

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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KEMPERI BAIHUA HUANI, *et al.*,

Plaintiff,

Index No. 151372/2013

-against-

STEVEN DONZIGER, THE LAW OFFICES OF  
STEVEN R. DONZIGER, DONZIGER &  
ASSOCIATES, PLLC, FRENTE DE DEFENSA LA  
AMAZONIA A/K/A AMAZON DEFENSE FRONT  
OR AMAZON DEFENSE COALITION, AND DOES  
1-20,

Defendants,  
----- X

**MOTION TO DISMISS PLAINTIFFS' COMPLAINT OF DEFENDANTS STEVEN  
DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, AND DONZIGER &  
ASSOCIATES**

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## **TABLE OF CONTENTS**

INTRODUCTION .....	1
BACKGROUND .....	2
I. FACTUAL BACKGROUND .....	2
A. The Ecuadorian Litigation.....	2
B. The Relief Sought Here By Plaintiffs Vis-à-Vis the Ecuadorian Litigation .....	4
II. PROCEDURAL BACKGROUND .....	5
A. Early Failed Attempts to Seek a Remedy Through U.S. Courts .....	5
B. Plaintiffs’ Many Failed Attempts to Seek a Remedy Through U.S. Courts .....	6
C. Plaintiffs Abandoned Their Sole Attempt to Obtain a Remedy in Ecuador Ten Years Ago .....	10
ARGUMENT.....	10
I. FORUM NON CONVENIENS (CPLR 327) .....	10
A. Forum Non Conveniens Legal Standard.....	10
B. Dismissal Pursuant to Forum Non Conveniens Is Appropriate .....	11
II. INABILITY TO JOIN A NECESSARY PARTY (CPLR 1001, 3211(a)(10)) .....	17
A. Legal Standard.....	17
B. ADF Is a Necessary Party .....	18
C. ADF Is Not Subject to the Court’s Personal Jurisdiction.....	20
D. ADF’s Absence from this Litigation Cannot be Excused .....	22
III. FAILURE TO STATE A CAUSE OF ACTION (CPLR 3211(a)(7)).....	26
A. Plaintiffs’ Declaratory Judgment Claim Failed to Allege An Actual Controversy.....	26
B. Plaintiffs Have Failed to State a Cause of Action for Unjust Enrichment .....	27
C. Plaintiffs Have Failed to State a Cause of Action for Constructive Trust.....	28
D. Plaintiffs Have Failed to State a Cause of Action for Breach of Fiduciary Duty .....	29
E. Plaintiffs Have Failed to State a Cause of Action For An Accounting .....	30
CONCLUSION .....	30

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Aguinda v. Texaco, Inc.</i> , 142 F. Supp. 2d 534 (S.D.N.Y. 2001) .....	passim
<i>Aguinda v. Texaco, Inc.</i> , 303 F.3d 470 (2d Cir. 2002) .....	passim
<i>Aguinda v. Texaco, Inc.</i> , Case No. 93 Civ. 7527 (S.D.N.Y.) .....	5
<i>Allsafe Tech., Inc. v. Benz</i> , 74 A.D.3d 1759, 902 N.Y.S.2d 462 (4th Dep’t 2010) .....	18
<i>American News Co. v. Avon Publishing Co.</i> , 283 A.D. 1042, 131 N.Y.S.2d 566 (1st Dep’t 1954) .....	26
<i>Baumann v. Hanover Community Bank</i> , 100 A.D.3d 814, 957 N.Y.S.2d 111 (2d Dep’t 2012) ...	29
<i>Blue Diamond Group Corp. v. Klin Constr. Group, Inc.</i> , No. 22040/08, 2010 N.Y. Misc. LEXIS 4471, 2010 N.Y. Slip Op. 32539 (U) (Sup. Ct. Nassau Cnty. Sept. 13, 2010) .....	26, 27
<i>Calderone v. Wiemeier</i> , 77 A.D.3d 1232, 911 N.Y.S.2d 190 (3d Dep’t 2010) .....	19
<i>Caniglia v. Chicago Tribune-New York News Syndicate</i> , 204 A.D.2d 233, 612 N.Y.S.2d 146 (1st Dep’t 1994) .....	26
<i>CDR Créances S.A. v. Euro-American Lodging Corp.</i> , 40 A.D.3d 421, 837 N.Y.S.2d 609 (1st Dep’t 2007) .....	28
<i>Center for Rehabilitation &amp; Nursing at Birchwood, LLC v. S &amp; L Birchwood, LLC</i> , 92 A.D.3d 711, 939 N.Y.S.2d 78 (2d Dep’t 2012) .....	30
<i>Chevron v. Donziger</i> , Case No. 11-CV-0691 (S.D.N.Y.) .....	3, 9
<i>Copp v. Ramirez</i> , 62 A.D.3d 23, 874 N.Y.S.2d 52 (1st Dep’t 2009) .....	20
<i>CP Solutions PTE, Ltd. v. General Electric Co.</i> , 553 F.3d 156 (2d Cir. 2009) .....	8
<i>Deer Consumer Products, Inc. v. Little</i> , 35 Misc. 3d 374, 938 N.Y.S.2d 767 (Sup. Ct. New York Cnty. Jan. 27, 2012) .....	21
<i>Doxey v. Glen Cove Community Dev. Agency</i> , 28 A.D.3d 511, 813 N.Y.S.2d 743 (2d Dep’t 2006) .....	29
<i>Ewart v. Ewart</i> , 78 A.D.3d 992, 912 N.Y.S.2d 265 (2d Dep’t 2010) .....	29
<i>Farah v. Sykes Datatronics</i> , 59 N.Y.2d 500, 465 N.Y.S.2d 917 (1983) .....	28

<i>Godfrey v. Spano</i> , 13 N.Y.3d 358, 920 N.E.2d 328 (2009).....	26
<i>Gozzo v. First Am. Title Ins. Co.</i> , 75 A.D.3d 953, 905 N.Y.S.2d 702 (3d Dep’t 2010).....	16
<i>Hsu v. Lien Sheng Chang</i> , 199 A.D.2d 309, 606 N.Y.S.2d 1009 (2d Dep’t 1993).....	14
<i>Huani v. Donziger</i> , Case No. 12-CV-5570 (S.D.N.Y.) .....	8, 9, 22
<i>Islamic Republic of Iran v. Pahlavi</i> , 62 N.Y.2d 474, 67 N.E.2d 245 (1984) .....	12
<i>Johnson v. Ward</i> , 4 N.Y.3d 516, 797 N.Y.S.2d 33 (2005).....	20
<i>Martin v. Mieth</i> , 35 N.Y.2d 414, 321 N.E.2d 777 (1974) .....	11
<i>MatlinPatterson ATA Holdings, LLC v. Fed. Express Corp.</i> , 87 A.D.3d 836, 929 N.Y.S.2d 571 (1st Dep’t 2011).....	26
<i>Nakamura v. Fujii</i> , 253 A.D.2d 387, 677 N.Y.S.2d 113 (1st Dep’t 1998).....	27
<i>Neuter, Ltd. v. Citibank, N.A.</i> , 239 A.D.2d 213, 657 N.Y.S.2d 663 (1st Dep’t 1997) .....	12
<i>Nguyen v. Banque Indosuez</i> , 19 A.D.3d 292, 797 N.Y.S.2d 89 (1st Dep’t 2005), <i>appeal denied</i> , 6 N.Y.3d 703, 844 N.E.2d 790 (2006) .....	10, 11, 17
<i>Palazzo v. Palazzo</i> , 121 A.D.2d 261, 503 N.Y.S.2d 381 (1986).....	30
<i>Prospect Plaza Tenant Ass’n, Inc. v. New York City Hous. Auth.</i> , 11 A.D.3d 400, 783 N.Y.S.2d 563 (1st Dep’t 2004).....	28
<i>Republic of Ecuador v. ChevronTexaco Corp.</i> , Case No. 04-CV-8378 (LBS) (S.D.N.Y.) ....	6, 7, 8
<i>Robinson v. Robinson</i> , 303 A.D.2d 234, 757 N.Y.S.2d 13 (1st Dep’t 2003).....	26
<i>Sequihua v. Texaco, Inc.</i> , 847 F. Supp. 61 (S.D. Tex. 1994) .....	1, 6, 15, 24
<i>Shin-Etsu Chem. Co. v. ICICI Bank Ltd.</i> , 9 A.D.3d 171, 777 N.Y.S.2d 69 (1st Dep’t 2004)..... .....	11, 12, 16, 17
<i>Silver v. Great Am. Ins. Co.</i> , 29 N.Y.2d 356, 278 N.E.2d 619 (1972) .....	11, 16
<i>State of N.Y. v. SCA Services, Inc.</i> , 761 F. Supp. 14 (S.D.N.Y. 1991) .....	27
<i>Steiner Sports Mktg. v. Weinreb</i> , 88 A.D.3d 482, 930 N.Y.S.2d 186 (1st Dep’t 2011).....	26
<i>Stephen Pevner, Inc. v. Ensler</i> , 309 A.D.2d 722, 766 N.Y.S.2d 183 (1st Dep’t 2003).....	28
<i>Storch v. Vigneau</i> , 162 A.D.2d 241, 556 N.Y.S.2d 342, 343 (1st Dep’t 1990) .....	20, 22

