl. 2801 at 3208:11-13; *see also* Decl. 2805 at DONZ-HDD-0215171. In mid-2010, Emery Celli began to represent the LAPs in Chevron's discovery actions brought under 28 U.S.C. § 1782. St. 97. A second retainer agreement between the LAPs and Emery Celli, which Donziger has testified that he may also have signed, was executed in either September or October 2010. Decl. 2807 (draft agreement between Emery Celli, Plaintiffs "through their duly authorized representatives," the Frente, and the

Asamblea de Afectados por Texaco); Decl. 2801 at 3208:23-3209:11 (testifying that Emery Celli entered into an agreement with Fajardo, Yanza, and Chavez, the president of the Frente, in September or October 2010 and that Donziger may have signed the agreement).

Emery Celli, working in close connection with Donziger, continued the Defendants' pattern of false representations to courts regarding Cabrera's neutrality and independence. As Donziger has admitted, he "had various face to face meetings with counsel for the Lago plaintiffs, particularly the Emery Celli counsel, counsel from other law firms as well, where we discussed a whole variety of issues including the Cabrera issue." Decl. 2801 at 1162:8-13. Similarly, when asked whether he had "a meeting or meetings where the subject of the Stratus work product and Mr. Cabrera's report was discussed," Donziger testified: "I've had a number of discussions with counsel about that issue, both by phone, e-mail, in person." Decl. 2801 at 1162:25-1163:15.

C. When Seeking to Stay the BIT Arbitration, Defendants Falsely Claimed That Cabrera Was Neutral and Independent

On January 14, 2010, Emery Celli filed an action on behalf of the LAPs in the Southern District of New York seeking to stay the BIT arbitration. Dkt. 30-5. The case was assigned to Judge Sand, and Donziger himself formally entered an appearance on behalf of the LAPs. Decl. 2823.

The LAPs' complaint falsely alleged that "[t]he best and most recent *independent* estimate available of the human health impact of this contamination is provided by the *neutral Special Master* [Cabrera] appointed by the [Lago Agrio] court to provide advice on damages," and that "the final report [was] *produced by the Cabrera team*" consisting of "14 technical officials" that Cabrera had appointed. Dkt. 30-5, ¶¶ 29-30 (emphasis added). This false statement closely tracked Donziger's false statement to the congressional Tom Lantos Human Rights Commission

on April 28, 2009: "The best and most recent independent estimate available of the human health impact of this contamination is provided by the expert appointed by the court, Richard Cabrera. This expert, along with a team of 14 technical officials, reviewed all the data in evidence as well as several peer-reviewed health studies." Dkt. 47-30 at 7.

The LAPs' complaint also alleged that "[e]nvironmental remediation experts from the United States have reviewed the Cabrera report and found its conclusions reasonable and its damages assessment consistent with the costs of other large environmental clean-ups around the world." Dkt. 30-5, ¶ 31. This false statement also closely tracked Donziger's April 28, 2009 testimony to the Tom Lantos Human Rights Commission: "Numerous qualified scientists have reviewed this report and found its conclusions reasonable and the damages assessment consistent with the costs of other large environmental clean-ups." Dkt. 47-30 at 5.

The "environmental remediation experts from the United States" were, however, Defendants Beltman and Maest of Stratus, a fact that the LAPs and Donziger failed to disclose. Indeed, there can be no doubt that "environmental remediation experts from the United States" referred to Stratus. As Donziger has admitted, while the LAPs attempted to obtain endorsements from other scientists, "no expert other than Stratus signed on to the written endorsement of the Cabrera report." Decl. 2801 at 2967:7-18.

On December 1, 2008, Stratus released a fifteen-page document purporting to analyze and defend the Cabrera Report. In this document, which bears the signatures of Beltman and Maest, as well as other Stratus employees, Stratus claimed, "Mr. Cabrera is thus acting in the capacity of a neutral 'expert' to the Court, and his role is to assist the Court in evaluating the scientific and technical information that was collected and compiled for the case. In the U.S. Court system, Mr. Cabrera would be called a Technical Special Master." Dkt. 34-26 at 1.

Stratus's "review" was intended to deceive, as one of the lawyers retained by the LAPs recognized. In response to an ongoing discussion about a (perverse) plan to accuse Chevron of fraud on the theory that it knew Stratus had written the Cabrera report all along, the lawyer wrote the following to Donziger and other conspirators:

> This document might end the discussion. These "comments" are written in a manner to give the impression that Cabrera was entirely independent and conducted his own research and came up with his own findings. There is no indication in this document that Stratus, ostensibly the company of experts independent from Cabrera, was itself involved in "ghosting" the Cabrera report. This might not be dispositive if there were other evidence showing that Chevron had actual or constructive knowledge that Stratus had been involved in the creation of the Cabrera report. In such a case Stratus's "comments" may have been a rather crude and awkward spin by a biased expert - but it would not have been a "fraud" upon Chevron. But, in the absence of such evidence, then it appears not only that Cabrera and [the Lago Agrio] plaintiffs can be charged with a "fraud" respecting the former's report, but that Stratus was an active conspirator.

