21-2486-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

STEVEN DONZIGER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CORRECTED BRIEF FOR THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

Steven Donziger appeals from a judgment of conviction on six counts of criminal contempt entered on July 26, 2021 in the United States District Court for the Southern District of New York, following a five-day bench trial before the Honorable Loretta A. Preska.

On July 31, 2019, the Honorable Lewis A. Kaplan, in civil case *Chevron Corp. v. Donziger et al.*, 11 Civ. 691 (S.D.N.Y.) (the "Civil Case") and pursuant to Federal Rule Criminal Procedure 42, filed an "Order to Show Cause Why Defendant Steven Donziger Should Not Be Held in Criminal Contempt" ("OTSC"). The OTSC charged Donziger with six separate counts of criminal contempt in violation of 18 U.S.C. § 401(3). That same day Judge Kaplan issued an "Order of Appointment," appointing three private attorneys (the "Special Prosecutors") to prosecute the criminal contempt charges against Donziger, as required by Rule 42(b), after the U.S. Attorneys' Office for the Southern District of New York "respectfully decline[d] on the ground that the matter would require resources that we do not readily have available." Civ. Dkt. 2277; JA-59. [1] Judge

[1] "Dkt." refers to an entry in this appeal; "Cr. Dkt." refers to an entry in *United States v. Donziger*, 19-cr-561; "Civ. Dkt." refers to an entry in the Civil Case; "GX" refers to a prosecution exhibit admitted into evidence at trial. Except where specified, GX numbers correspond to docket entries in the Civil Case.

Kaplan transferred the criminal contempt case, 19 Cr. 561, to Judge Preska. SPA-161-62.

Trial against Donziger commenced on May 10, 2021 and ended on May 17, 2021. On July 26, 2021, Judge Preska issued "Findings of Fact and Conclusions of Law" in a 245-page opinion, finding Donziger guilty on all six criminal contempt counts.

On October 1, 2021, Judge Preska sentenced Donziger to six months' imprisonment. Donziger began serving his sentence on October 27, 2021.

STATEMENT OF FACTS[2]

A. The Civil Case and RICO Judgment

This criminal contempt case arose from Donziger's repeated and willful disobedience of court orders over the course of years in the Civil Case.

The Civil Case began in 2011, when Chevron sued attorney Steven Donziger, Donziger's two law firms, 48 Lago Agrio Plaintiffs ("LAPs") and others, alleging that Donziger led a fraudulent and corrupt scheme to obtain an $8.5 billion judgment against Chevron in a lawsuit filed in Ecuador. GX 1 (11-cv-691 Docket Sheet); Cr. Dkt. 311 (Trial Tr.) at 76-78. Chevron alleged that Donziger and his co-conspirators engaged in, among other things, fraud,

[2] The facts set forth in the "Statement of Facts" as they relate to the Civil Case were proven at the May 2021 criminal trial before Judge Preska. Donziger has not challenged any of those findings on this appeal.

fabrication of evidence, bribery, and extortion in connection with the LAPs Ecuadorian lawsuit against Chevron, and that Donziger had violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act. *See* Cr. Dkt. 311 (Trial Tr.) at 76:2-78:23.

On behalf of his law firm, Donziger & Associates PLLC, Donziger signed a January 5, 2011 retainer agreement ("2011 Retainer") that granted his firm a 6.3% contingent interest in the Ecuadorian judgment. GX 1978-6 at 12; Tr. at 93:23-94:15. If collected in full, Donziger stood to make approximately $560 million. GX 1874 at 487-89, 1978-6; Tr. at 93:23-94:15. The "Assembly" was a group of indigenous groups in the Ecuadorian Amazon who had an interest in the Lago Agrio case. Tr. at 92:19-93:1.