<i>Swezey v. Merrill Lynch Pierce, Fenner &amp; Smith, Inc.</i> , 19 N.Y.3d 543, 973 N.E.2d 703 (2012) ....	24, 25
<i>Tilleke &amp; Gibbins Intl., Ltd. v. Baker &amp; McKenzie</i> , 302 A.D.2d 328, 765 N.Y.S.2d 179 (1st Dep’t 2003) .....	12

## **Statutes**

28 U.S.C. § 1332 .....	8
CPLR 1001 .....	1, 17, 23
CPLR 1001(b).....	22, 23, 25
CPLR 302 .....	20
CPLR 302(a)(1) .....	20, 21
CPLR 302(a)(2) .....	20, 22
CPLR 302(a)(3) .....	20
CPLR 302(a)(4) .....	20
CPLR 3211(a)(10) .....	1, 17
CPLR 3211(a)(7) .....	1, 26, 27
CPLR 327(a).....	10, 16

## **Treatises**

Siegel § 132 at 234 (5th ed.).....	18
Siegel § 28 at 32 (5th ed.).....	11

## **INTRODUCTION**

Plaintiffs are Ecuadorians, bringing this claim on behalf of a group of indigenous Ecuadorians, who assert an interest in a judgment entered in Ecuador by an Ecuador court after years of litigation in Ecuador over contamination that occurred in Ecuador. It is abundantly clear from Plaintiffs' allegations that their claims have almost no connection to the State of New York whatsoever, and are better suited to an Ecuador forum. Indeed, multiple U.S. courts have already held that claims, arising out of the same environmental harm and related injuries occurring in Ecuador as the result of activities in Ecuador, as those that Plaintiff seek adjudicated here, must be litigated in Ecuador. *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). The Court should follow the lead of the Second Circuit, the Southern District of New York, and the Southern District of Texas and dismiss Plaintiffs' claims in their entirety on grounds of forum non conveniens given their connection to Ecuador and their almost nonexistent connection to New York.

In addition to having "everything to do with Ecuador and nothing to do with the United States," *Aguinda*, 303 F.3d at 476 (quoting *Aguinda*, 142 F. Supp. 2d at 537), Plaintiffs' Complaint suffers from another fatal flaw: Plaintiffs' are unable to join an indispensable party in this action. Plaintiffs cannot dispute that Defendant Frente de Defensa de la Amazonia a/k/a Amazon Defense Front ("ADF") is a necessary party, yet ADF cannot be joined in this action because the Court cannot obtain personal jurisdiction over ADF. Given that (1) the Court cannot afford the relief Plaintiffs request without the presence of ADF, (2) all of the Defendants would be substantially prejudiced if this action were allowed to proceed in the absence of ADF, and (3) an alternative forum is available in Ecuador, the Court should dismiss this action for Plaintiffs' inability to join necessary party ADF pursuant to CPLR 3211(a)(10) and CPLR 1001.

Finally, putting aside the fact that the Complaint is not properly brought in New York court, and that Plaintiffs' are unable to join necessary party ADF, Plaintiffs' claims against the Donziger Defendants must be dismissed as deficient. Pursuant to CPLR 3211(a)(7), each of

Plaintiffs’ claims against the Donziger Defendants fails to properly state a cause of action, and therefore all of Plaintiffs’ claims against the Donziger Defendants should be dismissed.

## **BACKGROUND**

### **I. FACTUAL BACKGROUND**

#### **A. The Ecuadorian Litigation**

As alleged by Plaintiffs, in 2003 a group of Ecuadorians (the Lago Agrio Plaintiffs, or “LAPs”) brought suit in Ecuador on behalf of indigenous Ecuadorians who have been harmed by the oil exploration and extraction activities of Chevron Corporation and its predecessors (collectively referred to as “Chevron”) in the Ecuadorian Amazon (the “Lago Agrio Litigation”). Compl. ¶ 17.<sup>1</sup> As a result of the Lago Agrio Litigation, the Ecuador court found Chevron liable for substantial environmental damage and related injuries to the indigenous Ecuadorians and entered judgment in favor of the LAPs (the “Lago Agrio Judgment”). Compl. ¶ 19. The Lago Agrio Judgment orders Chevron to pay over \$19 billion in damages, half of which is to be allocated to numerous specific means of remedying the harm it caused (such as environmental remediation, compensation, and mitigation measures, including remediation of ground waters and soil, restoration of native flora and fauna, and delivery of potable water; and provision of healthcare), and the other half of which constitutes punitive damages that are to be used to compensate the affected indigenous communities. Compl. ¶ 24. The Lago Agrio Judgment was affirmed by the Appellate Division of the Provincial Court of Justice of Sucumbios on January 3, 2012. Compl. ¶ 26. However, the Lago Agrio Judgment has not yet been successfully enforced, and therefore no portion of the judgment has yet been collected from Chevron. Compl. ¶ 68 (describing the alleged ongoing “enforcement plan” seeking enforcement of the Lago Agrio Judgment around the world, and referencing multiple enforcement actions currently pending in Canada, Brazil, and Argentina trying “to enforce the Lago Agrio Judgment and collect monies

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<sup>1</sup> The allegations in the Complaint are taken as true solely for the purposes of this Motion.

from Chevron); *see also Chevron v. Donziger*, Case No. 11-CV-0691 (S.D.N.Y.) (action by Chevron seeking to enjoin the LAPs from enforcing the Lago Agrio Judgment).

**1. ADF and Its Role in the Ecuadorian Litigation**

“ADF is a nongovernmental organization registered under the laws of Ecuador with offices located [in Ecuador], and is therefore a citizen of Ecuador.” Compl. ¶ 13. As alleged by Plaintiffs, “ADF is a ‘non-profit’ organization purporting to represent [the Ecuadorians] who have been harmed by Chevron’s operations in Ecuador . . . in the Lago Agrio Litigation.” *Id.* ADF was appointed by the court overseeing the Lago Agrio Litigation (“Lago Agrio Court”) as the beneficiary of a trust designated by the court to receive and administer the Lago Agrio Judgment proceeds, and is “designated as the entity that will select the directors of said trust and of a second trust ordered by the [Lago Agrio Court] to receive punitive damages monies.” *Id.*

**2. The Donziger Defendants’ Role in the Ecuadorian Litigation**

According to Plaintiffs’ allegations, Defendant Steven Donziger (“Donziger”) is a “consulting attorney” for ADF and the LAPs in the Lago Agrio Litigation. Compl. ¶ 10. Donziger is the sole proprietor of Defendant The Law Offices of Steven R. Donziger, and is a principal at Donziger & Associates, PLLC (all three collectively referred to as the “Donziger Defendants”). Compl. ¶ 5.

**3. The Huaorani Plaintiffs**

As alleged by the Complaint, “Plaintiffs are members of the Huaorani people, an Indigenous people and minority group in the Amazon region in Ecuador” who have “been harmed by Chevron’s petroleum activities in the Amazon region in Ecuador.” Compl. ¶ 8. Plaintiffs contend that, as a result of Chevron’s “oil exploration and extraction in the Amazon Rainforest in Ecuador,” “Chevron contaminated and damaged large areas of Plaintiffs’ ancestral lands and territory, and destroyed and degraded natural resources that provided sustainable sources of food, water, and, [sic] medicine, among other things.” Compl. ¶¶ 30, 35.

Plaintiffs’ claim that the Lago Agrio Judgment “is based in significant part on injuries suffered by members of the Huaorani people. Compl. ¶ 21. As a result, Plaintiffs claim they are

entitled to a portion of the Lago Agrio Judgment issued by the Lago Agrio Court corresponding to the harm suffered by the Huaorani to compensate for and remedy that harm. Compl. ¶ 1. However, Plaintiffs admit they were not parties to the Lago Agrio Litigation. Compl. ¶ 51. Further, Plaintiffs contend that ADF and the Donziger Defendants were not authorized to represent the interests of Plaintiffs or the Huaorani in connection with the Lago Agrio Litigation. Compl. ¶ 5, 53-54. Nevertheless, Plaintiffs allege that they are entitled to a portion of the Lago Agrio Judgment “corresponding to their injuries for which Chevron was held liable.” Compl. at 46, ¶ 1. Plaintiffs base their purported rights in the Lago Agrio Judgment on their allegations that ADF and the Donziger Defendants purportedly claimed to represent *all* indigenous Ecuadorians harmed by Chevron’s actions in the Lago Agrio Litigation, including Plaintiffs and other Huaorani, not just the LAPs. Compl. ¶¶ 53-54. Plaintiffs contend that “as a result of the Donziger Defendants’ and ADF’s actions in connection with the Lago Agrio Litigation, and of the Lago Agrio Judgment consequently entered and affirmed on appeal,” ADF and the Donziger Defendants “owe a fiduciary duty to Plaintiffs,” including “a duty to protect their interests in the Lago Agrio Judgment.” Compl. ¶¶ 55-56.

**B. The Relief Sought Here By Plaintiffs Vis-à-Vis the Ecuadorian Litigation**

Plaintiffs claim that because they are members of the Huaorani, they are “beneficiaries of the judgment against Chevron” issued by the Ecuador court. Compl. ¶ 8. Plaintiffs seek a declaration that they are “entitled to recover their share of the judgment proceeds awarded under the Lago Agrio Judgment,” as well as a declaration that ADF and the Donziger Defendants owe Plaintiffs various fiduciary duties based on Plaintiffs’ purported rights in the Lago Agrio Judgment, ADF’s designation as the entity to receive and administer the Lago Agrio Judgment proceeds (should any actually be collected), and the Donziger Defendants’ purported status “as an agent and/or alter ego of ADF with respect to the Lago Agrio Litigation.” Compl. ¶¶ 1, 5. In short, Plaintiffs, a group of indigenous Ecuadorians, are asking this Court to declare their rights in a judgment obtained in Ecuador, by Ecuadorians, on behalf of Ecuadorians, based on conduct occurring entirely within Ecuador.