Dkt. 9-7 at 1.

Donziger testified that he personally initiated the process that led to the Stratus review of the Cabrera report: "I asked [Stratus] to prepare what we call a peer review of the Cabrera report … and it evolved into this piece of work." Decl. 2801 at 2966:18-23. And Donziger confirmed that the Stratus review was intended to deceive. Asked whether he "instruct[ed] Stratus not to disclose in the Stratus comments that were published the fact that they had been involved in writing the Cabrera report," Donziger stated that "as a general policy it was understood that that would be kept confidential." Decl. 2801 at 2966:24-2967:6.

D. In Opposing Chevron's § 1782 Applications, Defendants Resorted to Deception In an Attempt to Prevent the Revelation of the Cabrera Fraud

In 2010, Chevron initiated discovery actions in the United States under § 1782 to uncover proof of the Defendants' fraud in the Lago Agrio Litigation. Defendants recognized that Chevron's § 1782 actions threatened to reveal the extent of their fraud and posed severe risks for Defendants and their co-conspirators. Co-conspirator Julio Prieto expressed the gravity of the situa-

tion in an email to Donziger and Fajardo, after being told that Defendants' true relationship with Stratus was likely to be disclosed in the Stratus 1782: "[T]he effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail)[.]" Dkt. 9-6. Yet even after this warning, Defendants and their co-conspirators, including Emery Celli, did not reveal the truth, but instead set out to prevent disclosure of the evidence by lying to courts presiding over Chevron's § 1782 actions about the true nature of their relationship with Cabrera, as Donziger himself has admitted:

> Q. You certainly discussed with the Emery Celli lawyers at the time, at or about late March 2010, when you got this e-mail, the subject of making an application in Ecuador to try to shut down the 1782s, correct?
>
> A. There were ongoing discussions about that issue, yes.
>
> Q. So that the truth about Stratus' role in drafting the Cabrera report wouldn't come out, correct?
>
> . . .
>
> A. It was not something we wanted known, that is correct.
>
> Q. And that's because if it became known that Stratus had drafted Cabrera's report, it would be potentially devastating in Ecuador to the Lago Agrio litigation, correct?
>
> A. It could hurt the case, yes.
>
> . . .
>
> Q. Yet you and the Emery Celli lawyers then proceeded to take steps in the U.S., in Colorado and in the Southern District of New York, to try to prevent that truth from coming out in the U.S. proceedings, correct?
>
> . . .
>
> A. Well, we -- well, Emery Celli filed . . . filed the papers and the papers speak for themselves.
>
> . . .
>
> Q. So part of your litigation strategy formulated by you and Emery Celli was to prevent the truth from coming out about Stratus drafting the Cabrera report, correct?
>
> . . .
>
> A. It was to prevent confidential information from coming out.
>
> . . .

> Q. Am I correct that even after you got this e-mail from Julio Prieto on March 30, 2010, the substance of which you discussed with the lawyers at Emery Celli, that the Emery Celli firm continued to make filings in courts in Colorado and the Southern District of New York in which it was claimed that Cabrera was independent? Yes or no.
>
> A. I believe that's correct.
>
> . . .
>
> Q. Am I also correct that even after you got this e-mail from Julio Prieto dated March 30, 2010 that you and the Emery Celli lawyers continued to see to it that filings were made in federal court in Colorado and in the Southern District of New York on behalf of the Lago Agrio plaintiffs that sought to prevent the fact that Stratus had drafted the Cabrera report from coming out publicly?
>
> A. Sought to prevent Stratus' role relative to the Cabrera report from coming out, yes.

Decl. 2801 at 3358:22-3363:20.

Defendants' efforts to obstruct Chevron's discovery through false statements about Cabrera was widespread. For example, at an April 2010 hearing in the Stratus 1782 in the District of Colorado, counsel for Defendant Stratus made false representations to a U.S. magistrate judge, telling the judge that Stratus had been "astonish[ed]" to see similarity between its work product and the Cabrera Report. Dkt. 47-62 at 69:12-13. Counsel for Stratus also falsely assured the court that Stratus did not have "an opportunity to review Cabrera's report in draft form", *id.* at 40:10-12, that there had been no "direct communications between anyone at Stratus and Mr. Cabrera", *id.* at 58:5-17, and that what they provided their co-conspirators was "intended to assist them in their analysis of data," and in the "mediation," not "to assist Cabrera", *id.* at 56:25-57:4.