Following a trial, on March 4, 2014 Judge Kaplan issued a decision and judgment in Chevron's favor ("RICO Judgment"). GX 1874, 1875; Cr. Dkt. 311 (Trial Tr.) at 81:18-82:9. Judge Kaplan found: (1) in connection with the Lago Agrio litigation, Donziger and those he worked with had engaged in numerous acts of fraud and corruption, as well as committed RICO violations, to obtain the $8.5 billion judgment; and (2) the Ecuadorian judgment was the "direct result of fraud by Donziger." GX 1874 at 354-406, 488-89. Judge Kaplan determined that Donziger should not profit from his fraud and RICO violations. GX 1874 at 487-89. To that end, Judge Kaplan imposed a constructive trust for the benefit of

Chevron on "all property" Donziger has or may receive that is traceable to the Ecuadorian judgment, and directed that Donziger transfer any such property to Chevron "forthwith." GX 1875 ¶ 1. Judge Kaplan prohibited Donziger from taking any acts to monetize or profit from that fraudulently procured judgment, and from enforcing the judgment in the United States. GX 1875 ¶ 5, 1874 at 481, 489, 497. Judge Kaplan's decision specifically included Donziger's 6.3% contingent fee granted by the 2011 Retainer in Paragraph One of the RICO Judgment, and his shares in Amazonia. GX 1874 at 281 n.1110, 489 and n.1821

Donziger appealed the RICO Judgment to the Second Circuit and, on March 18, 2014, moved for a stay pending appeal. GX 1888, 1899. On April 25, 2014, Judge Kaplan granted the stay, in part, but directed Donziger transfer those shares to the Clerk of the Court. GX 1899 at 16, 33. Judge Kaplan explained: "Allowing the shares to remain in Donziger's hands pending appeal would enable him to benefit from his fraud prior to any collections by selling the shares and by hiding or dissipating the sale proceeds." *Id*. at 16.

On August 8, 2016, the Second Circuit affirmed the RICO Judgment and, on June 19, 2017, the Supreme Court denied certiorari. GX 1914, 1922, 1923.

B. Donziger's Immediate Defiance of the RICO Judgment and Chevron's March 19, 2019 Motion for Contempt and Post-Judgment Discovery

While Donziger's appeal was pending, on August 7, 2014, Chevron's attorneys at Gibson Dunn & Crutcher LLP ("Gibson Dunn") wrote to Donziger requesting that he promptly comply with the Court's April 25, 2014 order and execute a stock power transferring his interest in Amazonia shares to the Clerk of the Court. GX 100 (Aug. 7, 2021 Email); Cr. Dkt. 317 (Trial Tr.) at 683:6-688:20. On August 21, 2014, Donziger told Chevron's attorneys that he would not transfer his interest in Amazonia. GX 102 (Aug. 22, 2014 Email).

After the Supreme Court denied certiorari, in June 2017 Chevron's attorneys asked Judge Kaplan to reactivate their motion for costs and alerted the District Court to the fact that Donziger "appears never to have complied" with the Court's April 25, 2014 order. GX 1922. Chevron requested that the Court order Donziger to "comply forthwith" with Paragraph Three of the RICO Judgment. *Id.*; Cr. Dkt. 311 (Trial Tr.) at 110-112; *see also* GX 1923 (requiring Chevron to make a formal motion for relief)

In February 2018, Judge Kaplan issued an $813,602.71 judgment ("Money Judgment") against Donziger. GX 1962, 1963; *see* SPA-35. Donziger noticed an appeal of the Money Judgment (No. 18-855). GX 1972; Cr. Dkt. 317 (Trial Tr.) at 632-33.

In March 2018, after Chevron obtained evidence that Donziger was in violation of Paragraph Five of the RICO Judgment, Chevron moved to hold Donziger in contempt. GX 1965, 1966. Chevron also moved for: (1) a contempt finding due to Donziger's failure to execute a stock power in favor of Chevron for his shares in Amazonia; (2) an order directing that Donziger preserve documents relating to the RICO Judgment and his compliance therewith; and (3) leave to conduct post-judgment discovery relevant to enforcement of the judgment and Donziger's compliance with the RICO Judgment. GX 1, 1965, 1966. Chevron argued that discovery was "necessary to determine *the full extent of Donziger's violations of the [RICO] Judgment and ensure compliance*." GX 1966 at 20 (emphasis added); *Id*. at 5 (requesting "leave to conduct post-judgment discovery of Donziger and those acting in concert with him, . . . in order to uncover the full extent of Donziger's violations [of the RICO Judgment]").

After that motion, litigation ensued regarding: (1) Donziger's refusal to transfer to Chevron his Amazonia shares and his contingent fee interest in the Ecuadorian judgment; and (2) post-judgment discovery regarding the Money Judgment and Donziger's compliance with the RICO Judgment. Cr. Dkt. 311 (Trial Tr.) at 125:1-25.