Plaintiffs also assert claims for breach of fiduciary duty/constructive trust and unjust enrichment arising out of the same subject matter: Plaintiffs' purported rights in the Lago Agrio Judgment. Plaintiffs claim ADF and the Donziger Defendants breached a fiduciary duty to Plaintiffs by "pursuing the Lago Agrio Litigation based on the asserted interests, claims and rights of Plaintiffs and other Huaorani." Compl. ¶ 102. Further, Plaintiffs claim ADF and the Donziger Defendants breached fiduciary duties to Plaintiffs by failing to inform Plaintiffs what portion of the judgment they are entitled to, failing to inform Plaintiffs of the enforcement status and distribution plan for the judgment, and failing to agree to pay Plaintiffs their portion of the judgment, Compl. ¶ 102, even though Plaintiffs also allege that ADF acknowledged in writing, in response to Plaintiffs' inquiry, "that the Huaorani people should benefit from the Lago Agrio Litigation." Compl. ¶ 62. With respect to the unjust enrichment claims, Plaintiffs claim the Donziger Defendants and ADF have been "unjustly enriched by the possession of those monies received as a result of the Lago Agrio Judgment which was awarded for the benefit of Plaintiffs and other Huaorani." Compl. ¶ 115. Finally, Plaintiffs request an accounting of any interests in or distributions of the Lago Agrio Judgment "to determine the portion of the judgment proceeds to be paid Plaintiffs and their communities." Compl. ¶ 117.

## **II. PROCEDURAL BACKGROUND**

### **A. Early Failed Attempts to Seek a Remedy Through U.S. Courts**

#### **1. The *Aguinda* Action**

In November 1993, a group of indigenous Ecuadorians filed suit in the Southern District of New York based on the harms caused by Chevron's oil exploration and drilling activities in Ecuador. *Aguinda v. Texaco, Inc.*, Case No. 93 Civ. 7527 (S.D.N.Y.) ("*Aguinda* Action"). The *Aguinda* Action was ultimately dismissed on grounds of forum non conveniens, which dismissal was affirmed by the Second Circuit. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *see also* Compl. ¶ 45. The district court found the following factors favored dismissal of the action in favor of an Ecuadorian forum: (1) the relative ease of access to sources of proof given that the plaintiffs sustained their injuries in Ecuador and their relevant medical and property records were

located there; (2) the cost of obtaining the attendance of willing witnesses; (3) the availability of compulsory process for attendance of unwilling witnesses; (4) the possibility of viewing the contaminated premises; (5) the fact that the plaintiffs lived in Ecuador; (6) the necessity of translating testimony and documents; and (7) the likely application of Ecuadorian law. *Aguinda*, 142 F. Supp. 2d 534, 548, 552 (S.D.N.Y. 2001). In affirming the district court's dismissal, the Second Circuit agreed with the district court's conclusion that the case had “everything to do with Ecuador and nothing to do with the United States,” and that Ecuador courts provide an adequate alternative forum. *Aguinda v. Texaco, Inc.*, 303 F.3d at 476-79 (quoting *Aguinda*, 142 F. Supp. 2d at 537) (emphasis added). The Second Circuit also found that Ecuadorian law was sufficiently developed, and that Ecuadorian courts were capable of awarding the types of equitable relief requested (i.e., damages for remediation and restoration). *Id.* at 477-78.

## **2. The Sequihua Action**

Around the same time the *Aguinda* Action was filed in New York in 1993, another group of Ecuadorians sued Chevron in Texas, also “for environmental contamination and damages caused by Chevron’s petroleum operations in the Ecuadorian Amazon.” Compl. ¶ 44; *see also Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (“*Sequihua* Action”). Like the *Aguinda* Action, the *Sequihua* Action was ultimately dismissed in favor of an Ecuadorian forum on forum non conveniens and international comity grounds. *Id.* at 63-65.

### **B. Plaintiffs’ Many Failed Attempts to Seek a Remedy Through U.S. Courts**

#### **1. Plaintiffs’ Attempted Intervention in the Republic of Ecuador’s Action to Stay Arbitration**

Plaintiffs’ first attempted to assert claims related to the Lago Agrio Litigation in the U.S. by filing a motion to intervene in a federal action between the Republic of Ecuador and Chevron. *See Republic of Ecuador v. ChevronTexaco Corp.* (“Arbitration Action”), Case No. 04-CV-8378 (LBS) (S.D.N.Y.), Dkt. No. 126 (Notice of Motion and Memorandum of Law of Proposed

Intervening Plaintiffs<sup>2</sup> Kemperi Baihua, et al., in Support of the Motion of Kemperi Baihua, et al., to Intervene as Plaintiffs Pursuant to Fed. R. Civ. P. 24) (Oct. 12, 2006) (attached as Exhibit 2 to the Declaration of Stuart G. Gross (“Gross Dec.”)). There, the Republic of Ecuador and its state-owned oil company, Petroecuador, sought to stay arbitration initiated by Chevron seeking indemnification of expenses related to the Lago Agrio Litigation. *Id.* at 1. In their proposed Intervenor Complaint, the Proposed Intervening Plaintiffs asserted a litany of claims against Chevron based on the environmental harm caused by Chevron’s oil exploration and extraction in Ecuador.

While the subject matter of the Arbitration Action was primarily a contractual dispute regarding whether the Republic of Ecuador and Petroecuador were obligated to indemnify Chevron for the cost of defending the Lago Agrio Litigation, the Proposed Intervening Plaintiffs attempted to inject numerous new claims<sup>3</sup> arising out of the environmental harm caused by Chevron’s oil exploration and extraction activities in Ecuador which would turn on distinct and complex fact issues concerning Chevron’s activities in Ecuador and the resulting environmental impact. *See id.*, Dkt No. 126 at 54-82; *see also id.*, Dkt. No. 130 (Chevron’s opposition to motion to intervene) (attached as Exhibit 3 to the Gross Dec.) at 5-6 & Dkt. No. 131 (Ecuador’s opposition to motion to intervene) (attached as Exhibit 4 to the Gross Dec.) at 19-20. What’s more, the proposed claims were largely identical to those claims dismissed in *Aguinda* and already pending in Ecuador in the Lago Agrio Litigation. Both the Republic of Ecuador and

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<sup>2</sup> Some, but not all, of the Huaorani plaintiffs attempting to intervene in the Arbitration Action (“Proposed Intervening Plaintiffs”) are Plaintiffs in this action. However, in both cases the lead plaintiff is the same (“Kemperi Baihua Huani” or “Kemperi Baihua”) and both sets of plaintiffs purport to bring claims “individually and on behalf of their families, their communities and the Huaorani People.” Arbitration Action, Dkt. No. 126 at 34, ¶ 26; *see also* Compl. at 1 (Plaintiffs sue “on behalf of themselves, on behalf of their family groups, on behalf of their communities, and on behalf of the Huaorani people”). Kimerling

<sup>3</sup> Plaintiffs asserted the following claims: (1) equitable relief for remediation and restoration and medical monitoring; (2) negligence; (3) public nuisance; (4) private nuisance; (5) trespass; (6) intentional infliction of emotional distress; (7) battery; (8) violation of 28 U.S.C. § 1350; (9) discrimination; (10) ethnocide and violation of the right to culture; (11) conversion; and (12) civil conspiracy.

Chevron vigorously opposed intervention, *id.* at Dkt. Nos. 130 and 131, and the court agreed, summarily denying the motion to intervene. *Id.* (Nov. 6, 2006 Dkt. Entry: “oral argument on motion to intervene – Motion denied”).

## **2. Plaintiffs’ Separate S.D.N.Y. Action Against ADF and the Donziger Defendants**

Nearly six years later, Plaintiffs made their second attempt to assert claims related to the Lago Agrio Litigation in U.S. court when they filed a complaint for declaratory relief, constructive trust, unjust enrichment, and an accounting against ADF and the Donziger Defendants in the Southern District of New York. *See Huani v. Donziger* (“Huaorani Federal Action”), Case No. 12-CV-5570 (S.D.N.Y.), Dkt. No. 1 (Complaint) (attached as Exhibit 5 to the Gross Dec.).<sup>4</sup> Plaintiffs served the Donziger Defendants approximately three months after filing the complaint, but failed to serve ADF at any time in that action. *See generally id.* (Certificates of Service on the Donziger Defendants at Dkt. Nos. 3, 4, 5) (copy of docket attached as Exhibit 6 to the Gross Dec.). Although the Huaorani Federal Action purported to base federal subject matter jurisdiction on diversity of citizenship, complete diversity did not actually exist because the suit was brought by foreign plaintiffs against defendants that included a foreign company (ADF). *See* 28 U.S.C. § 1332; *see also CP Solutions PTE, Ltd. v. General Electric Co.*, 553 F.3d 156, 158 (2d Cir. 2009) (complete diversity does not exist in cases that include one or more foreign citizen plaintiff and one or more foreign citizen defendant). As a result of the lack of subject matter jurisdiction, Plaintiffs voluntarily dismissed the Huaorani Federal Action. *See Huani*, Case No. 12-cv-5570, Dkt. No. 8 (Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(A)(1)(A)(I)) (Nov. 28, 2012) (attached as Exhibit 7 to the Gross Dec.); *see also* Compl. ¶¶ 71-72 (admitting Huaorani Federal Action was dismissed for lack of subject matter jurisdiction). Notably, Plaintiffs did not attempt to cure the lack of subject matter jurisdiction by simply dismissing ADF, the sole foreign defendant that destroyed diversity. Rather, recognizing that

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<sup>4</sup> Plaintiffs in this action are identical to the plaintiffs in the Huaorani Federal Action.