1. Donziger and His Selected Attorneys Drafted a False Declaration and Caused it to be Submitted to this Court Under Fajardo's Signature

A central element in Defendants' efforts to mislead U.S. courts about their relationship with Cabrera is a declaration signed by Defendant Pablo Fajardo, which both affirmatively misrepresents that relationship and omits material facts. Donziger played an integral role in prepar-

ing Fajardo's false declaration, coordinating its authorship by a team of attorneys under his direction, and causing it to be filed in this Court and other U.S. courts. For instance, Donziger participated in correspondence between lawyers from Emery Celli and Patton Boggs that focused on how best to present the Defendants' improper relationship with Cabrera in the declaration they were drafting, and which they eventually decided Fajardo should sign. One Emery Celli attorney wrote that the declaration should not describe Cabrera as "neutral," while another noted that "[t]he more we emphasisze [sic] his neutrality the less sense it makes that we were talking to him out of school." Dkt. 48-6. And Donziger participated in and consented to the decision to use Fajardo as the declarant, for the express reason that they did not think that he would be deposed. Dkt. 542-8. Donziger also discussed the particulars of drafting in conversations with the lawyers—after Jonathan Abady of Emery Celli asked "Isn't Cabrera a non testifying expert whether or not he labeled 'nuetral' [sic]?" Donziger responded, "Will call u later." Dkt. 48-6.

Donziger controlled the final editing and discussion of the declaration with Fajardo. In the days leading up to the filing, Fajardo was staying at Donziger's New York apartment, where Donziger personally finalized the declaration and obtained Fajardo's signature. Decl. 2801 at 2794:24-2795:20; Decl. 2808 at 2; Decl. 2810. Fajardo, who has limited English skills, was dependent on Donziger to explain and revise the declaration. *See* Decl. 2801 at 2772:19-2773:2 (asked whether, in May 2010, Fajardo could read English, Donziger testified: "Maybe a teeny bit. Generally he is not bilingual"); *id.* at 2779:15-23 (Donziger testifying that he did not know if there was a Spanish translation of the declaration before Fajardo signed it on May 5, 2010, but that Donziger had orally translated the declaration for Fajardo).

The Fajardo declaration that Donziger and others drafted falsely claimed that Cabrera was "independent" and that "Chevron enjoyed the same opportunity as Plaintiffs to provide ma-

terials to Cabrera." Decl. 2811, ¶¶ 11, 21. The declaration also omitted the improper pressure Donziger and his co-counsel placed on the Ecuadorian judge to appoint Cabrera, and instead falsely suggests that the court independently appointed Cabrera "from the pool of seven independent experts it previously appointed in the case" because the "parties ultimately could not reach an agreement" on who should be the global damages expert. *Id.* ¶ 11. The declaration also represented that "On November 6, 2007, Mr. Cabrera filed an official complaint with the Lago Agrio Court claiming that members of Chevron's legal team in Ecuador subjected him to threats and insults when he would complete his field work." *Id.* ¶ 15. Yet the declaration failed to disclose that Fajardo personally ghostwrote that complaint for Cabrera. Dkt. 400-3 (Ex. 2036) (2007.12.17 email from Fajardo to Donziger attaching draft of the Cabrera letter in which Cabrera claimed to be threatened by Chevron ("Cabrera threat letter")); Dkt. 400-3 (Ex. 2037) (draft of Cabrera threat letter sent by Fajardo to Donziger with the metadata showing the author as "Pablo" and that the document was last modified six days before the threat letter was filed in Cabrera's name); Dkt. 402-13 (Ex. 2318) at 133,469 (2007.11.05 filed version of the Cabrera threat letter in which Fajardo, writing as Cabrera, claims "my life, as well as the lives of my family and collaborators, are in serious danger" because of Chevron); *see also* Dkt. 32-11 at 133,759 (2007.11.29 Ecuadorian court order ordering police protection for Cabrera as a result of Fajardo's ghostwritten letter). The declaration also claims that "Mr. Cabrera performed no less than forty-eight (48) separate site inspections on his own, in constant communication with the court," Decl. 2811, ¶13, but that, too, is false. A contemporaneous email from Donziger reflects the truth that Cabrera's field work would only "continue under the most strict control with an extremely limited number of samples." Dkt. 32-12. Donziger continued, "And we'll change the focus of the data at our offices." *Id.*

2. Donziger and His Selected Attorneys Drafted and Caused to be a Submitted a Similar Declaration In Ecuador Which They Rely Upon for the False Claim that Defendants' Contacts With Cabrera Were "Disclosed"

