UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(ECF)

PATTON BOGGS LLP, Plaintiff, - against - CHEVRON CORP., Defendant.	12 Civ. 9176 (LAK) (JCF) REPORT AND RECOMMENDATION

TO THE HONORABLE LEWIS A. KAPLAN, U.S.D.J.:

In this action, plaintiff Patton Boggs LLP ("Patton Boggs") seeks to recover on a preliminary injunction bond posted by defendant Chevron Corporation ("Chevron") pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, as well as attorneys' fees, damages for malicious prosecution, and disgorgement for unjust enrichment under state law. Chevron moves for dismissal of all claims. For the following reasons, I recommend granting Chevron's motion.

Background

This action is one in a cluster of cases concerning a conflict that, according to the United States Court of Appeals for the Second Circuit, "must be among the most extensively [described] in the history of the American judiciary." Chevron Corp. v. Naranjo, 667 F.3d 232, 235 (2d Cir.), cert. denied, 133 S. Ct. 523 (2012). Nevertheless, some background is needed to provide context for the disputes at issue here.

The action that forms the foundation of this lawsuit (and many others) was brought by "a coalition of residents from indigenous

and farming communities located in the Amazon region of Ecuador" (the "Lago Agrio Plaintiffs" or "Ecuadorian Plaintiffs") against a company later acquired by Chevron (Amended Complaint ("Am. Compl."), ¶ 1), "alleg[ing] that Chevron's predecessor extensively polluted the Lago Agrio region of Ecuador and claim[ing] that Chevron is liable for the resulting damages," Naranjo, 667 F.3d at 234. Although originally filed in this district in 1993, the action was eventually dismissed on grounds of forum non conveniens. Id. at 235-36; see also Aguinda v. Texaco, Inc., 303 F.3d 470, 472-73 (2d Cir. 2002) (affirming district court's dismissal). The Ecuadorian Plaintiffs thereafter initiated an action against Chevron in Ecuador (the "Lago Agrio Action" or "Ecuadorian Action"), (Am. Compl., ¶ 5); Naranjo, 667 F.3d at 235-36, and, eight years later, on February 14, 2011, obtained a multi-billion dollar judgment in their favor (Am. Compl., ¶ 5); Naranjo, 667 F.3d at 236. That judgment is currently in the final step of the appeals process in Ecuador. (Memorandum of Law in Opposition to Defendant Chevron Corporation's Motion to Dismiss Patton Boggs' Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(3), (6), and (7) ("Pl. Memo.") at 3 n.1).

Meanwhile, two weeks before the trial court in Ecuador issued the original judgment, Chevron filed an action in this district against 56 defendants, including various attorneys involved in one way or another with the Lago Agrio Action, certain environmental consultants who provided an expert report in that action, and most of the original Ecuadorian Plaintiffs (the "Donziger Defendants").

Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 625 (S.D.N.Y. 2011), rev'd sub nom. Naranjo, 667 F.3d 232 (2012). The complaint in that action also listed a number of "Non-Party Co-Conspirators," including Patton Boggs, which, Chevron alleged, developed the "strategy for pursuing the assets of Chevron . . . on the basis of a fraudulent judgment in Ecuador." (Complaint, Chevron Corp. v. Donziger, No. 11 Civ. 0691 (S.D.N.Y. Feb. 1, 2011) ("Donziger Compl."), at 6, 10). Chevron asserted numerous claims against the various defendants, including racketeering, fraud, and conspiracy. (Donziger Compl. at 119-44). Chevron also sought a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), that "any [] judgment [in the Lago Agrio Action] is unenforceable and non-recognizable" on various bases, including under New York's Recognition of Foreign Country Money Judgments Acts, New York Civil Practice Law and Rules ("NYCPLR") § 5301 et seq. (the "Recognition Act"). (Donziger Compl. at 144); see also Naranjo, 667 F.3d at 238. It argued that the judgment in the Ecuadorian Action fell into three exceptions to the presumption of enforceability of foreign judgments codified in the Recognition Act: "(1) that the judgment was fraudulently procured . . . ; (2) that Ecuador lacks impartial tribunals . . . ; and (3) that domestic and international due process were violated in procuring the judgment." Id. at 240 (citing NYCPLR §§ 5304(a)(1), (b)(3)).