ADF is an indispensable party to their claims, Plaintiffs dismissed the entire federal action.

*Huani*, Case No. 12-cv-5570, Dkt. No. 8.

### **3. Plaintiffs’ Attempted Intervention in Chevron’s RICO Action**

On the same day Plaintiffs voluntarily dismissed the Huaorani Federal Action for lack of subject matter jurisdiction, they made a third attempt to assert their claims in a U.S. forum by filing a motion to intervene in a suit by Chevron against the Donziger Defendants, ADF, the Lago Agrio Litigation plaintiffs, and related parties. *Chevron v. Donziger* (“RICO Action”), Case No. 11-CV-0691 (S.D.N.Y.), Dkt. No. 641 (Notice of Motion and Memorandum of Law in Support of Motion to Intervene) (attached as Exhibit 8 to the Gross Dec.). In that action, Chevron seeks to collaterally attack the Lago Agrio Judgment by alleging the Lago Agrio Litigation was a “sham.” Compl. ¶ 52. Plaintiffs’ proposed cross-complaint in the RICO Action was substantively identical to the Complaint filed in this action and the complaint filed in the Huaorani Federal Action, alleging claims for declaratory judgment, breach of fiduciary duty/constructive trust, unjust enrichment, and an accounting against ADF and the Donziger Defendants. *Chevron*, Case No. 11-CV-0691, Dkt. No. 642-1 (Exhibit A to the Declaration of Judith Kimerling in Support of Motion to Intervene, attaching proposed cross-complaint) (attached as Exhibit 9 to the Gross Dec.) at 113-130. The court denied Plaintiffs’ request to intervene in the RICO Action. *Id.*, Dkt. No. 724 (Memorandum and Order) (attached as Exhibit 10 to the Gross Dec.) at 4.

### **4. The Instant Action**

Here, Plaintiffs make their fourth attempt to assert claims related to the Lago Agrio Litigation in a U.S. forum by filing a nearly identical claims to those filed in the Huaorani Federal Action in New York state court. Just as in Plaintiffs’ prior failed attempts to secure a U.S. forum, Plaintiffs’ claims have no place in a U.S. court, but rather should be adjudicated in Ecuador: once again, Plaintiffs, a group of Ecuadorians, seek adjudication of their rights to a judgment issued by an Ecuador court, on behalf of Ecuadorians, based on events that took place in Ecuador.

**C. Plaintiffs Abandoned Their Sole Attempt to Obtain a Remedy in Ecuador Ten Years Ago**

Plaintiffs admit that the Huaorani have only made a single attempt to bring claims related to the Lago Agrio Litigation in Ecuador. In 2003, several Huaorani filed suit against Chevron in the Superior Court of Justice in Tena, Ecuador (“Tena Action”) seeking environmental and social remediation for the damage caused by Chevron’s petroleum operations in Ecuador. Comp. ¶ 48. Rather than pursue the Tena Action, Plaintiffs admit that the Huaorani ultimately abandoned the action because of purportedly “improper and undue influence on the Tena court” by Chevron representatives. Compl. ¶ 50. Yet in the ten years since the Huaorani abandoned their sole attempt to bring their claims in an Ecuador forum, an Ecuador court awarded the Lago Agrio Judgment redressing the very environmental harm complained of by the Huaorani in the Tena Action. Despite the entry and affirmation on appeal of the Lago Agrio Judgment in Ecuador, Plaintiffs have made no attempt to assert rights related to the Lago Agrio Judgment in the forum in which it was entered. Rather, their focus has remained uniformly (and inappropriately) on gaining adjudication of their rights by a court in New York; this time a New York state court, after three failed attempts to have a New York federal court take up the task.

**ARGUMENT**

**I. FORUM NON CONVENIENS (CPLR 327)**

**A. Forum Non Conveniens Legal Standard**

“The common-law doctrine of forum non conveniens, codified in CPLR 327, permits a court to dismiss an action when it finds that ‘in the interest of substantial justice the action should be heard in another forum.’” *Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 294, 797 N.Y.S.2d 89, 91 (1st Dep’t 2005), *appeal denied*, 6 N.Y.3d 703, 844 N.E.2d 790 (2006) (quoting CPLR 327(a)). Specifically, CPLR 327(a) states:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

“The doctrine is based upon the equitable principles of justice, fairness and convenience and should be applied flexibly by the court, in its sound discretion, based upon the facts and circumstances of each particular case.” *Nguyen*, 19 A.D.3d at 294 (internal citation omitted). In exercising its sound discretion, the factors to be considered by a court include:

the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit . . . . The court may also consider that both parties to the action are nonresidents . . . and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction . . . .

*Id.* (quoting *Shin-Etsu Chem. Co. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 176, 777 N.Y.S.2d 69, 73 (1st Dep’t 2004)). Another “factor which weighs in favor of dismissal on forum non conveniens grounds is the applicability of foreign law.” *Id.* “Moreover, New York courts ‘need not entertain causes of action lacking a substantial nexus with New York.’” *Id.* (quoting *Martin v. Mieth*, 35 N.Y.2d 414, 418, 321 N.E.2d 777, 779 (1974)); *see also Shin-Etsu*, 9 A.D.3d at 176 (“[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York.”) (quoting with modification *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361, 278 N.E.2d 619 (1972)). This consideration is particularly salient where the plaintiff is not a New York resident, for “[t]he obvious reason that New York courts are primarily for the use of New Yorkers.” Siegel § 28 at 32 (5th ed.).

**B. Dismissal Pursuant to Forum Non Conveniens Is Appropriate**

**1. Plaintiffs’ Claims Would Place a Substantial Burden on This Court**

Plaintiffs’ claims, if allowed to proceed, would place a substantial and unnecessary burden on this Court for a number of reasons. First, Plaintiffs’ request for a declaratory judgment would require re-litigation of issues already decided by the Lago Agrio Court. Plaintiffs contend that the Lago Agrio Judgment “is based in significant part on injuries suffered by members of the Huaorani people,” and on that basis seek a declaration “that Plaintiffs and their family groups and their communities are entitled to recover their share of the judgment proceeds awarded under

the Lago Agrio Judgment,” and “that every Huaorani community and every Huaorani is also entitled to recover their share of the judgment proceeds.” Compl. ¶ 89. In seeking such a declaration, Plaintiffs ask this Court to declare their rights in the Lago Agrio Judgment. Yet a declaration of Plaintiffs alleged rights in the Lago Agrio Judgment would require re-litigation of the same complex fact issues that took a court in Ecuador many years to address in the Lago Agrio Litigation as they relate to the Huaorani—that is, whether and to what extent Plaintiffs and other Huaorani were actually injured by Chevron’s oil activities in Ecuador, and what portion of the corresponding judgment Plaintiffs and the Huaorani are entitled to receive. There is no need for the Court to take on the enormous burden of wading through the complex facts and background underlying the Lago Agrio Litigation to decide issues that have already been decided by the Lago Agrio Court.

Second, Plaintiffs’ claims would impose a substantial burden on this Court in that they would require the application of Ecuadorian law. Specifically, the Court would have to determine whether, and to what extent, under Ecuadorian law, the particular group of Ecuadorians before it are entitled to a share of proceeds awarded by an Ecuadorian court for violations of Ecuadorian law arising out of contamination in Ecuador. “[T]he applicability of foreign law is an important consideration in determining a forum non conveniens motion” and weighs against retention of the action. *Shin-Etsu*, 9 A.D.3d at 178 (reversing denial of forum non conveniens motion to dismiss). For this reason, New York courts commonly dismiss actions that may require interpretation of foreign law. *See, e.g., Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 480, 67 N.E.2d 245 (1984) (“likely applicability of foreign law” supports dismissal on forum non conveniens grounds); *Tilleke & Gibbins Intl., Ltd. v. Baker & McKenzie*, 302 A.D.2d 328, 328, 765 N.Y.S.2d 179 (1st Dep’t 2003) (holding action involving Thai evidence and applying Thai law would be inordinate burden on New York court); *Neuter, Ltd. v. Citibank, N.A.*, 239 A.D.2d 213, 213, 657 N.Y.S.2d 663 (1st Dep’t 1997) (dismissing action in favor of Sweden where, *inter alia*, court would be required to apply Swiss law, and expert testimony would be required); *Davidson Extrusions, Inc. v. Touche Ross Co.*, 131 A.D.2d 421, 421, 516

N.Y.S.2d 230 (2d Dep't 1987) (dismissing action because, *inter alia*, Cypriot law was applicable to the dispute).