In addition to the Fajardo declaration, the LAPs' U.S. counsel also prepared a petition for Fajardo to submit to "the Ecuadorian court in an effort to 'cleanse' any perceived impropriety related to the Cabrera Report." Dkt. 9-8. This petition was later submitted to both this Court in the Berlinger and Donziger 1782 proceedings and to the Second Circuit in the appeal of Judge Sand's decision in the BIT arbitration stay proceeding, in support of the false assertion that Cabrera's contacts with their lawyers and consultants were "disclosed" to the Ecuadorian court. In the petition, Fajardo again falsely claimed that Cabrera was "independent" and that "Chevron enjoyed the same opportunity as Plaintiffs to provide information to Cabrera in support of its position in the case." Decl. 2812 at 6, 7; Decl. 2813 at 6, 7; Decl. 2814 at 6, 7. As with the Fajardo declaration, Donziger was directly involved in both the strategy behind, and preparation of, the Fajardo petition. For example, in email discussions with the LAPs' other U.S. lawyers, Donziger argued against admitting in the petition that Stratus-prepared annexes appeared "verbatim" in Cabrera's report, because doing so would lead to "negative fallout in a number of areas." Decl. 2815. Additionally, Donziger was copied on emails discussing the "Final Proposed Draft" of the petition and whether the LAPs should fully disclose their relationship with Cabrera. Dkt. 47-55.

3. Donziger's Selected Attorneys Made False Statements to this Court Regarding the Contents of the *Crude* Outtakes Sought by Chevron

In the Berlinger 1782, lawyers for the LAPs made a series of false statements both to this Court and the Second Circuit regarding the contents of the outtakes from *Crude* that Chevron sought to obtain.

In response to Chevron's discovery that a scene in Crude had been modified at the Defendants' request in order to suppress evidence of meetings between them and Cabrera team

member Carlos Beristain, the LAPs told this Court that the meeting was "innocuous" and "of no relevance to anything." Dkt. 48-27 at 8. The LAPs also stated that Chevron's contention that the "outtakes [would] reveal evidence of substantial relevance to the Lago Agrio Court or the BIT" was "unsupported speculation." Id. Similarly, on appeal of the Court's order requiring production of the Crude outtakes, the LAPs claimed that they had requested Berlinger to delete the scene from the DVD version of the film only to "avoid the misimpression, cynically fostered by Chevron below, that [the Lago Agrio] plaintiffs participated in one of Dr. Beristain's focus groups after he was a court expert." Dkt. 48-28 at 23.

These representations as to the significance of the meeting with Beristain and the contents of the *Crude* outtakes were false. *Cf. In re Application of Chevron Corp.*, No. 10 MC 00001 (LAK), 2010 WL 3489341, at *2 (S.D.N.Y. Sept. 7, 2010) (noting that representations by Berlinger and his counsel that "there was nothing relevant in the outtakes" had "proved inaccurate"). Far from "innocuous," the meeting from which Beristain was carefully edited out was in fact arranged and funded by the Defendants as part of their scheme to control the content of Cabrera's report. Dkt. 6-2, CRS-161-01-01-CLIP-01 (*Crude* outtake video clip of meeting among S. Donziger, P. Fajardo, and L. Yanza re C. Beristain's role in expert report); Dkt. 6-10 at 128-135; Dkt. 30-2 at 48-49; Dkt. 8-7 at 2:14-2:16; Dkt. 48-29 (2007.05.07 Email from P. Fajardo to C. Beristain re "CALENDARIO DE REUNIONES" ["MEETINGS PLAN WITH C"]) at 1. In fact, when Fajardo pressed Berlinger to edit Beristain out of *Crude*, he emphasized that the potential disclosure of the relationship between the LAPs' counsel and Beristain was "so serious that we could lose everything." Dkt. 47-6.

Nor was the meeting with Beristain the only evidence of wrongdoing that disclosure of the *Crude* outtakes would reveal. Among other things, the outtakes revealed that the LAPs'

counsel and consultants secretly met with Cabrera himself two weeks before his appointment to plan the expert report. Dkt. 6-2, CRS-187-01-02 (2007.03.03 Crude outtake video clip of meeting at Selva Viva headquarters among S. Donziger, P. Fajardo, L. Yanza, A. Maest, R. Kamp, C. Champ, R. Cabrera, and others). And when the Second Circuit ordered Berlinger to produce the outtake footage, one of Donziger's attorneys, Ilann Maazel of Emery Celli, disclosed in an email to Donziger and others that he already knew that this Cabrera meeting was captured on those tapes. Dkt. 48-30 at 3. Yet it was Maazel himself who signed the brief calling Chevron's argument that the tapes would reveal just such a relationship, "unsupported speculation." Dkt. 48-27 at 8.

SUMMARY JUDGMENT STANDARD

Rule 56(a) requires a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a).

Where, as here, the movant would bear the burden of proof at trial, "its own submissions in support of the motion must entitle it to judgment as a matter of law." *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 618 (2d Cir. 1998). Only a *genuine* dispute as to a *material* fact "will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material only if it "might affect the outcome of the suit under the governing" substantive law. *Id.* A dispute as to a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Thus, "conclusory statements, conjecture [and] speculation . . . will not defeat summary judgment." *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996). Nor is it sufficient for the nonmoving party to put forward evidence that merely raises "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586

(1986). Rather, the nonmoving party "must offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998).