On February 8, 2010, the Honorable Lewis A. Kaplan, U.S.D.J., entered a temporary restraining order (the "TRO") that prohibited "[d]efendants, their officers, agents, servants, employees and

attorneys . . . from funding, commencing, prosecuting, advancing in any way, or receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron" in the Lago Agrio Action. (Order on Plaintiff's Motion for a Temporary Restraining Order dated Feb. 8, 2011, attached as Annex 1 to Am. Compl., at 1). On March 7, 2011, Judge Kaplan granted a preliminary injunction against all but three of the defendants, which

> enjoined and restrained, pending the final determination of this action, [the affected Donziger Defendants] from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in [the Lago Agrio Action], or any other judgment that hereafter may be rendered in the Lago Agrio [Action] by that court or by any other court in Ecuador in or by reason of the Lago Agrio [Action] (collectively, a "Judgment"), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment.

Donziger, 768 F. Supp. 2d at 660; (Excerpt from Order, attached as Annex 3 to Am. Compl., at 1). Counsel for Chevron sent a letter to Patton Boggs asserting that "Chevron Corporation considers you and anyone else in active concert or participation with the [enjoined] defendants . . . to be on actual notice of, and bound by, Judge Kaplan's order." (Letter of Randy M. Mastro dated March 8, 2011, attached as Annex 4 to Am. Compl., at 1).

The District Court later severed the declaratory judgment claim from the other claims in the action. (Memorandum Opinion dated April 15, 2012, attached as Exh. 5 to Declaration of Herbert J. Stern dated April 16, 2012 ("Stern Decl."), at 22). In

accordance with Judge Kaplan's order granting the preliminary injunction, and in compliance with the Federal Rules of Civil Procedure, Chevron posted a preliminary injunction bond in the amount of $21,800,000 (the "Bond") to be paid to the enjoined Donziger Defendants for damages and costs sustained as a result of the Bond, should it later be decided that Chevron was not entitled to the injunction. (Preliminary Injunction Bond, attached as Exh. 6 to Stern Decl. and as Annex 5 to Am. Compl.).

Upon emergency motion by some of the enjoined Donziger Defendants (Memorandum of Law of Appellants Hugo Gerardo Camacho Naranjo's and Javier Piaguje Payaguaje's Emergency Motion to Stay Proceedings and Certain Portions of the March 7, 2011 Order, attached as Exh. 6 to Declaration of James E. Tyrell, Jr., dated May 7, 2012 ("Tyrell Decl.")), on May 12, 2011, the Second Circuit stayed the portions of the injunction that "restrain[ed] activities other than commencing, prosecuting, or receiving benefit from recognition, enforcement, or pre-judgment seizure or attachment proceedings." (Order dated at May 12, 2011, attached as Exh. 8 to Stern Decl., at 1). The Second Circuit vacated the injunction in September 2011 and later remanded the case. Chevron Corp. v. Naranjo, Nos. 11–1150–cv(L), 11–1264–cv(con), 11–2259–op(con), 2011 WL 4375022 (2d Cir. Sept. 19, 2011) (vacating injunction); Naranjo, 667 F.3d at 247 (reversing and remanding). The Court of Appeals held that "[t]he Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor," and that, therefore, the Declaratory

Judgment Act could not be the basis for the claim or the injunction. Naranjo, 667 F.3d at 240, 245. It directed the district court to dismiss Chevron's severed claim for injunctive and declaratory relief. Id. at 247.