C. Donziger's Refusal to Transfer His Amazonia Shares and 2011 Contingent Fee Interest

At a May 8, 2018 hearing before Judge Kaplan, Donziger did not deny that he had not transferred his interest in the Amazonia shares to Chevron as directed four years earlier. GX 2010 at 27, 28, 29; *see also* GX 2010 at 36:14-22, 37:5-7; Cr. Dkt. 311 (Trial Tr.) at 135:13-36:2, GX 114 (May 9, 2018 Email) (handing and emailing share transfer forms).

Donziger ultimately executed a form with an accompanying addendum that sought to negate the transfer. GX 2003-3; Cr. Dkt. 311 (Trial Tr.) at 139:17-42:23. Judge Kaplan concluded that Donziger "made no effort to comply" with Paragraph Three of the RICO Judgment between 2014-2018. GX 2006 at 9. Notably, Judge Kaplan's decision also put Donziger on notice that he would consider a properly filed contempt motion directed at Paragraph One of the RICO Judgment. *Id*. at 14-15. In the weeks thereafter, Donziger did not execute any assignment of his interest in the 2011 Retainer to Chevron.

On June 25, 2018, Donziger appeared for a deposition. Chevron's attorneys presented Donziger with a general assignment form. GX 114 (May 9, 2018 Email), GX 201 (June 25, 2018 Depo. Tr.) at 229:21-231:20, 201-1; Cr. Dkt. 311 (Trial Tr.) at 153:21-56:25. Donziger refused to execute that document either at or after his deposition. GX 201 (June 25, 2018 Depo. Tr.) at 229:21-231:20; Cr. Dkt. 311 (Trial Tr.) at 155:10-25.

Chevron moved to compel, and on August 15, 2018, Judge Kaplan directed Donziger to execute and acknowledge before a notary public, and deliver to Chevron's counsel by August 21, 2018: (1) a transfer document for the Amazonia shares, GX 2048-2; and (2) a modified transfer and assignment (annexed to the Order as Exhibit 1), which would assign Donziger's right under the 2011 Retainer to Chevron. GX 2072 at 9; Cr. Dkt. 311 (Trial Tr.) at 160:11-168:6. Judge Kaplan specifically noted his prior finding that Donziger's "right to a contingent fee and the fee itself are property," which was "immediately assignable." GX 2072 at 7. Judge Kaplan limited the form to interest under the 2011 Retainer. GX 2072 at 12; Cr. Dkt. 311 (Trial Tr.) at 168:7-169:14.

On August 20, 2018, Donziger sought an extension through September 7, 2018 to "return from [foreign] travel and properly address the ethical issues raised by the ordered transfer," noting that he was seeking counsel "on the issue of transferring my contingency interest" because his "clients have forbidden [him]" to make such a transfer. GX 2075; Cr. Dkt. 311 (Trial Tr.) at 169:22-170:12. On August 21, 2018, Judge Kaplan again directed him to sign and notarize the forms. GX 2079 at 5-6. Donziger then provided a notarized version of the assignment of his contingent fee under the 2011 Retainer, but not the notarized version of the share transfer form for his Amazonia shares. GX 2085-1; Cr. Dkt. 311 (Trial Tr.) at 180-181.

On September 17, 2018, Chevron moved to hold Donziger in contempt and to impose coercive sanctions for his failure to comply with the District Court's August 15 and August 21 orders. GX 127 (Sept. 14, 2018 Email); GX 2084 at 9; Cr. Dkt. 311 (Trial Tr.) at 184-187. Only after Chevron's motion did Donziger, on October 5, 2018, provide to Chevron an executed and notarized transfer and assignment form of his Amazonia shares as directed. GX 2104-1; Cr. Dkt. 311 (Trial Tr.) at 187:13-20. Judge Kaplan then ruled that Chevron's motion was moot given the belated compliance. GX 2105.