Although summary judgment "should [not] be used to prevent a party from fully litigating a genuine factual dispute," *Curry Rd. Ltd. v. K Mart Corp.*, 893 F.2d 509, 511 (2d Cir. 1990) (citing *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987)), it "should never be mistaken for 'a disfavored procedural shortcut,'" *id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

ARGUMENT

New York Judiciary Law Section 487 provides, in relevant part, that "[a]n attorney or counsel who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action." As the New York Court of Appeals has explained, Section 487 is not merely "a codification of a common-law cause of action for fraud," but instead "is a unique statute of ancient origin in the criminal law of England." *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (2009). The "statute's evident intent [is] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." *Id.* Indeed, "'[e]very lawyer is an officer of the court . . . [and] he always has a duty of candor to the tribunal.'" *United States v. Gotti*, 322 F. Supp. 2d 230, 237 (E.D.N.Y. 2004) (quoting *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994)); *see also In re Dinova*, 212 B.R. 437, 447 (B.A.P. 2d Cir. 1997) (attorneys "owe the court and the public duties of good faith and complete candor in dealing with the judiciary").

All the elements of a Section 487 claim are satisfied here because Donziger engaged in deceit or consented to a deceit in proceedings before several New York courts, Donziger intend-

ed to deceive these courts and Chevron, and Chevron suffered damages proximately caused by this deceit. *See* N.Y. Jud. Law § 487; *Amalfitano v. Rosenberg*, 533 F.3d 117, 123 (2d Cir. 2008); *Amalfitano*, 12 N.Y.3d at 14. Accordingly, Chevron is entitled to summary judgment on its Section 487 claim against Donziger.

I. As an Attorney for the LAPs, Donziger Engaged in Deceit, or Consented to a Deceit, in Multiple Proceedings Before New York Courts

The undisputed record demonstrates that Donziger, in his role as an attorney for the LAPs, either directly engaged in deceit, or colluded or consented to deceit perpetrated by attorneys whom Donziger personally hired and worked closely with, in actions before New York (and other) courts.[2]

To be actionable under Section 487, an "act of deceit need not occur during a physical appearance in court; the statute applies to any oral or written statement related to a proceeding and communicated to a court or party with the intent to deceive." *Amalfitano*, 533 F.3d at 123. By the plain language of the statute, an attorney can be held liable not only for engaging in an act of deceit, but also for "consent[ing]" to a deceit. N.Y. Jud. Law § 487; *cf. Dupree v. Voorhees*, 891 N.Y.S.2d 124, 126 (2009) (holding that liability under Section 487 can be imposed on lawyers within a partnership regardless of "whether the other partners condoned the offending partner's actions"). Additionally, Section 487 prohibits attempted but unsuccessful deceit, because

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2 The Second Circuit held in *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978), that Section 487 does not apply extraterritoriality, but instead is limited to "the conduct of litigation before the New York courts." *Id.* at 1166. More recently, however, a New York trial court has criticized the reasoning of *Schertenleib*, including the lack of textual support in Section 487 for its conclusion, and expressly held that conduct by New York attorneys before courts outside of New York was actionable under Section 487. *See Cinao v. Reers*, 893 N.Y.S.2d 851, 859 (Sup. Ct. 2010) ("[T]his Court sees no basis for limiting the applicability of Judiciary Law § 487 to judicial proceedings pending in New York courts. A New York court has sufficient interest in supervising the conduct of attorneys admitted before its bar, and protecting resident clients who have been harmed by the deceit of an admitted attorney, to apply Judiciary Law § 487 to the attorney's conduct no matter where the action is pending."). Although the interpretation in *Cinao* is correct, this Court does not need to reach this issue to grant summary judgment given Donziger's conduct before courts in New York.

the "operative language at issue—'guilty of any deceit'—focuses on the attorney's intent to deceive, not the deceit's success." *Amalfitano*, 12 N.Y.3d at 14.

"[S]ome courts in New York have imposed an additional prerequisite to recovery [under Section 487]: that the plaintiff . . . show 'a chronic and extreme pattern' of legal delinquency by the defendant." *Amalfitano*, 533 F.3d at 123 (collecting cases). The Second Circuit, however, has criticized this approach, noting that this additional "requirement appears nowhere in the text of the statute," and, moreover, other "courts have found attorneys liable under the statute for a single intentionally deceitful or collusive act." *Id.* (collecting cases). But even if demonstrating a chronic and extreme pattern of legal delinquency were necessary, the repeated misrepresentations made in multiple different proceedings before New York and other courts by Donziger and the team of lawyers he recruited to represent the LAPs is more than sufficient to meet this additional requirement.