Patton Boggs then initiated this action in the District of New Jersey. The amended complaint alleges that the TRO and the preliminary injunction "choked off the [Lago Agrio Plaintiffs'] ability to obtain funding that would allow them to reasonably contend with the upwards of 39 law firms . . . that Chevron has admitted . . . to deploying on this matter" and precluded the Lago Agrio Plaintiffs' lawyers, including Patton Boggs, from "taking measures to attach and restrain the movement and disposition of assets, to assure those assets would be available upon enforcement." (Am. Compl., ¶¶ 34-35). Patton Boggs seeks (1) to execute against the bond for the full amount of $21,800,000, because the TRO and preliminary injunction prevented it from performing legal services and collecting fees from its clients (Am. Compl., ¶¶ 47-49); (2) to recover the attorneys' fees incurred "in resisting, and attempting to have lifted, an unlawful restraint," pursuant to New York law (Am. Compl., ¶¶ 52-53); (3) to obtain damages for malicious prosecution founded on "Chevron's bid for a frivolous TRO and preliminary junction," as well as its "abusive" litigation strategy (Am. Compl., ¶ 59); and (4) to require disgorgement of "Chevron's ill-gotten gains" derived from its "knowing pursuit of a vexatious" TRO and preliminary injunction (Am. Compl., ¶¶ 65, 67).

Chevron moved to transfer the action from the District of New Jersey. Patton Boggs LLP v. Chevron Corp., Civil Action No. 12-901, 2012 WL 6568526, at *1 (D.N.J. Dec. 14, 2012). Simultaneously, Chevron made an application in the Donziger action to exonerate the Bond. (Letter of Herbert J. Stern dated March 13, 2012, attached as Exh. 1 to Tyrell Decl., at 1; Plaintiff Chevron Corporation's Memorandum of Law in Support of its Application by Order to Show Cause Why this Court Should not Exonerate Chevron's $21.8 Million Bond, attached as Exh. 7 to Tyrell Decl.). On April 2, 2012, Judge Kaplan exonerated the Bond, noting that Patton Boggs had not intervened to interpose a claim in Donziger and opining that any such claim would be meritless. (Memorandum Opinion (Corrected) dated April 2, 2012 ("Exoneration Order"), attached as Exh. 18 to Stern Decl., at 5-8). Specifically, Judge Kaplan held that the preliminary injunction, which barred enforcing or attempting to enforce the judgment in the Ecuadorian Action could not give rise to a claim for damages because that judgment "was not enforceable throughout the entire period during which the injunction was in effect." (Exoneration Order at 5). Addressing the argument that the Bond should not be exonerated because Patton Boggs had already filed this action to collect on the Bond, Judge Kaplan held not only that Patton Boggs "must live with the consequences of their tactical decision to forego th[e] opportunity" to submit a claim for damages against the Bond, but also that exoneration of the Bond was not premature, given that (1) the Second Circuit had already ruled on the preliminary injunction

and (2) as a result of that ruling, "all secured parties ha[d] been afforded the opportunity to make claims." (Exoneration Order at 6). Patton Boggs, as an "Interested Non-Party," has filed a notice of appeal of that order, as have certain Donziger defendants. (Notice of Appeal dated May 2, 2012, attached as Exh. 21 to Defendant Chevron Corporation's in Support of Motion to Dismiss Patton Boggs' Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(3), (6), and (7) ("Pl. Reply"); Notice of Appeal, Chevron Corp. v. Donziger, No. 11 Civ. 0691 (S.D.N.Y. May 2, 2012), Docket no. 466).

After the Bond was exonerated, Chevron filed a motion to dismiss this action with the New Jersey court. After that motion was fully briefed, this case was transferred to this Court, based on the pendency of the related Donziger action. Patton Boggs, 2012 WL 658526, at *1, 3. Judge Kaplan granted Chevron's request to consider the motion on the papers already filed and referred the motion to me. (Memorandum Endorsement dated Jan. 24, 2013, at 8; Order of Reference dated Feb. 12, 2013).

Discussion

A. Legal Standards

1. Materials Considered

On a motion to dismiss, the court is generally limited to reviewing the allegations in the complaint and documents attached to it or incorporated by reference. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-54 (2d Cir. 2002). In addition, a court may consider "matters of which judicial notice may be taken." Id.

at 153 (internal quotation marks omitted). It is well-established that a court may take judicial notice of documents filed in other courts "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Global Network Communications, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006) (internal quotation marks omitted).