Third, this case would burden the Court with claims that cannot currently be adjudicated because they depend on events that have not yet occurred. Plaintiffs' claims relate to the administration and distribution of funds through what is presently an unfunded trust. No portion of the Lago Agrio Judgment has been collected from Chevron. *See* Compl. ¶ 68 (describing ongoing attempts to enforce and collect on judgment). Plaintiffs' purported interest in the Lago Agrio Judgment depends on both (1) the judgment being recognized and successfully enforced in some jurisdiction, and (2) the trust set up to administer the judgment actually collecting funds. Only once those two steps have been completed will Plaintiffs' interest in how said funds are distributed among various Ecuadorian interests become colorable. And then, the only appropriate court to hear any such claims would be the Court in Ecuador that has established the trust. It is wholly unreasonable for the Plaintiffs to ask, instead, for a New York state court to issue rulings concerning how this Ecuadorian trust established by an Ecuadorian court will be administered. Plaintiffs should go to the Ecuadorian court at the appropriate time and seek whatever relief they believe is necessary to preserve what they believe are their interests.

**2. Allowing Plaintiffs' Claims to Proceed in New York Court Would Cause Substantial Hardship to Defendants**

Permitting Plaintiffs' collateral attack on the Ecuadorian judgment here in New York would result in significant hardship to Defendants in defending against Plaintiffs' claims. Plaintiffs assert rights in a judgment obtained in Ecuador based on events that occurred in Ecuador, and Plaintiffs' claims are based entirely on conduct related to the litigation in Ecuador, the resulting Ecuadorian judgment, and the trust appointed by the Ecuador court to administer that judgment. With the exception of the Donziger Defendants, the entirety of the parties, non-party witnesses, and evidence are located in Ecuador. As a result, litigating in New York would present a substantial hardship to Defendants. Furthermore, if Plaintiffs were to be successful in their claims before this Court, Defendants could be placed in a situation in which they are subject

to orders by an Ecuadorian court concerning the trust created by an Ecuadorian court that are in conflict with orders issued by this Court. This could not only result in Defendants being placed in a whipsaw type situation, but could also impede the trust from operating as intended to benefit those harmed by the contamination at issue.

Additionally, as discussed further below in Section II, the Donziger Defendants would suffer a unique and substantial hardship if this action were to proceed because Plaintiffs are unable (and apparently unwilling) to join ADF, a crucial party to determination of Plaintiffs' claims. The Donziger Defendants would be burdened and unfairly prejudiced if they were required to defend against Plaintiffs' claims without the presence of the key Defendant—indeed, the very Defendant on whose behalf Plaintiffs allege the Donziger Defendants were acting and which will be in charge of administering the trust concerning which Plaintiffs seeks to have their interest adjudicated. *See* Compl. ¶ 5, ; *see also Aguinda*, 142 F. Supp. 2d at 550-51 (fact that crucial Ecuadorian parties were not parties to the suit “whereas they could be joined in any similar suit brought in Ecuador” supports dismissal on forum non conveniens grounds); *Aguinda*, 303 F.3d at 479 (agreeing with “the district court’s observation that in the absence of the Ecuadorian Republic as a party, a U.S. court would be incapable of effectively ordering several aspects of the equitable relief sought”); *Hsu v. Lien Sheng Chang*, 199 A.D.2d 309, 310, 606 N.Y.S.2d 1009 (2d Dep’t 1993) (affirming forum non conveniens dismissal and finding even if defendant resides in New York, that a foreign corporation was necessary party favors dismissal).

### **3. An Alternative and More Appropriate Venue for Plaintiffs’ Claims Is Available in Ecuador**

The courts in Ecuador are not simply available as an *alternative* forum in which to bring their claims; rather, the Ecuador courts are overwhelmingly the *proper* forum in which Plaintiffs’ claims should be heard. First, the Lago Agrio Court in Ecuador oversaw the Lago Agrio Litigation. To the extent Plaintiffs wish to challenge any purported representation of its interests by ADF and/or the Donziger Defendants in the course of that litigation, such a challenge should be presented to the Ecuador court that oversaw the litigation and allegedly approved such

representation of Plaintiffs' interests. Second, the Lago Agrio Court issued the Lago Agrio Judgment in which Plaintiffs assert rights. The existence and extent of Plaintiffs' rights in that judgment should therefore be determined by the Court that issued the judgment. Third, the Lago Agrio Court charged ADF with administering the trust, should funds ever be collected. Ecuadorians like Plaintiffs who seek to challenge the adequacy of that trust or influence its administration or distribution should therefore bring such actions in Ecuador before the Court that appointed the trust.

Multiple U.S. courts, including the Second Circuit, have already held that claims such as those Plaintiffs seek to assert here do not belong in a U.S. forum. *See Aguinda*, 303 F.3d 470; *Aguinda*, 142 F. Supp. 2d 534; *Sequihua*, 847 F. Supp. 61. Plaintiffs, a group of Ecuadorians, challenge, on behalf of a larger group of Ecuadorians, the authority and qualifications of, and actions by, an Ecuadorian trust established by an Ecuador court and administered by Ecuadorian NGO to represent the interest of Ecuadorians in connection with litigation pursued under Ecuadorian law in an Ecuador forum that arose out of environmental contamination in Ecuador. Plaintiffs seek further to have the propriety of the alleged involvement by the government of Ecuador (via the Lago Agrio Court) in this process adjudicated. Such an action should be heard in Ecuador, not New York. Indeed, the Second Circuit has already held, in the context of the larger litigation to which Plaintiffs' claims are connected, that matters related to the Lago Agrio Litigation and the facts out of which they arise are properly adjudicated not by a court in New York, but rather must be heard by a court in Ecuador. *See Aguinda*, 303 F.3d at 480. Plaintiffs cannot argue that they are unable to seek a remedy in a forum in Ecuador, as the Second Circuit has already concluded that the Ecuador courts are a suitable alternative forum, *id.* at 477-78, and, indeed, Plaintiffs claim arises out of a successful pursuit of remedies by other Ecuadorians in Ecuadorian courts. Further, even if Plaintiffs were to dispute that the Ecuador courts provide an available alternative forum in which to bring their claims (which, given the Second Circuit's holdings in the *Aguinda* Action and the successful pursuit of remedies in Ecuador that resulted in Lago Agrio Judgment, they cannot), their claims would still be subject to dismissal under forum

non conveniens doctrine. The availability (or lack thereof) of an alternate forum is not dispositive of the forum non conveniens analysis under New York law. “[U]nlike the federal precedents, which require an alternate forum for a non conveniens dismissal, New York’s do not.” *Shin-Etsu Chem.*, 9 A.D.3d at 179 (internal citations omitted).

**4. Plaintiffs’ Claims Have No Substantial Nexus With New York, As the Key Parties Are Nonresidents and the Transaction Out of Which Plaintiffs’ Claims Arise Occurred Primarily in Ecuador**

Plaintiffs are all nonresidents with no connection whatsoever to the United States, let alone New York; and their claims have virtually no nexus to New York, but rather are overwhelmingly tied to Ecuador. Indeed, the only connection to New York – aside from the residency of one of the attorneys representing the Plaintiffs – is the residency of the Donziger Defendants. Yet the mere fact that the Donziger Defendants reside in New York does not connect Plaintiffs’ claims to this forum. The Donziger Defendants are only implicated in this action as alleged agents of Defendant ADF, an Ecuadorian NGO appointed by the Lago Agrio Court (an Ecuadorian court) to administer the Lago Agrio Judgment (an Ecuadorian judgment). *See* Compl. ¶ 5. In light of the overwhelming lack of any other connection between Plaintiffs or their claims to New York, this meager connection is not sufficient to avoid dismissal under forum non conveniens doctrine. *Gozzo v. First Am. Title Ins. Co.*, 75 A.D.3d 953, 954, 905 N.Y.S.2d 702 (3d Dep’t 2010) (“a party’s New York residency does not preclude dismissal, particularly where, as here, there is no substantial nexus between this state and the cause of action”); *see also* CPLR 372(a); *Silver*, 29 N.Y.2d at 361. There is simply no substantial nexus with New York where, as here, the parties are primarily nonresidents and the transactions out of which the claims arise occurred primarily in a foreign jurisdiction.

It is also noteworthy that Ecuador has a substantial interest in adjudicating Plaintiffs’ claims, as this fact also militates in favor of dismissal on forum non conveniens grounds. *See Aguinda*, 142 F. Supp. 2d at 551 (noting the Ecuadorian local interest in the controversy out of which the Lago Agrio Litigation arose is “very substantial”). “New York courts have recognized that where a foreign forum has a substantial interest in adjudicating an action, such interest is a

factor weighing in favor of dismissal. *Shin-Etsu*, 9 A.D.3d at 178 (internal citations omitted); *see also Nguyen*, 19 A.D.3d at 295 (dismissing action on forum non conveniens grounds because New York’s interest in the subject matter of the action was “practically non-existent” where plaintiffs claimed entitlement to benefits from foreign bank as a result of employment in a foreign country). The Lago Agrio Judgment was entered as the result of massive environmental damage suffered by Ecuador and Ecuadorians, and Ecuador has a strong interest in adjudicating not only claims related to that environmental damage (as it did in the Lago Agrio Litigation), but also claims asserting rights related to the Lago Agrio Judgment issued by the Ecuador court as a result of the Lago Agrio Litigation, and the proper administration of trust established by an Ecuadorian court. If there is any issue with any part of this process, the Ecuadorian courts involved have a very substantial interest in adjudicating and resolving any such issue. Indeed, the potential for conflicting rulings and resulting judicial chaos if it was otherwise is manifest.