In at least four separate New York actions, Donziger or lawyers that he personally hired and with whom he was closely coordinating attempted to deceive courts regarding the independence and neutrality of Cabrera:

Quarles Declaration. In 2007, Donziger modified Quarles's declaration to state that Cabrera acted independently of both the LAPs and Chevron. Donziger personally edited Quarles's draft declaration to add in the false statements that "Mr. Cabrera has at all times acted independently from both the plaintiffs and the defendant. At no time has Mr. Cabrera entertained suggestions or even met with plaintiffs or their representatives regarding his current work plan." Dkt. 48-33 at 5. The declaration that Quarles submitted to Judge Sand contained the substantively identical misrepresentation that "Mr. Cabrera and his team have acted independently from

both the [Lago Agrio] plaintiffs and the defendant at the three (3) Phase II inspections that were witnessed on September 6 – 7, 2007." Dkt. 48-31 at 3-4.

Bilateral Investment Treaty Arbitration Stay Action. After being recruited and retained by Donziger, the Emery Celli firm initiated the BIT arbitration stay action in 2010 with a complaint that incorporated Donziger's false testimony to Congress and falsely alleged that "[t]he best and most recent *independent* estimate available of the human health impact of this contamination is provided by the *neutral Special Master* [Cabrera] appointed by the [Lago Agrio] court to provide advice on damages," and that "the final report [was] *produced by the Cabrera team*" consisting of "14 technical officials" that Cabrera had appointed. Dkt. 30-5, ¶¶ 29-30 (emphasis added). The LAPs' complaint also falsely stated that experts in the United States had "reviewed the Cabrera report and found its conclusions reasonable and its damages assessment consistent with the costs of other large environmental clean-ups around the world," when these experts were limited to co-conspirators Beltman and Maest of Stratus—the authors of the Cabrera report. *Id.* ¶ 31. Additionally, on appeal the LAPs submitted to the Second Circuit a petition that Fajardo filed in Ecuador that contained false statements regarding Cabrera's independence from the LAPs. Decl. 2812 at 6, 7.

Donziger 1782. Donziger participated in the drafting of a declaration from Fajardo that the LAPs filed in the Donziger 1782. In this declaration, Fajardo falsely claimed that Cabrera was "independent" and that "Chevron enjoyed the same opportunity as Plaintiffs to provide materials to Cabrera." Decl. 2811, ¶¶ 11, 21. Donziger was specifically involved in discussions among the LAPs' U.S. lawyers regarding the Cabrera-related language in Fajardo's declaration. Dkt. 48-6. Additionally, Donziger personally obtained Fajardo's approval of the draft declaration. *Id.* The LAPs also filed in the Donziger 1782 the false Fajardo petition discussed above, in

support of their false assertion that the contacts between their lawyers and Cabrera had been "disclosed" to the Lago Agrio court. Decl. 2814.

Berlinger 1782. As in the Donziger 1782, Emery Celli, on behalf of the LAPs, relied on false statements regarding Cabrera's independence to oppose Chevron's § 1782 application. In their brief to this Court, the LAPs claimed that a meeting between Cabrera team member Beristain was "innocuous" and "of no relevance to anything." Dkt. 48-27 at 8. They also stated that Chevron's contention that the "outtakes [would] reveal evidence of substantial relevance to the Lago Agrio Court or the BIT" was "unsupported speculation." Id. And before the Second Circuit, they sought to misrepresent the import of Donziger's contacts with Beristain, claiming that Chevron had "cynically fostered" the "misimpression . . . that [the Lago Agrio] plaintiffs participated in one of Dr. Beristain's focus groups after he was a court expert." Dkt. 48-28 at 23. Additionally, the LAPs filed the false Fajardo petition discussed above in the Berlinger 1782. Decl. 2813.

That these misrepresentations regarding the independence and neutrality of Cabrera constitute deceit cannot be disputed.[3] In addition to the extensive documentary evidence that revealed the Defendants' control over Cabrera (including Defendants' own emails and the outtakes from *Crude* that were obtained through Chevron's Section 1782 actions), Donziger himself has admitted that "the general idea" was "that Stratus would draft the report in a form that it could be submitted directly to the Ecuadorian court by Mr. Cabrera." St. 55. Donziger cannot create a

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3 One court interpreting Section 487 has relied on the definitions of deceit found in *Black's Law Dictionary*. *See Amalfitano v. Rosenberg*, 428 F. Supp. 2d 196, 211 n.40 (S.D.N.Y. 2006) ("As a general matter, definitions of "deceit" include: 1. The act of intentionally giving a false impression . . . . 2. A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone else will act upon it . . . . 3. A tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it." (quoting *Black's Law Dictionary* (8th ed. 2004)). The clear falsehoods at issue here would constitute deceit under any plausible definition of the term.

genuine issue of material fact as to the falsity of the statements made at his direction or with his consent to New York courts, including this Court.