D. The 2017 ADF Agreement Granting Donziger a Contingent Interest and His Refusal to Assign that Interest

At his deposition, Donziger testified he entered into a "subsequent agreement" with the ADF that "superseded" the 2011 Retainer. GX 201 (June 25, 2018 Depo. Tr.) at 14:8-10; 16:19-17:9; 28-29; 57:15-58:19; Cr. Dkt. 313 (Trial Tr.) at 200:24-05:13. And on June 28, 2018, Donziger produced to Chevron the new ADF Agreement—despite that it was responsive to a specific discovery document request from Chevron that Judge Kaplan had directed Donziger to comply with by June 15, 2018, a date that had already passed. GX 1989-1A (Document Request No. 26), 2009, 2165 at 2 n.3; Cr. Dkt. 313 (Trial Tr.) at 205:9-207:18. The new ADF Agreement was dated November 1, 2017 ("2017 ADF Agreement").

The parties to the 2017 ADF Agreement differed from the 2011 Retainer. GX 120 (June 29, 2018 Email); Cr. Dkt. 313 (Trial Tr.) at 217:19-18:4. Under the 2017 ADF Agreement, the ADF was the only party contractually bound to Donziger. The 2017 ADF Agreement stated that "the [ADF] hereby acknowledges, confirms and undertakes to support Mr. DONZIGER's existing contractual INTEREST or, alternatively, to the extent it is necessary or useful, hereby grants Mr. Donziger an INTEREST in his own right equal to Mr. DONZIGER's existing contractual INTERST. Such Interest. . . shall be understood to entitle Mr. DONZIGER to 6.3% of any funds recovered." GX 120 (June 29, 2018 Email) at 4.

After Chevron brought the 2017 ADF Agreement to the attention of the District Court, Judge Kaplan on August 7, 2018 informed the parties that Chevron had raised a "new and independent ground for holding Donziger in contempt," i.e.,. Judge Kaplan noted that Chevron could file a new motion. GX 2064 at 2; Cr. Dkt. 313 (Trial Tr.) at 215:20-217:7. On October 1, 2018, Chevron so moved. GX 2089. But Donziger did not forthwith assign to Chevron his interest in the 2017 ADF Agreement.

On February 21, 2019, Judge Kaplan directed the parties to file an executed instrument of assignment of the 2017 ADF Agreement on or before February 28, 2019. GX 2165 at 2-3; Cr. Dkt. 313 (Trial Tr.) at 222:25-223:6. Donziger did not

execute an assignment of his interest in the 2017 ADF Agreement by the date prescribed in Judge Kaplan's order. Cr. Dkt. 313 (Trial Tr.) at 225:22-24.

On May 23, 2019, Judge Kaplan found Donziger in willful civil contempt for, among other things, his "failure to assign and transfer to Chevron all rights to any contingent fee that he now has or hereafter may obtain including without limitation all such rights under the 2017 Retainer." GX 2209 at 69; Cr. Dkt. 313 (Trial Tr.) at 226:4-229:18. Judge Kaplan imposed coercive sanctions that would begin at $2,000 for May 28, 2019, doubling "for each subsequent day during which Donziger fails fully to purge himself of this contempt." GX 2209; Cr. Dkt. 313 (Trial Tr.) at 226:4-229:18. Following the civil contempt finding and imposition of coercive sanctions, on May 28, 2019, Donziger executed an assignment to Chevron of his interest in the 2017 ADF Agreement. GX 136 (May 28, 2019 Email), 2216-1; Cr. Dkt. 313 (Trial Tr.) at 229:19-230:9.

E. Post-Judgment Discovery Litigation

In connection with Chevron's March 19, 2019 post-judgment motion for discovery, Judge Kaplan issued an order stating that Chevron could conduct discovery in aid of enforcement of the monetary portion of the judgment without leave of the court. GX 1968. Chevron then served Document Requests and an Information Subpoena with an April 30, 2018 return date. GX 1989. Donziger did not produce a single responsive document, nor did he provide any privilege log.

Cr. Dkt. 313 (Trial Tr.) at 241-42, 296. Instead, Donziger objected to all of the Document Information Subpoena Requests. GX 112 (Apr. 30, 2018 Email). Chevron moved to compel and on May 17, 2018 the Court granted that motion. GX 2009. Judge Kaplan divided Chevron's April 16, 2018 discovery request into two categories: (1) "Money Judgment Discovery Requests" and (b) "Paragraph 5 Compliance Discovery." *Id.* Donziger was directed to comply fully with the Money Judgment discovery requests by June 15, 2018. *Id.* On May 31, 2018, Donziger filed a motion for declaratory relief and to dismiss Chevron's application to hold him in contempt for selling non-enjoined interests in the Ecuadorian judgment, arguing that Judge Kaplan's April 25, 2014 "stay" decision permitted him to raise funds to cover litigation fees by selling non-enjoined interests. GX 2018.