"[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material." Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000) (alteration in original) (internal quotations marks omitted); see also Quick Cash of Westchester Avenue LLC v. Village of Port Chester, 11 Civ. 5608, 2013 WL 135216, at *3 (S.D.N.Y. Jan. 10, 2013) (quoting Friedl, 210 F.3d at 83). "A district court, however, 'is not obliged to convert a 12(b)(6) motion to one for summary judgment in every case in which a party seeks to rely on matters outside the complaint in support of a 12(b)(6) motion; it may, at its discretion, exclude the extraneous material and construe the motion as one under Rule 12(b)(6).'" PNCEF, LLC v. OZ General Contracting Co., No. 11 CV 724, 2012 WL 4344538, at *3 (E.D.N.Y. Aug. 2, 2012) (quoting United States v. International Longshoremen's Association, 518 F. Supp. 2d 422, 450-51 (E.D.N.Y. 2007)).

Both parties attach material to their submissions on this motion to dismiss -- Chevron includes 22 exhibits, Patton Boggs includes 10. Most of these materials fall into the realm of allowable additional material, as they are largely filings in this or related cases, which need be considered only for the fact of the filings and their arguments, but not for the truth of the assertions contained within them. However, one submission is clearly inappropriate: an expert declaration submitted by Patton Boggs that purports to establish that Patton Boggs' claimed damages are "capable of measurement and quantification." (Declaration of Patrick A. Gaughan, Ph.D., dated May 3, 2012, attached as Exh. 9 to Tyrell Decl.). Rather than convert this motion to a motion for summary judgment, I will not consider this declaration.[1]

2. Sufficiency of Pleading

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). While a complaint need not make "'detailed factual allegations,'" it must contain more than mere "'labels and conclusions' or []'formulaic recitation[s] of the elements of a cause of action.'" Id. (quoting Twombly, 550 U.S. at

[1] In any case, the declaration is irrelevant. Patton Boggs submits it in support of its unjust enrichment claim. (Pl. Memo. at 29). However, as discussed below, that claim should be dismissed because the law of New Jersey does not recognize unjust enrichment as an independent tort. Therefore, even if it were appropriate to consider the declaration at this stage, it would not alter my recommendations.

555). A complaint with "'naked assertions' devoid of 'further factual enhancement'" is insufficient. Id. (quoting Twombly, 550 U.S. at 557). Further, where the complaint's factual allegations permit the court to infer only a possible, but not a plausible, claim for relief, it fails to meet the minimum standard. Id. at 679. In ruling on a motion to dismiss, the court's task "'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" GVA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd., 580 F. Supp. 2d 321, 327 (S.D.N.Y. 2008) (quoting Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004)).

In assessing a motion to dismiss under Rule 12(b)(6), a court must take as true the allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (per curiam); DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 110–11 (2d Cir. 2010). However, this is inapplicable to legal conclusion and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).

3. Presumption of Recovery and Pleading Standard

Patton Boggs argues that "where, as here, a presumption exists in favor of a plaintiff, the Rule 12(b)(6) standard includes a presumption in favor of recovery." (Pl. Memo. at 7). However, the cases it cites do not support the conclusion that a presumption in favor of recovery on a bond has any effect on the pleading standard

a complaint must meet to survive a motion to dismiss.

It is, of course, true that when an element of a cause of action is presumed, the plaintiff is relieved from pleading such an element. See In re Vonage Initial Public Offering (IPO) Securities Litigation, Civil Action No. 07-177, 2009 WL 936872, at *14 (D.N.J. April 6, 2009) ("[P]laintiffs have no obligation to plead or prove loss causation in [cases under] § 11 or § 12 [of the Securities Act], rather, causation is presumed."). Similarly, Patton Boggs is correct that "wrongfully enjoined parties are entitled to a presumption in favor of recovery" on a bond. Nokia Corp. v. InterDigital, Inc., 645 F.3d 553, 560 (2d Cir. 2011). However, this presumption does not work to relieve a plaintiff of the requirement to plead each element of its cause of action; instead, it functions merely to shift the burden to the party opposing recovery to demonstrate that such recovery should be denied. Id. at 559 ("The burden of demonstrating that recovery should be denied is on the party opposing recovery."). Indeed, Patton Boggs does not describe, and I cannot conceive of, how such a presumption could modify the familiar pleading standard derived from the Twombly/Iqbal line of cases.