With respect to the Quarles and Fajardo declarations, the evidence establishes that Donziger directly influenced the drafting of these declarations, specifically with respect to the false statements about Cabrera's independence, with full knowledge and intent that they would be submitted in court filings. St. 82-90, 115-26. Donziger's level of involvement in the preparation of these false declarations constitutes a violation of Section 487. *See Amalfitano*, 428 F. Supp. 2d at 201 (finding that attorney violated Section 478 by preparing false client affidavit).

Furthermore, Section 487 does not impose liability only on attorneys who directly engage in deceit, but also on attorneys who have "consent[ed]" to a deceit. *See* N.Y. Jud. Law § 487. Here, Donziger, as chief U.S. counsel for the LAPs, recruited and led a team of U.S. lawyers, including Emery Celli, with whom he worked closely as the LAPs litigated in New York. Indeed, Donziger has admitted that he "had various face to face meetings with counsel for the Lago plaintiffs, particularly the Emery Celli counsel, counsel from other law firms as well, where we discussed a whole variety of issues including the Cabrera issue," and that he also "had a number of discussions with counsel about" the Cabrera report and Stratus "by phone, e-mail, in person." Decl. 2801 at 1162:8-13, 1162:25-1163:15. And Donziger has further admitted that he, with the help of Emery Celli, attempted to prevent the revelation of the Cabrera fraud by continuing to falsely claim that Cabrera was independent in proceedings before New York courts. Decl. 2801 at 3358:22-3363:20. Given this evidence, Donziger cannot dispute that he colluded with or consented to Emery Celli's presentation of false statements.

Finally, Donziger formally appeared as counsel in the BIT arbitration stay proceedings, and therefore is directly responsible for the false allegations in the LAPs' complaint in that ac-

tion. Decl. 2823. And, as noted above, these false statements track those he personally made to Congress. Dkt. 47-30 at 7.

Donziger may also argue, as he did in his motion to dismiss, that he was not acting as an attorney in any of the relevant proceedings. This Court has already confirmed that Chevron has properly alleged that Donziger was acting as an attorney. Dkt. 468 at 50. And there can be no dispute that Donziger in fact was performing legal tasks on behalf of the LAPs when he helped craft the Quarles and Fajardo declarations, and when he appeared as counsel in the BIT arbitration stay proceeding. Donziger was also acting as an attorney for the LAPs when he recruited and hired Emery Celli to represent the LAPs in U.S. proceedings, and coordinated with that firm to implement a strategy to combat Chevron's Section 1782 proceedings by resorting to deception. And that Donziger also appeared in the Donziger 1782 in a personal capacity is irrelevant because the filings containing the actionable misrepresentations in that proceeding were made in filings by Emery Celli on behalf by the LAPs, not Donziger.

II. Donziger Intended to Deceive New York Courts

Donziger's intention to deceive New York courts inescapably follows from the conclusion that he directly engaged in, or consented to, a pattern of deceit in his role as "mastermind[]" behind the Lago Agrio Litigation and "chief U.S. counsel for the LAPs." Dkt. 571 at 2 & n.5. The only reason to repeatedly make false statements to courts is to deceive those courts. *See Amalfitano*, 428 F. Supp. 2d at 209 (finding that intent to deceive was "inescapable" where lawyer presented client affidavit containing statements that the lawyer knew were false); *see also, e.g.*, *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 224 F. Supp. 2d 679, 686 (S.D.N.Y. 2002) (granting plaintiff's motion for summary judgment on common law fraud claim where "no reasonable jury would conclude that the representations at issue were offered for a purpose other than to deceive"). Moreover, there is no possible argument that the false statements regarding

Cabrera's independence were inadvertent. On the contrary, these misrepresentations were part of an intentional scheme designed to prevent the revelation of the Cabrera fraud and frustrate Chevron's attempts to obtain discovery under Section 1782. Decl. 2801 at 3358:22-3363:20. As Donziger explained to his co-conspirators, "Our goal is that they [Chevron] don't know shit . . . and that's why they're so panicked." St. 112. Maintaining that secrecy was crucial, for Donziger and his co-conspirators knew that revelation of their conduct could "destroy[] the proceeding" and even result in their "go[ing] to jail." Dkt. 9-6.

III. Chevron Incurred Damages as the Result of the Misrepresentations to New York Courts

Attorneys' fees incurred because of deceit are "a legitimate source of damages in an action under Judiciary Law § 487." *Dupree v. Voorhees*, 876 N.Y.S.2d 840, 846 (Sup. Ct. 2009), *aff'd as modified*, 891 N.Y.S.2d 422 (2009). "When a party commences an action grounded in a material misrepresentation of fact, the opposing party is obligated to defend or default and necessarily incurs legal expenses. Because, in such a case, the lawsuit could not have gone forward in the absence of the material misrepresentation, that party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation." *Amalfitano*, 12 N.Y.3d at 15. As outlined above, when Chevron turned to U.S. courts to pursue discovery under Section 1782 from Defendants in the U.S. and their American co-conspirators, Defendants aggressively opposed Chevron's applications using deception—materially false assertions about the independence of Cabrera and what the *Crude* outtakes would reveal. St. 110-53.