On June 15, 2018, after Judge Kaplan directed that Donziger produce Paragraph 5 Compliance discovery relating to a solicitation of a particular investor, Donziger moved for a protective order to preclude any discovery "that would tend to reveal the identity of any . . . material supporter of the Ecuador Litigation and/or the internal operational, organizational, administrative, or financial management practices of the teams of individuals and organizations that directly or indirectly oppose Chevron in the Ecuador litigation." GX 2026. Donziger stated the order was necessary to protect his and his colleagues' First Amendment rights. *Id.* As of

June 15, 2018, Donziger had produced approximately 18 pages of documents and no privilege log. GX 118; Cr. Dkt. 313 (Trial Tr. at 255:17-22).

On June 25, 2018, Donziger admitted at a deposition that he had withheld many responsive documents on First Amendment grounds and had not provided any privilege log. GX 201 at 47, 49, 232.

On June 25, 2018, Judge Kaplan denied Donziger's motions for a declaratory judgment and to dismiss the contempt motion (GX 2018), motion for a protective order (GX 2026), and a motion Donziger had filed for an emergency administrative stay related to some third-party discovery (Cr. Dkt. 2028). GX 2037. On June 27, 2018, Judge Kaplan issued a decision in support of that order. GX 2045.

On July 23, 2018, Judge Kaplan issued an order directing Donziger to produce to Chevron all of the Paragraph 5 Compliance Discovery by August 15, 2018. GX 2056. After Donziger's initial production of 18 pages of responsive documents to Chevron on April 30, 2018, Donziger produced just two additional responsive documents during 2018: (1) the 2017 ADF Agreement, which he produced on June 28, 2018; and (2) a document from the ADF providing Donziger additional authority to fundraise and pay litigation expenses, produced on July 5, 2018. Cr. Dkt. 313 (Trial Tr.) at 277.

On July 26, 2018, Donziger noticed an appeal from Judge Kaplan's June 27, 2018 decision and July 23, 2018 discovery order with the Second Circuit. GX 8 (2d Cir. No. 18-2191); Cr. Dkt. 313 (Trial Tr.) at 293:14-294:3. On August 13, 2018—two days before his deadline to comply with the July 23, 2018 discovery order—Donziger filed a motion in the District Court seeking a stay of "all discovery" while his Second Circuit appeal No. 18-2191 was pending. GX 2067 at 3; Cr. Dkt. 313 (Trial Tr.) at 294:10-295:21. When the August 15, 2018 discovery deadline came, Donziger did not produce any additional documents. Cr. Dkt. 313 (Trial Tr.) at 295-96. Nor did Donziger produce any privilege log. *Id.*

On August 16, 2018, Chevron moved to compel Donziger to fully comply with the Money Judgment Discovery Request and the Paragraph 5 Compliance Requests. GX 2073; Cr. Dkt. 313 (Trial Tr.) at 296:7-298:9. In response to the motion to compel, on August 26, 2018 Donziger filed a "Opposition to Chevron's Latest Motion to Compel And Reiterated Motion To Stay." GX 2077; Cr. Dkt. 313 (Trial Tr.) at 298:16-299:20. Donziger did not dispute that he continued to withhold responsive documents. GX 2077.

On September 25, 2018, Judge Kaplan issued an order denying Donziger's motion for a stay "in all respects." GX 2088; Cr. Dkt. 313 (Trial Tr.) at 300:10-302:7. Judge Kaplan pointed that the post-judgment discovery is aimed at: (1) discovering assets and sources of income to satisfy the outstanding money

judgment issued on February 28, 2018; and (2) determining whether Donziger has complied with the RICO judgment. GX 2088.

Following the stay denial, Donziger did not produce any additional responsive documents during 2018. Cr. Dkt. 313 (Trial Tr.) at 301:24-302:3. Donziger did not go to the Second Circuit to seek relief from this order denying his application for a stay. He did not seek a stay with the Second Circuit as part of his pending appeals, nor did he file a mandamus petition or seek any emergency or expedited relief. Cr. Dkt. 317 (Trial Tr.) at 654:1-655:16.