B. Recovery on the Bond

To review: the Bond was posted as a consequence of the entry of the preliminary injunction. The Second Circuit vacated the preliminary injunction, and Patton Boggs brought this action in New Jersey to recover on the Bond. Judge Kaplan exonerated the Bond, holding that neither any defendant nor any other party could

properly have submitted any claim on it. In doing so, he rejected the argument that Patton Boggs' claim against the Bond, which was then before the New Jersey court, was an obstacle to exoneration. (Exoneration Order at 5-7). Both Patton Boggs and two of the Donziger defendants have appealed that decision.

As noted above, there is a presumption in favor of recovery by the wrongfully-enjoined on a preliminary injunction bond. However, Chevron has rebutted whatever presumption might attach to Patton Boggs' application, because the Bond has been exonerated. As a general rule, the exoneration of a bond eliminates it as a source of recovery. See, e.g., Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167–1168 (9th Cir. 1976), cited in W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757, 770 n.14 (1983); Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 450, 461 (Iowa 1999) (noting that effect of order exonerating a bond is to "discharge . . . any liability for damages under the bond and to eliminate the bond as a source of funds for the payment of any such damages"). The propriety of Judge Kaplan's exoneration of the Bond and the consequences of that exoneration now are the province of the Court of Appeals.[2] See,

[2] Indeed, Patton Boggs seems to recognize that its claims against the Bond no longer belong in this collateral action. In a series of letters to the Court after this case was transferred to this district, Patton Boggs requested that Judge Kaplan "dismiss this action based on the [Exoneration Order]" (Letter of S. Alyssa Young dated Jan. 22, 2013, attached as part of Docket no. 50), because the "reasoning in [that order] . . . would serve to dismiss, with prejudice, Patton Boggs' claims in this action" (Letter of S. Alyssa Young dated Jan. 23, 2013, attached as part of

e.g., J.A. Preston Corp. v. Fabrication Enterprises, 68 N.Y.2d 397, 401, 502 N.E.2d 197, 198 (1986) (stating that when undertaking has been required and is then improperly discharged, "the impropriety of its discharge can[] be corrected by an appellate court."); cf. Buddy Systems, 545 F.2d at 1169-70 (holding district court without jurisdiction in collateral action to award wrongful-injunction damages where, in original action, party was wrongfully enjoined, district court erroneously exonerated bond, and party failed to appeal error). That is, the Second Circuit must decide whether to vacate the exoneration of the Bond and allow it to be collected upon; I cannot.

Indeed, one of the cases Patton Boggs cites demonstrates this. In Financial Marketing Services, the plaintiff was granted temporary injunctive relief and posted a bond. 588 N.W.2d at 454. Thereafter, the trial court granted the defendant's motion for summary judgment on the claim for injunctive and declaratory relief, but did not exonerate the bond. Id. at 454-55. The defendant then brought a collateral action to recover on the bond, while the plaintiff moved in the original action to exonerate the bond. Id. at 455. The trial court exonerated the bond. Id. The plaintiff appealed the trial court's decision on injunctive relief. Id. Rather than pressing its claims to collect on the bond in the collateral action, as Patton Boggs does here, the defendant appealed the exoneration of the bond in the original action. Id.

Patton Boggs relies on Atomic Oil Co. of Oklahoma v. Bardahl

Docket no. 50).