Defendants' misrepresentations in Section 1782 proceedings, although ultimately not successful in preventing the disclosure of evidence that finally revealed the Cabrera fraud, imposed additional, unnecessary litigation costs on Chevron. Although Chevron incurred significant costs as a result of Donziger's violations of Section 487, Chevron only seeks an award of $1

in nominal damages rather than the actual amount of attorneys' fees it has incurred. *See, e.g.*, *In re Bankers Trust Co.*, 450 F.3d 121, 123 (2d Cir. 2006) (affirming award of $1 in nominal damages awarded to plaintiff on summary judgment). An award of nominal damages is warranted because there can be no dispute that Chevron was forced to incur at least some amount of additional attorneys' fees as the result of Donziger's violations of Section 487. For example, Chevron was forced to prepare three briefs that directly responded to false statements that the LAPs made to this Court and the Second Circuit.

Berlinger 1782 Reply Brief. The LAPs filed an opposition to Chevron's application in the Berlinger 1782 in which they falsely claimed that the meeting with Beristain found in a *Crude* outtake—which the LAPs deemed "the linchpin for [Chevron's] extraordinary application"—was an "innocuous meeting, which is of no relevance to anything." Dkt. 48-27 at 8. As the result of the LAPs' false statement regarding the relevance of the Beristain meeting, Chevron incurred legal fees related to the preparation of a reply brief in which it had to again establish the importance of the Beristain meeting. Decl. 2816 at 2-3, 16-19. The legal fees incurred in preparing this reply brief were proximately caused by the LAPs' false statements.

Berlinger 1782 Appellate Brief. When the LAPs appealed this Court's decision in the Berlinger 1782, they again relied on false statements regarding the Beristain meeting. Dkt. 48-28. In an attempt to undermine what they called the "centerpiece of [Chevron's] entire application," the LAPs claimed that they had requested Berlinger to delete the Beristain scene from the DVD version of the film only to "avoid the misimpression, cynically fostered by Chevron below, that [the Lago Agrio] plaintiffs participated in one of Dr. Beristain's focus groups after he was a court expert." *Id.* at 22-23. In its appellate brief, Chevron was forced to again counter the LAPs' false statements regarding the Beristain meeting. Decl. 2817. For example, Chevron argued that

"[t]he presence of Plaintiffs' legal team at a meeting with Dr. Beristain is directly relevant to the issue of whether Cabrera and his team were 'neutral' and 'independent of the parties.'" *Id.* at 22.

Had the LAPs not initiated an appeal that was premised on falsehoods, Chevron would not have incurred legal fees responding to the LAPs' attempts to minimize the relevance of the Beristain meeting. The legal fees incurred in preparing those portions of the appellate brief were thus proximately caused by the LAPs' misrepresentations.

Donziger 1782 Motion to Quash Opposition Brief. In support of their motion to quash subpoenas issued in the Donziger 1782, the LAPs submitted Fajardo's declaration and petition, both of which contained false statements regarding the LAPs' relationship with Cabrera and his independence. Decl. 2811, ¶¶ 11, 21 (Fajardo declaration claiming that Cabrera was "independent" and that "Chevron enjoyed the same opportunity as Plaintiffs to provide materials to Cabrera."); Decl. 2814 (Ecuador Petition making same claims). Moreover, the LAPs made the propriety of contact with Cabrera a significant focus of their brief. Decl. 2818 at 2. In response, Chevron filed an opposition brief that specifically countered the LAPs' false statements regarding Cabrera—statements that were supported by the false Fajardo declaration and petition. Decl. 2819. Chevron's opposition focused heavily on the impropriety of the LAPs' relationship with Cabrera. *Id.* at 13-14, 20-22. In fact, Chevron devoted more than five full pages to establishing that, contrary to the LAPs' misrepresentations, the LAPs' relationship with Cabrera violated both U.S. and Ecuadorian law. *Id.* at 22-27.

Because the LAPs' motion to quash in the Donziger 1782 was supported by false statements regarding the supposed independence of Cabrera, Chevron was forced to incur legal fees specifically responding to the LAPs' deceptive arguments regarding the propriety of their relationship with Cabrera and his purported independence. The legal fees incurred in preparing the

opposition to the motion to quash were thus proximately caused by the LAPs' misrepresentations.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in Chevron's favor on its eighth claim for relief (Violation of New York Judiciary Law Section § 487), and award Chevron $1 in nominal damages.

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New York, NY

Respectfully submitted,

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