Accordingly, as all of the factors relevant to the forum non conveniens analysis weight heavily in favor of dismissal in favor of an Ecuador forum, the Complaint should be dismissed on this ground pursuant to CPLR 327.

## **II. INABILITY TO JOIN A NECESSARY PARTY (CPLR 1001, 3211(a)(10))**

### **A. Legal Standard**

Dismissal for failure or inability to join a necessary party is governed by CPLR 3211(a)(10) and CPLR 1001. CPLR 3211(a)(1) provides that a defendant may move to dismiss a complaint on the ground that “the court should not proceed in the absence of a person who should be a party.” CPLR 1001, in turn, defines, in its subsection (a), the criteria by which a person is determined necessary, and in its subsection (b), the standard according to which a court should determine whether a case should be dismissed if a person qualifies as necessary under CPLR 1001(a) but is not subject to the court’s personal jurisdiction.

Thus, the analysis effectively has three steps. First, the court determines that the person is necessary. Second, the court determines whether the person is subject to personal jurisdiction.

Third, the Court determines if the action should be dismissed in the absence of the person over whom it lacks personal jurisdiction.

**B. ADF Is a Necessary Party**

Plaintiffs cannot dispute that ADF is a necessary party to this action. Professor Siegel summarizes the standard under which a person qualifies as a necessary party or, as he puts it, an “ought-to-be party person” under CPLR 1001(a) as follows:

1. his joinder would make the relief between those already parties more complete;  
or

2. the judgment may in some way inequitably affect him.

Siegel § 132 at 234. As ADF’s joinder is required both to enable complete relief to be awarded and to avoid ADF and those it represents from being inequitably affected by any relief this Court might award, ADF is a necessary party.

**1. Without ADF Almost All of the Relief Sought by Plaintiffs Cannot Be Granted**

The gravamen of Plaintiffs’ complaint is that Plaintiffs are purportedly entitled to a portion of the Lago Agrio Judgment, and that ADF (and the Donziger Defendants, as alleged agents of ADF) owe Plaintiffs certain fiduciary duties arising out of Plaintiffs’ purported rights in that judgment. Compl. ¶¶ 89, 98-99, 111-12. All of Plaintiffs claims arise of ADF’s designation by the Lago Agrio Court as the entity to receive and administer the Lago Agrio Judgment proceeds, therefore all of the relief sought by Plaintiffs depends on the status and actions of ADF with respect to the Lago Agrio Judgment. The Donziger Defendants are only implicated in Plaintiffs’ claims to the extent that they allegedly acted “as an agent and/or alter ego of ADF with respect to the Lago Agrio Litigation.” Compl. ¶ 5. As a result, all of the relief requested by Plaintiffs is, at its core, relief sought against ADF, and therefore cannot be granted absent ADF’s involvement in this action. *See Allsafe Tech., Inc. v. Benz*, 74 A.D.3d 1759, 1760, 902 N.Y.S.2d 462 (4th Dep’t 2010) (where plaintiff sued defendant individual for claims based on defendant’s alleged actions on behalf of nonparty corporation, dismissal for failure to join necessary party was proper because nonparty corporation took the actions that were the subject

of plaintiff's claims, therefore complete relief could not be accorded between the parties without joining it). Indeed, Plaintiffs have already acknowledged the necessity of ADF to this action. Plaintiffs could have maintained the Huaorani Federal Action by simply dismissing ADF as a party, thus creating the diversity required to support federal subject matter jurisdiction. Plaintiffs failed to do so, essentially conceding the indispensable character of ADF.

**2. A Judgment Rendered Without ADF Would Inequitably Affect ADF and Those it Represents**

As Plaintiffs allege, “ADF has been designated as the beneficiary of the trust that will administer the environmental remedial monies from the Lago Agrio Judgment” and represents “all of the communities and community members who have been harmed by Chevron’s operations in Ecuador.” Compl. ¶¶ 5, 13. A judgment by this Court regarding Plaintiffs’ purported rights in the Lago Agrio Judgment would inequitably affect ADF and all of those on behalf of whom it is entrusted with managing and administering the Lago Agrio Judgment. Plaintiffs ask for a declaration that they are entitled to a share of the judgment proceeds awarded under the Lago Agrio Judgment, and if the Court were to make such a declaration it would affect ADF’s duties as administrator of the Lago Agrio Judgment and potentially diminish the value of the judgment proceeds to which others are entitled and expose ADF to potentially conflicting legal obligations (i.e. those imposed by this Court and those imposed by the court in Ecuador that established the trust). *See Calderone v. Wiemeier*, 77 A.D.3d 1232, 1233, 911 N.Y.S.2d 190 (3d Dep’t 2010) (where plaintiff life insurance policy holder sued defendant insurance agent related to life insurance policy which named trust as the policy beneficiary, affirming trial court’s finding that trust was a necessary party to action because “ultimate ruling as to the potentially diminished value of the policy could inequitably affect the trust’s interests”). As the Court may not declare Plaintiffs’ rights in the Lago Agrio Judgment without affecting the value of the judgment to others on behalf of whom the judgment was awarded, and thereby affecting ADF’s duties in distributing the judgment, this action could inequitably affect both ADF and those it represents, and therefore ADF ought to be a party.

**C. ADF Is Not Subject to the Court's Personal Jurisdiction**

As an out-of-state resident, ADF cannot be subject to personal jurisdiction in New York unless Plaintiffs prove that New York's long-arm statute confers jurisdiction over them by reason of their contacts with New York. *Copp. v. Ramirez*, 62 A.D.3d 23, 28, 874 N.Y.S.2d 52, 57 (1st Dep't 2009). The burden rests on Plaintiffs, as the party seeking to assert personal jurisdiction, to demonstrate such contacts. *Id.* New York's long-arm jurisdiction is set forth in CPLR 302. Only CPLR 302(a)(1) and 302(a)(2) are potentially applicable, as CPLR 302(a)(3) concerns acts outside of New York injuring persons or property within New York, and Plaintiffs are all nonresidents; and CPLR 302(a)(4) concerns a non-domiciliary who "owns, uses or possesses any real property situated within the state," which Plaintiffs do not allege.

**1. There Is No Personal Jurisdiction Under CPLR 302(a)(1)**

In order to obtain jurisdiction under CPLR 302(a)(1) over a non-domiciliary such as ADF, the following two conditions must be met: "(1) the defendant must transact business in the State; and (2) the cause of action must be directly related to, and arise from, the business so transacted." *Storch v. Vigneau*, 162 A.D.2d 241, 242, 556 N.Y.S.2d 342, 343 (1st Dep't 1990). If either condition is not met, "jurisdiction cannot be conferred under CPLR 302(a)(1)." *Johnson v. Ward*, 4 N.Y.3d 516, 519, 797 N.Y.S.2d 33 (2005). Because Plaintiffs cannot establish either of these conditions, the Court lacks personal jurisdiction over ADF and therefore ADF cannot be joined in this action.

First, ADF does not transact business within New York. It is undisputed that ADF is a foreign NGO that was established to represent the interests in Ecuador of Ecuadorian victims of certain environmental contamination that occurred in Ecuador. Compl., ¶ 13. Plaintiffs do not allege that ADF is authorized or registered to do business in New York, owns or controls any property in New York, maintains any office or business address in New York, or otherwise performs any services in New York. The only ground Plaintiffs rely on to support their contention that New York has jurisdiction over ADF is the alleged contact between ADF and the Donziger Defendants, located in New York, related to enforcing the Lago Agrio Judgment. The

minimal contact between ADF and individuals located in New York alleged by Plaintiffs does not rise to the level of ADF transacting business within the state for purposes of long-arm jurisdiction. Additionally, Plaintiffs allegations regarding a website “through which ADF seeks to provide information regarding the Lago Agrio Litigation and its collection efforts” are inapposite. Compl. ¶ 5. Plaintiffs do not identify any way in which this website is targeted at New York, and therefore the website does not provide any basis for jurisdiction here. *See Deer Consumer Products, Inc. v. Little*, 35 Misc. 3d 374, 386, 938 N.Y.S.2d 767 (Sup. Ct. New York Cnty. Jan. 27, 2012) (holding that postings on a website did not constitute “transaction of business” in New York because “there is no indication that [defendant’s] internet postings . . . which are merely accessible to anyone – in New York and the entire world – were expressly targeted at anyone in New York”).

Second, even assuming the alleged activities of the Donziger Defendants and others in New York (purportedly on behalf of ADF) related to the Lago Agrio Judgment did amount to the transaction of business in New York by ADF, Plaintiffs’ claims do not directly relate to and arise from these alleged activities as required by CPLR 302(a)(1). Plaintiffs’ claims arise directly out of conduct that occurred in Ecuador during the Lago Agrio Litigation. Specifically, Plaintiffs’ allege that ADF claimed to represent Plaintiffs *in the Lago Agrio Litigation*, that ADF was not authorized to represent Plaintiffs *in the Lago Agrio Litigation*, and that ADF owes Plaintiffs fiduciary duties as a result of its “actions in connection with *the Lago Agrio Litigation*.” Compl. ¶¶ 53-55 (emphasis added). The Lago Agrio Litigation, and any purported representations to or by the Lago Agrio Court during the Lago Agrio Litigation, took place entirely within Ecuador. As a result, ADF’s alleged actions that purportedly resulted in ADF having received “possession of assets and/or monies which rightfully belong to Plaintiffs”—i.e., the Lago Agrio Judgment—cannot form the basis for personal jurisdiction because they did not take place in New York. As Plaintiffs claims against ADF are directly related to, and arise from, activities that took place in Ecuador, they cannot support personal jurisdiction pursuant to CPLR 302(a)(1).