Oil Co., 419 F.2d 1097 (10th Cir. 1970), but it is easily distinguishable. In that case, the Tenth Circuit affirmed the district court's award, in a collateral action, of wrongful injunction damages against a bond exonerated in the original action. Id. at 1099-1101. In doing so, the court stated that, because the bond was released before the lower court could determine on the merits whether there was liability on the bond, "the injunction court's release of the security [did not] similarly release[] the appellant from its liability." Id. at 1101. There are two significant differences in this case. First, Judge Kaplan exonerated the Bond after ruling that it could not be collected on because it was impossible for anyone to have been damaged by the preliminary injunction. That is, unlike the situation in Atomic Oil, the Bond was exonerated not merely because the preliminary injunction was dissolved, but because the court ruled, on the merits, that the Bond could not be collected upon. The situation does not, then, fit into the Atomic Oil exception, which relied on the absence of a merits determination. Second, the district court in Atomic Oil was not asked to decide whether the bond could be collected upon during the pendency of an appeal of the order exonerating the bond, whereas, here, Patton Boggs asks for a ruling directly contravening Judge Kaplan's while the appeal of Judge Kaplan's decision is pending.

Indeed, none of the cases Patton Boggs marshals as support involves a situation akin to this one, in which a court has granted, on the merits, a motion to exonerate a preliminary

injunction bond, and, while that decision is on appeal, a claimant seeks to recover on the exonerated bond in a collateral action. See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 562 F. Supp. 304, 307-08 (S.D.N.Y. 1983) (district court that exonerated bond before any claims upon it could be determined awards wrongful-injunction damages in same action after injunction and, arguably, exoneration reversed by appellate court); Sycamore Management Group, LLC v. Coosa Coble Co., 81 So. 3d 1224, 1227 (Ala. 2011) (after appellate court reverses grant of injunction, parties aggrieved by injunction and exoneration of bond file motion for recovery of wrongful-injunction damages).

Because there is no security to claim against unless and until the Court of Appeals reverses the Exoneration Order, I recommend that Patton Boggs' claim for recovery on the Bond be dismissed.

C. Attorneys' Fees under New York Law

Patton Boggs claims that, under three provisions of the NYCPLR -- Sections 6212(e), 6312(b), and 6313(e) -- it is entitled to attorneys' fees incurred both in its defense against Chevron's motion for a TRO and preliminary injunction and in its successful appeal of the preliminary injunction.[3] (Am. Compl., ¶¶ 53-54; Pl. Memo. at 18). This claim, too, should be dismissed.

[3] Notwithstanding the fact that Patton Boggs alleges that the damage inflicted upon it by the Donziger action occurred in New Jersey (Am. Compl., ¶ 42), it asserts that New York, rather than New Jersey, law applies to this claim because "the [p]reliminary [i]njunction was an outgrowth of a cause of action in New York," (Pl. Memo. at 18). To the extent that there is a disagreement about which state's law might apply (Def. Memo. at 19 n.13), the answer is irrelevant because, as discussed below, federal law applies to this issue.

The parties disagree about whether federal or state law governs this question. It matters because, as the parties agree, if federal law applies, Patton Boggs cannot recover attorneys' fees. See, e.g., Agnew v. Alicanto, S.A., 125 F.R.D. 355, 358 (E.D.N.Y. 1989) (noting that right to recover attorneys' fees expended in litigating temporary restraining order depends on whether injunction was granted pursuant to Rule 65 or state law). According to Patton Boggs, state law governs because (1) jurisdiction over this action and Donziger, the action in which the TRO and preliminary injunction issued, is grounded in diversity (Am. Compl., ¶ 51; Pl. Memo. at 19); and (2) the TRO and preliminary injunction in Donziger was based on New York law (Am. Compl., ¶ 52; Pl. Memo. at 18-19). Chevron counters that federal law should be applied because the TRO and preliminary injunction were granted under federal law: Rule 65 of the Federal Rules of Civil Procedure. (Def. Memo. at 18-19; Pl. Reply at 5-6).