On October 18, 2018, Judge Kaplan issued an order granting Chevron's motion to compel "in its entirety." GX 2108 at 2; Cr. Dkt. 313 (Trial Tr.) at 302:15-303:25 (discussing GX 2108), 842:11-24 (confirming admission of GX 2108). Judge Kaplan further found that Donziger waived or forfeited any claim of privilege because of his failure to produce a privilege log as required by Fed. R. Civ. P. 26(b)(5) and S.D.N.Y. Civ. R. 26.2. *Id*. Judge Kaplan ordered that Donziger "shall comply fully with the outstanding discovery requests forthwith without holding any responsive documents or information on privilege grounds." *Id.* Judge Kaplan also directed because of Donziger's "stonewalling of post-judgment discovery" it was appropriate that "Donziger's devices be imaged and examined for any responsive documents that Donziger has thus far not produced under appropriate safeguards of the interests of all parties." *Id.*

On October 25, 2018, Donziger advised Judge Kaplan that he would not comply. GX 2118; Cr. Dkt. 313 (Trial Tr.) at 307:15-308:6. Donziger did not go to the Second Circuit to seek any form of relief from the October 18, 2021 order. Cr. Dkt. 317 (Trial Tr.) at 654, 655. At a January 8, 2019 conference, Judge Kaplan pointed out to Donziger that he had no stay. GX 2149; Cr. Dkt. 313 (Trial Tr). at 312-317.

Because of Donziger's "obdurate refusal to make any serious, good faith effort to produce the documents he has been ordered to produce," on March 5, 2019 Judge Kaplan entered a Forensic Protocol Order (the "Protocol Order") that directed Donziger to: (a) provide by March 8, 2019 a sworn list to a court-appointed Neutral Forensic Expert of all devices and accounts he had used since March 2012 to communicate or store information; and (b) surrender his electronic devices on March 18, 2019 to the Neutral Forensic Expert for imaging. Civ. Dkts. 2171, 2172; SPA-99-103. Donziger did not appeal the Protocol Order, nor did he seek a stay or mandamus relief with the Circuit. Cr. Dkt. 317 (Trial Tr.) at 656.

Donziger did not comply with the Protocol Order. *Id.* at 792-796. Donziger informed the Neutral Forensic Expert, Ondrej Krehel, that "I will voluntarily go into civil contempt of the legally unfounded orders in order to obtain appellate review. . . . I hope you have not cleared your schedule to work on this matter, because, as Chevron knows, I will not be producing documents until my Due

Process rights are respected." GX 133 (March 11, 2019 Email); Cr. Dkt. 317 (Trial Tr.) at 794-96.

During post-judgment discovery of third parties, Chevron obtained evidence from life coach David Zelman in the form of deposition testimony and documents, that Donziger had pledged a portion of his own personal contingency interest in the Ecuadorian judgment to Zelman in exchange for approximately $14,000 for coaching services. Cr. Dkts. 313 at 355, 315 at 569-77, 317 at 615-6; GX 105 (Dec. 21, 2016 Email). In a December 23, 2016 email, Donziger memorialized this agreement. GX 105 (Dec. 21, 2016 Email), 106 (Dec. 23, 2016 Email); Cr. Dkt. 315 (Trial Tr.) at 576-77. On March 20, 2019 Chevron moved to hold Donziger in contempt for this conduct. GX 2179. Following that motion, Donziger spoke with Zelman and, in an April 21, 2019 email, Zelman told Donziger that "I am cancelling our deal" and "we have NO agreement going forward from this date." GX 135; Cr. Dkt. 315 (Trial Tr.) at 590-91.