**2. There Is No Personal Jurisdiction Under CPLR 302(a)(2)**

Nor is there personal jurisdiction over ADF under CLPR 302(a)(2), which permits personal jurisdiction over a non-domiciliary who “commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act.” Plaintiffs have not alleged any tortious acts committed by ADF within New York. As described above, all the relevant alleged acts by ADF underlying Plaintiffs’ claims relate to the Lago Agrio Litigation and were committed in Ecuador. The allegations of the Complaint do not allege a single tortious act committed by ADF in New York. Accordingly, CPLR 302(a)(2) does not support personal jurisdiction over ADF. *See Storch v. Vigneau*, 162 A.D.2d at 242.

**3. Even if Personal Jurisdiction Exists, Plaintiffs’ Ability and Will to Join ADF in This Action is Doubtful**

Finally, even if this Court could exercise personal over ADF (it can’t), Plaintiffs’ have not taken steps to join ADF in this action and do not appear to have any real intention to do so. Plaintiffs filed their first version of these claims back in July of 2012 when they filed the Huaorani Federal Action. *Huani*, Case No. 12-CV-5570, Dkt. No. 1. Yet Plaintiffs never served ADF in the Huaorani Federal Action in the over four months that action was pending, despite having served all of the Donziger Defendants. *See generally id.* (Dkt. Nos. 3, 4, 5). Similarly, although this action was filed back in February, Plaintiffs have not yet served ADF, and apparently have made no attempt to do so. Nearly a year after Plaintiffs filed their first claims against ADF, Plaintiffs still have not served them with process to bring them within the jurisdiction of the U.S. courts, and whether Plaintiffs actually intend to—or are even able to—is highly questionable. Accordingly, even if ADF were theoretically subject to personal jurisdiction of this Court, it appears highly unlikely that Plaintiffs would actually succeed in joining them in this action.

**D. ADF’s Absence from this Litigation Cannot be Excused**

CPLR 1001(b) enumerates five criteria to be considered by a court in determining whether, in a case such as this in which the court cannot obtain jurisdiction over the absent

necessary party without the party's "consent or appearance," the case should be dismissed. Those criteria are:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

CPLR 1001.

**1. Plaintiffs Have Other Effective Remedies Pursuable in Ecuador**

As described in detail above in Section I.B.3., Plaintiffs have other effective remedies available in Ecuador should this action be dismissed on account of nonjoinder. The courts in Ecuador are the by far the proper fora for Plaintiffs' claims, as Plaintiffs are Ecuadorians asserting rights in a judgment issued by a court in Ecuador on behalf of Ecuadorians based on conduct occurring entirely within Ecuador and which will be administered by the trust established by an Ecuadorian court and administered by Ecuadorians. The award of the Lago Agrio Judgment in the first place demonstrates that the Ecuador courts can and have already awarded effective remedies for injuries such as those Plaintiffs allege to have suffered. Indeed, multiple U.S. courts, including the Second Circuit, have already held that Ecuador courts provide a suitable forum for Plaintiffs' claims. *See Aguinda*, 303 F.3d at 477-78. Accordingly, this factor favors dismissal under CPLR 1001(b).

**2. Both ADF and the Donziger Defendants Would Be Prejudiced if This Case Proceeds Without ADF**

ADF would be severely prejudiced if this action were allowed to proceed without joinder of ADF. Plaintiffs assert rights in a foreign judgment that ADF is charged with administering. Plaintiffs' claims in the Lago Agrio Judgment would reduce the value of the judgment to others

and affect ADF's duties in collecting and distributing the judgment. This in turn could open up ADF to liability to others based on ADF's duty to administer the judgment on their behalf and/or subject ADF to the whipsaw of conflicting legal duties imposed by this Court and a court in Ecuador. This factor also favors dismissal. *See, e.g., Swezey v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 552, 973 N.E.2d 703 (2012) (finding second factor favors dismissal where allowing a federal court judgment to be executed on property that may rightfully belong to a foreign nation could irreparably undermine the foreign nation's claim to those assets).

Additionally, as described in Section I.B.2., the Donziger Defendants would be prejudiced if this case were allowed to proceed without ADF. The Donziger Defendants would be unfairly burdened if they were required to defend against Plaintiffs' claims without the presence of a key defendant—indeed, the very defendant on whose behalf the Donziger Defendants were acting, according to Plaintiffs' own allegations. *See* Compl. ¶ 5.

**3. Plaintiffs Could Have, and Still Can, Avoid this Prejudice by Pursuing Relief in Ecuadorian Courts**

As already stated, Plaintiffs have an adequate alternative forum in Ecuador. *See supra* § I.B.3. Plaintiffs can and should avoid the prejudice this action would pose to ADF and the Donziger Defendants by bringing their suit before the very court that issued the judgment in which they now claim to hold rights and which established the trust in which they claim an interest. Multiple U.S. courts have already held that Ecuador is the proper forum for the types of claims Plaintiffs seeks to assert here. *See Aguinda*, 303 F.3d 470; *Aguinda*, 142 F. Supp. 2d 534; *Sequihua*, 847 F. Supp. 61.

**4. No Conceivable Protective Provision Could Protect ADF and the Donziger Defendants from the Potential Prejudice**

With respect to the feasibility of a protective order that might shield ADF and the Donziger Defendants from the prejudice they will suffer if this action is allowed to proceed, this factor also supports dismissal. The only way to protect ADF's interest in administering the Lago Agrio Judgment on behalf of the LAPs is to prohibit Plaintiffs' from bringing claims against ADF in this forum based on alleged rights in that judgment. Plaintiffs may properly bring such

claims in Ecuador where the judgment was rendered. *See Swezey*, 19 N.Y.3d at 554 (in the context of turnover proceeding seeking to enforce judgment, “the only ruling by a New York court that can simultaneously safeguard the interests of the [class on behalf of which plaintiff brings the action] and the [foreign nation with an interest in the assets against which plaintiff seeks to enforce the judgment] is one that prevents either from accessing [the assets] so that neither claim to the property is irreparably prejudiced” and “dismissal . . . would accomplish that result”). Similarly, the only way to protect the Donziger Defendants from the prejudice they would suffer if forced to defend this action, which centers on ADF’s purported duties to Plaintiffs in administering and distributing the Lago Agrio Judgment, without ADF’s presence in the suit, is to prevent this suit from proceeding absent ADF’s participation.

**5. No Effective Judgment is Possible in ADF’s Absence**

Most importantly, this Court could not effectively remedy Plaintiffs’ claims without ADF’s presence as a party in this action, as a judgment in Plaintiffs’ favor regarding Plaintiffs’ purported rights in the Lago Agrio Judgment and ADF’s purported fiduciary duties to Plaintiffs would not be binding on a non-party such as ADF. *See Swezey*, 19 N.Y.3d at 554 (finding fifth factor favored dismissal because a judgment in favor of the plaintiff “would not be binding on a non-party”). Further, allowing this action to go forward “would create the possibility of multiple conflicting judgments” given that the Lago Agrio Judgment has already been entered and affirmed as a result of the same injuries Plaintiffs assert in this action and the trust that will administer the judgment proceeds if and when the judgment is successfully enforced will be subject to orders by the Ecuadorian court that established it. *See id.* (fifth factor favors dismissal where “allowing the [] proceeding to go forward would create the possibility of multiple conflicting judgments”); Compl. ¶ 68.

Accordingly, all five factors support dismissal based on Plaintiffs’ inability to join indispensable party ADF, making dismissal pursuant to CPLR 1001(b) appropriate.

### **III. FAILURE TO STATE A CAUSE OF ACTION (CPLR 3211(a)(7))**

In the alternative, the Donziger Defendants move to dismiss all of Plaintiffs' claims against them pursuant to CPLR 3211(a)(7) for failure to state a cause of action. A plaintiff must allege sufficient facts supporting each essential element of its claims. *MatlinPatterson ATA Holdings, LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839, 929 N.Y.S.2d 571, 575 (1st Dep't 2011). Conclusory allegations that are supported by specific facts do not suffice. *Steiner Sports Mktg. v. Weinreb*, 88 A.D.3d 482, 482-83, 930 N.Y.S.2d 186, 187 (1st Dep't 2011). Allegations consisting of "bare legal conclusions with no factual specificity . . . are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373, 920 N.E.2d 328, 334 (2009); *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233, 233-34, 612, N.Y.S.2d 146 (1st Dep't 1994). Moreover, although, on a motion to dismiss, certain allegations are presumed to be true, factual claims that are "inherently incredible . . . are not entitled to such consideration." *Caniglia*, 204 A.D.2d at 233-34. Furthermore, "on a § 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence." *Robinson v. Robinson*, 303 A.D.2d 234, 235, 757 N.Y.S.2d 13 (1st Dep't 2003) (citations omitted); *Caniglia*, 204 A.D.2d at 233-34 (same). As each of Plaintiffs' claims against the Donziger Defendants fails to meet these pleading requirements, all claims against the Donziger Defendants should be dismissed.