It is clear that the TRO and preliminary injunction were requested and granted, and the Bond was posted, pursuant to Rule 65. ([Proposed] Order to Show Cause Why a Temporary Restraining Order and Preliminary Injunction Should Not Be Entered, attached to Stern Decl. as Exh. 19, at 1; Exoneration Order at 2-3); Donziger, 768 F. Supp. 2d at 596 & n.10, 651-53, 656-57 (referring to Rule 65). The weight of authority holds that attorneys' fees expended in resisting a preliminary injunction are not recoverable when that injunction has been imposed pursuant to federal law. See Nokia Corp., 645 F.3d at 560 (noting that "it has long been established"

that prevailing party may not collect attorneys' fees expended in litigating injunction); Bass v. First Pacific Networks, 219 F.3d 1052, 1054-55 (9th Cir. 2000) (holding that attorneys' fees are not recoverable in action pursuant to Rule 65.1 to recover for wrongful injunction); Fireman's Fund Insurance Co. v. S.E.K. Construction Co., 436 F.2d 1345, 1352-53 (10th Cir. 1971) (attorneys' fees not recoverable when injunction bind issued pursuant to Rule 65); Vendetti v. Compass Environmental, Inc., No. 06 C 3556, 2008 WL 1774983, at *2 (N.D. Ill. April 16, 2008) (noting that Seventh Circuit held in Minnesota Power and Light v. Hockett, 14 F. App'x 703, 705-09 (7th Cir. 2001), that attorneys' fees are not recoverable when injunction has been issued pursuant to Rule 65). But see Bulova Watch Co. v. Rogers-Kent, Inc., 181 F. Supp. 340, 344-45 (E.D.S.C. 1960) (applying state law).[4]

Other than Bulova Watch, which other courts have refused to follow, see Fireman's Fund, 436 F.2d at 1351-52 & n.9, the cases Patton Boggs cites to support its argument that state law should apply are inapposite because in those cases the restraint was issued either pursuant to state law, see Federal Beef Processors, Inc. v. CBS Inc., 864 F. Supp. 127, 130 (D.S.D. 1994) ("In this case, Federal sought a preliminary injunction pursuant to South

[4] These cases deal with motions under Rule 65.1, whereas here, Patton Boggs proceeds under 28 U.S.C. § 1352. However, there is no principled reason to make a distinction between proceedings under the rule and proceedings under the statute where the relief requested is exactly the same. See U.S. D.I.D. Corp. v. Windstream Communications, Inc., __ F. Supp. 2d __, __, 2013 WL 67257, at *4 (S.D.N.Y. 2013) (noting that litigants can proceed under either Rule 65.1 or section 1352 to recover damages for wrongful injunction).

Dakota law in state court [before the case was removed]."), or pursuant to Rule 64 of the Federal Rules of Civil Procedure, which mandates the use of state procedures, see Fed. R. Civ. P. 64(a); Merck & Co. v. Tecnoquimicas S.A., No. 01 Civ. 5354, 2001 WL 963977, at *2-3 (S.D.N.Y. Aug. 22, 2001); Globex International Inc. v. Commercial Bank of Namibia Ltd., No. 99 Civ. 4789, 1999 WL 1211827, at *1 (S.D.N.Y. Dec. 17, 1999); Agnew, 125 F.R.D. at 359. Because attorneys' fees are not recoverable here, I recommend that this claim be dismissed.

D. Malicious Use of Process

Patton Boggs alleges that Chevron brought the Donziger action without probable cause, and is therefore liable for malicious use of process.[5] (Am. Compl., ¶¶ 55-63). Patton Boggs does not have standing to bring this claim, and I therefore recommend its dismissal.

The first element that a malicious use of process plaintiff must plead is that "a [civil] action was instituted by this defendant against this plaintiff." LoBiondo, 199 N.J. at 1022, 970 A.2d at 90. Patton Boggs cannot do so, because it was not a party to the Donziger action. See, e.g., Jackson v. Kessner, 206 A.D.2d 123, 126, 618 N.Y.S.2d 635, 637 (1st Dep't 1994) ("It is

[5] Under New Jersey law, "[m]alicious prosecution provides a remedy for harm caused by the institution or continuation of a criminal action that is baseless," while "[m]alicious use of process is essentially the analog used when the offending action in question is civil rather than criminal." LoBiondo v. Schwartz, 199 N.J. 62, 89-90, 970 A.2d 1007, 1022 (2009) (footnote omitted). Thus, although Patton Boggs denominates this a claim for malicious prosecution, I will refer to it as a malicious use of process claim.

axiomatic that only a party to the proceeding complained of is entitled to maintain an action for malicious prosecution."); C.N.C. Chemical Corp. v. Pennwalt Corp., 690 F. Supp. 139, 141 (D.R.I. 1988) ("Implicit among the elements constituting this cause of action is that the previous proceeding must have been brought against the party claiming malicious prosecution.").