F. Contempt Findings and Coercive Sanctions

On May 23 and 29, 2019, Judge Kaplan found Donziger in civil contempt for, among other things: (1) violating the RICO Judgment by failing to transfer his interest in the 2017 ADF Agreement; (2) violating the RICO Judgment by pledging to a life coach a portion of his interest in the judgment in exchange for personal services; (3) violating the RICO Judgment by selling non-enjoined interests in the

Ecuadorian judgment; (4) making transfers of money out of his personal checking account, in violation of a restraining notice prohibiting transfers of property in which he had an interest; (5) disobedience of the Protocol Order by failing to provide to the Neutral Forensic Expert a list of the devices and accounts he had used since March 2012; and (6) disobedience of the Protocol Order by failing to surrender his devices to the Neutral Forensic Expert. Civ. Dkts. 2209, 2222; SPA-109-111. To coerce compliance with the Protocol Order, Judge Kaplan imposed daily escalating fines until Donziger purged the contempt. *Id.* Donziger noticed an appeal from Judge Kaplan's contempt findings, which was docketed as 19-584. GX 9 (2d Cir. No. 19-1584 Docket Sheet).

On May 29, 2019, Donziger emailed Krehel a declaration purporting to list his devices or accounts. GX 138 (May 29, 2019 Email), 2230-1. On June 5, 2019, Donziger emailed Krehel a revised declaration providing additional information. GX 140 (June 5, 2019 Email), 2230-1; Cr. Dkt. 317 (Trial Tr.) at 806-807. Chevron disputed the completeness and accuracy of the information Donziger provided and argued that Donziger had not purged his contempt with respect to that portion of the Protocol Order. GX 2229.

At a June 10, 2019 hearing on whether he had purged the contempt, Donziger stated he could not pay the fines and did not dispute that he had not surrendered his devices for imaging as directed. GX 2352 at 14; Cr. Dkt. 313

(Trial Tr.) at 338. On June 11, 2019, Judge Kaplan issued an order, as an additional coercive measure, directing Donziger to surrender any passports to the S.D.N.Y. Clerk by June 12, 2019 at 4 p.m. Civ. Dkt. 2232; SPA-115-116. Donziger did not comply. Civ. Dkt. 2366; SPA-120. Donziger did not seek appellate relief from this order. Cr. Dkt. 317 (Trial Tr.) at 657.

On June 28, 2019, Judge Kaplan suspended further accumulation of the coercive fines because "it does not appear that the further accumulation of monetary civil contempt sanctions for these violations is likely to have the desired effect." GX 2252; SPA-118.

On July 2, 2019, Judge Kaplan conditionally granted Donziger a stay pending appeal of specific provisions of the Protocol Order that required or permitted disclosure to Chevron. GX 2254; SPA-118-119. However, Judge Kaplan conditioned that stay on Donziger filing his appellate brief by July 31, 2019. *Id.* Donziger did not file his appellate brief until September 9, 2019, and he did not surrender his passports to the Clerk of Court as directed. Nor did Donziger apply to Judge Kaplan for any extension of time. Cr. Dkt. 313 (Trial Tr.) at 349:15-18; GX 9 (2d Cir. No. 19-1584 Docket Sheet). Moreover, despite claiming in his June 12 motion for a stay that he was "immediately turning to the task of preparing an emergency stay to the Circuit in the event Your Honor denies this motion," GX 2234 at 15 n.6, Donziger sought no stay with the Circuit. GX 9 (2d

Cir. No. 19-1584 Docket Sheet). On appeal, Donziger did not challenge the Protocol Order and he did not challenge the civil contempt findings as related to the Protocol Order. GX 317 (Sept. 9, 2019 2d Cir. No. 19-1584 Donziger Brief); Cr. Dkt. 317 (Trial Tr.) at 651-52.

G. The Filing of Criminal Charges and the Appointment of the Special Prosecutors

On July 31, 2019, Judge Kaplan filed the OTSC charging Donziger with six counts of criminal contempt in violation of 18 U.S.C. § 401(3). Civ. Dkt. 2276; JA-49. Counts One through Three arose from Donziger's repeated refusal to obey court orders during the Civil Case post-judgment discovery proceedings. Counts Four through Six concerned Donziger's violation of the RICO Judgment with respect to Donziger's *personal* interests in the Ecuadorian judgment.

Also on July 31, 2019, Judge Kaplan, "pursuant to Fed. R. Crim. P. 42(a)(2) and the inherent power of the court," issued an "Order of Appointment" appointing three private attorneys at Seward & Kissel LLP "to prosecute Steven Donziger on the criminal contempt" charges set forth in the OTSC.[3] JA-59. The order stated that the prosecution had been first tendered to the U.S. Attorney for the S.D.N.Y., who "respectfully decline[d] on the ground that the matter would require resources

[3] In March 2021, Rita M. Glavin and Sareen K. Armani left Seward & Kissel LLP to work at Glavin PLLC. Brian Maloney remains at Seward & Kissel LLP.

that we do not readily have available," Civ. Dkt. 2277; JA-59. Judge Kaplan transferred the matter to Judge Preska in accordance with Rule 14 of the Rules for the Division of Business Among District Judges. SPA-161-62.