#### **A. Plaintiffs' Declaratory Judgment Claim Failed to Allege An Actual Controversy**

In order to withstand a motion to dismiss for failure to state a claim, "the complaint in action for declaratory judgment must contain factual allegations showing the existence of a real controversy concerning jural relations, and a sufficient basis for invocation of the court's discretionary power to pronounce judgment declaring the rights and legal relations of the parties." *Blue Diamond Group Corp. v. Klin Constr. Group, Inc.*, No. 22040/08, 2010 N.Y. Misc. LEXIS 4471, at \*42-43, 2010 N.Y. Slip Op. 32539(U) (Sup. Ct. Nassau Cnty. Sept. 13, 2010) (quoting *American News Co. v. Avon Publishing Co.*, 283 A.D. 1042, 1042, 131 N.Y.S.2d 566 (1st Dep't 1954)). Here, Plaintiffs have failed to allege an actual controversy. Plaintiffs'

declaratory judgment claim requests a declaration of rights in certain judgment proceeds that have not yet been collected, and seeks to influence the administration and distribution of those not-yet-collected funds through what is presently an unfunded trust. Plaintiffs' purported interest in the Lago Agrio Judgment depends on both (1) the judgment being recognized and successfully enforced in some jurisdiction, and (2) the trust set up to administer the judgment actually collecting funds. Only then will Plaintiffs' interest in how said funds are distributed become justiciable. Further, according to Plaintiffs' own allegations, ADF has not denied Plaintiffs' purported interest in the Lago Agrio Judgment, having allegedly "admitt[ed] that the Huaorani people should benefit from the Lago Agrio Litigation," therefore Plaintiffs' request for a declaration of the same is moot. Accordingly, Plaintiffs' request for declaratory judgment against the Donziger Defendants should be dismissed pursuant to CPLR 3211(a)(7) for failure to state a claim. *See Blue Diamond*, 2010 N.Y. Misc. LEXIS 4471, at \*43-44 (because "no action has been commenced against [the plaintiff], [the plaintiff's insurer's] duty to defend under the insurance policy was never triggered and thus there is an absence herein of a 'real controversy concerning jurial relations' between the parties herein") (citation omitted).

**B. Plaintiffs Have Failed to State a Cause of Action for Unjust Enrichment**

Plaintiffs' claim for unjust enrichment against the Donziger Defendants also fails because Plaintiffs do not allege any actual benefit conferred upon the Donziger Defendants by Plaintiffs, a necessary element of any unjust enrichment claim. Unjust enrichment is an equitable claim that operates as a quasi-contract to force a defendant to make restitution to the plaintiff. *See State of N.Y. v. SCA Services, Inc.*, 761 F. Supp. 14, 15 (S.D.N.Y. 1991). However, the remedy of restitution is only applicable if a benefit has passed from the plaintiff to the defendant for which the plaintiff should be compensated in equity and good conscience. Accordingly, "to state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefore." *Nakamura v. Fujii*, 253 A.D.2d 387, 390, 677 N.Y.S.2d 113 (1st Dep't 1998). If the complaint does not allege a conferred benefit, the claim should be dismissed. *CDR*

*Créances S.A. v. Euro-American Lodging Corp.*, 40 A.D.3d 421, 422, 837 N.Y.S.2d 609 (1st Dep’t 2007) (holding that the “unjust enrichment cause of action was properly dismissed for “failure to identify any improper benefit bestowed on [the defendant]”). *Accord, e.g., Prospect Plaza Tenant Ass’n., Inc. v. New York City Hous. Auth.*, 11 A.D.3d 400, 401, 783 N.Y.S.2d 563 (1st Dep’t 2004); *Stephen Pevner, Inc. v. Ensler*, 309 A.D.2d 722, 723, 766 N.Y.S.2d 183 (1st Dep’t 2003). It is not sufficient that a plaintiff alleges damage caused by the defendant’s conduct. Because the remedy is restitution, an unjust enrichment claim is only warranted if the alleged injury is the result of the plaintiff conferring a benefit to the defendant. *See Farah v. Sykes Datatronics*, 59 N.Y.2d 500, 504, 465 N.Y.S.2d 917 (1983).

Here, there is no allegation that any benefit has yet been bestowed on the Donziger Defendants by Plaintiffs. Plaintiffs contend that the Donziger Defendants have been unjustly enriched “by the possession of those monies awarded for the benefit of Plaintiffs and other Huaorani” under the Lago Agrio Judgment, Compl. ¶¶ 113-14, yet at the same time admit that the Lago Agrio Judgment has not yet been enforced. Compl. ¶ 68. Plaintiffs nowhere allege that the proceeds of the Lago Agrio Judgment have been collected by the Donziger Defendants, ADF, or any other party for that matter, as they cannot—the judgment proceeds cannot be collected from Chevron until the judgment is successfully enforced. Similarly, Plaintiffs’ allegation that the Donziger Defendants have sold interest in the judgment to third parties does not save its unjust enrichment claim, as this does not constitute a benefit conferred on the Donziger Defendants *by Plaintiffs*. The Lago Agrio Judgment was awarded on behalf of the LAPs, and any purported sale of interests in the portion of the Lago Agrio Judgment to which the Donziger Defendants are entitled for their representation of the LAPs cannot be construed as a benefit that Plaintiffs have conferred on the Donziger Defendants. As Plaintiffs have not identified any benefit they have bestowed on Defendants, Plaintiffs’ unjust enrichment claim necessarily fails.

**C. Plaintiffs Have Failed to State a Cause of Action for Constructive Trust**

Plaintiffs’ claim for a constructive trust automatically fails in light of their failure to state a claim for unjust enrichment against the Donziger Defendants. “To state a cause of action for

the imposition of a constructive trust, the plaintiffs must plead and prove four essential elements: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment.” *Doxey v. Glen Cove Community Dev. Agency*, 28 A.D.3d 511, 512, 813 N.Y.S.2d 743 (2d Dep’t 2006). Further, Plaintiffs have not alleged any promise by the Donziger Defendants as required to state a constructive trust cause of action, nor have they alleged any transfer of property by Plaintiffs in reliance on such promise. Accordingly, Plaintiffs’ constructive trust claim must also be dismissed for failure to state a claim. *Id.* (dismissing cause of action to impose a constructive trust where plaintiffs failed to show legally cognizable transfer in reliance on any promise or unjust enrichment); *see also Ewart v. Ewart*, 78 A.D.3d 992, 912 N.Y.S.2d 265 (2d Dep’t 2010) (“the complaint fails to state a cause of action to impose a constructive trust upon the property because it does not contain factual allegations demonstrating an express or implied promise and a transfer made in reliance thereon”).

**D. Plaintiffs Have Failed to State a Cause of Action for Breach of Fiduciary Duty**

Plaintiffs have also failed to state a claim for breach of fiduciary duty against the Donziger Defendants. The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct. *See Baumann v. Hanover Community Bank*, 100 A.D.3d 814, 817, 957 N.Y.S.2d 111 (2d Dep’t 2012). As an initial matter, Plaintiffs admit there is no agreement between Plaintiffs and the Donziger Defendants out of which any purported fiduciary duty might arise. Compl. ¶ 54. Plaintiffs were not parties to the Lago Agrio Litigation, and therefore to the extent the Donziger Defendants represented the LAPs during the Lago Agrio Litigation, Plaintiffs were not included in the LAPs. However, even assuming the Donziger Defendants did owe a fiduciary duty to Plaintiffs, Plaintiffs have alleged no breach of any such purported duty, nor any resulting damages. By Plaintiffs own allegations, ADF had represented that Plaintiffs are expected to benefit from the Lago Agrio Litigation. Compl. ¶ 62. However, the Lago Agrio Judgment has not yet been enforced, and no funds have been collected from Chevron

under the Lago Agrio Judgment. Compl. ¶ 68. As the trust designated to receive and administer those funds remains unfunded, the Donziger Defendants cannot have breached any purported fiduciary duties to Plaintiffs arising out of the management of those uncollected funds. Finally, for the same reason, Plaintiffs can show no damage as a result of any purported breach. The Lago Agrio Judgment has not yet been enforced, meaning no funds have been received, and therefore Plaintiffs cannot have suffered any damage related to the management, administration, or distribution of uncollected funds.

**E. Plaintiffs Have Failed to State a Cause of Action For An Accounting**

Finally, Plaintiffs' request for an accounting fails for the same reasons its cause of action for breach of fiduciary duty fails. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Center for Rehabilitation & Nursing at Birchwood, LLC v. S & L Birchwood, LLC*, 92 A.D.3d 711, 713, 939 N.Y.S.2d 78 (2d Dep't 2012) (quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265, 503 N.Y.S.2d 381 (1986)) (quotations omitted). As Plaintiffs have failed to adequately allege the existence of a confidential or fiduciary relationship between Plaintiffs and the Donziger Defendants, and, even assuming such a relationship did exist, Plaintiffs have not alleged facts showing a breach of the duties imposed by such a relationship respecting property in which Plaintiffs have an interest, Plaintiffs have failed to adequately state a cause of action for an accounting. *See, e.g.*, Compl. ¶¶ 54 (admitting that there is no agreement between Plaintiffs and the Donziger Defendants), 68 (admitting that the Lago Agrio Judgment has not yet been enforced), 62 (alleging that ADF "admitted that the Huaorani people should benefit from the Lago Agrio Litigation").

**CONCLUSION**

For the foregoing reasons, the Donziger Defendants respectfully request that this Court dismiss this action in its entirety.

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