Patton Boggs points to no authority that contradicts this fundamental principle. The single case that it cites to indicate the possibility of a slight expansion of standing in malicious use of process cases is unavailing. In One Thousand Fleet Ltd. Partnership v. Guerriero, 346 Md. 29, 42 n.4, 694 A.2d 952, 958 n.4 (1997), Maryland's high court "le[ft] for another day the question of whether a party who was not an original party in the underlying lawsuit but rather participated as an intervenor may maintain a cause of action for malicious use of process." Not only did the court refuse to decide the question, but the question it deferred was not one that is relevant to this case, as Patton Boggs was neither a party nor an intervenor in Donziger. Moreover, the One Thousand Fleet court noted that most courts to address the question have limited standing in malicious use of process actions to plaintiffs who were original parties to the underlying action. Id. I therefore recommend dismissal of this claim.

E. Unjust Enrichment

Finally, Patton Boggs asserts that Chevron's "knowing pursuit of an unlawful and vexatious TRO and [p]reliminary [i]njunction . . . wrongfully conferred [] benefits [on Chevron] attendant to

restricting . . . the activities" of the Lago Agrio Plaintiffs' attorneys, including Patton Boggs. (Am. Compl., ¶ 65). It demands disgorgement of "Chevron's ill-gotten gains to which [Patton Boggs] is entitled under [Patton Boggs'] agreement with the [Lago Agrio Plaintiffs] or otherwise." (Am. Compl., ¶ 67). More specifically, Patton Boggs claims that, through the TRO and preliminary injunction, Chevron was able to begin to "sell off or restructure otherwise attachable assets," making them judgment-proof, and "plan for pre-and post-judgment enforcement activities." (Am. Compl., ¶ 35; Pl. Memo. at 29).

The conduct that Patton Boggs alleges underlies its unjust enrichment claim sounds in tort -- indeed, it is largely the same conduct alleged in its malicious use of process claim. (Pl. Memo. at 28-29). "New Jersey does not recognize unjust enrichment as an independent tort cause of action." Wiatt v. Winston & Strawn, LLP, Civil Action No. 10-6608, 2011 WL 2559567, at *14 (D.N.J. June 27, 2011) (citing Castro v. NYT Television, 370 N.J. Super. 282, 299, 851 A.2d 88, 98 (App. Div. 2004), and Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999)); Nelson v. Xacta 3000 Inc., No. 08-5426, 2009 WL 4119176, at *7 (D.N.J. Nov. 24, 2009). Because Patton Boggs has not alleged a quasi-contractual relationship with Chevron in which Patton Boggs conferred a tangible benefit on Chevron with the expectation that Chevron would pay for it, see Mann v. TD Bank, N.A., Civil No. 09-1062, 2010 WL 4226526, at *10 (D.N.J. Oct. 20, 2010); South Broward Hospital District v. Medquist Inc., 516 F. Supp. 2d 370, 386

(D.N.J. 2007), this claim should be dismissed, see, e.g., Steamfitters Local Union No. 420 Welfare Fund, 171 F.3d at 936 ("We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court properly dismissed the traditional tort claims . . . ."); Wiatt, 2011 WL 2559567, at *14 (collecting cases).[6]

Conclusion

For the foregoing reasons, I recommend that Chevron's motion to dismiss (Docket no. 22) be granted. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Lewis A. Kaplan, Room 2240, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully Submitted,

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

[6] While New York state law appears to recognize a free-standing tort claim for unjust enrichment, such a claim is unavailable where, as here, the claim merely duplicates Patton Boggs' "conventional" tort claim for malicious prosecution/malicious use of process. See Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 790-91, 967 N.E.2d 1177, 1185 (2012).

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