H. The January 6, 2020 Pretrial Conference

In advance of a January 6, 2020 pretrial conference, in a December 31, 2019 letter the defendant requested that the District Court direct the prosecutors to "disclose the full extent of their firm's ties to the Chevron Corporation." The defendant further requested clarification as to "whether and the extent to which Judge Kaplan has played or is playing a continuing role in this prosecution." *Id.*

The Special Prosecutors responded by letter dated January 3, 2020. Cr. Dkt. 50. The prosecution noted that "prior to taking on this representation, Seward performed appropriate conflict checks" and that the prosecution team did not have conflicting loyalties that "call[] into question the objectivity of those charged with bringing a defendant to judgment" pursuant to *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 809-10, 813-14 (1987).

In a January 5, 2020 letter to the District Court, Donziger requested that "the Court require the prosecutors to disclose the full extent and nature of the business, professional and personal relationships between Seward and its clients and Oaktree and Chevron." Cr. Dkt. 51 at 2. Defense counsel stated that he had consulted with a legal ethics expert, "from whom I expect to request a written opinion." *Id.*

On January 6, 2020 the parties appeared before Judge Preska for a pretrial conference. Defense counsel made repeated statements that he would further consult with his ethics expert to obtain a legal opinion and make a submission to the Court. JA-70, JA-72, JA-78. The Special Prosecutors responded that neither the special prosecutors nor their law firm Seward "have existing client relationships that would result in the . . . prosecutors having conflicting loyalties . . . that would cause the independence of our decision making on behalf of. . . the United States in this case, to be anything but impartial and objective." JA-65, 72-73.

After Judge Preska asked about a motion schedule, defense counsel said that he would file a submission with an opinion from his ethics expert "on an expedited basis within the next. . . two weeks"—i.e., January 20. JA-78. As for pretrial motions, the defense agreed they would be filed by February 14, 2020. JA-79. Ultimately, the pretrial motions deadline was extended to February 27, 2020, and the ethics opinion was likewise not filed until that date. JA-82; *see also* SPA-143 & n.499.

I. The Pretrial Motions and the District Court's Order Denying the Pretrial Motions

On February 27, 2020, Donziger moved, among other things, to (1) disqualify all judges from the Southern District of New York ("S.D.N.Y."), from presiding over the case or to have a jury empaneled if an S.D.N.Y. judge presides;

(2) disqualify the special prosecutors based on their law firm's ties to the oil and gas industry and Chevron Corporation ("Chevron"); and (3) dismiss the contempt charges with prejudice. *See* SPA-302; Cr. Dkt. 60. With that motion, Donziger attached an ethics opinion alleging that the Special Prosecutors were not disinterested because of ties to Chevron and the oil and gas industry.

The Special Prosecutors opposed the motions. With respect to whether the Special Prosecutors were disinterested under *Young*, the prosecution submitted a declaration filed by Seward's co-General Counsel, which laid out facts confirming that there was no issue under *Young*, and that the special prosecutors were not subject to conflicting loyalties in this case. JA-83-86; JA-84 at ¶¶ 3-4 (declaration); *see id.* at ¶ 4(g)-(i) (only work Seward had performed for Chevron in the last 10 years was corporate work in 2016 and 2018 involving the preparation of corporate forms and issuance of related legal opinions for two Chevron foreign affiliates, concluding in March 2018); *id.* at ¶ 4(e)-(i) (total fees and disbursements relating to that work of $30,403.73, constituting an immaterial portion of Seward's revenues (far less than 0.1%) in those years); *id.* (noting Seward had no current attorney-client relationship with Chevron).

On May 7, 2020, the District Court denied all of the defendant's pretrial motions. SPA-302. The District Court found in pertinent part that disqualification was unwarranted based on the standards set forth in *Young*. SPA-316-17; *see id.*

SPA-318-19 ("Seward's prior work for Chevron—completing corporate forms and opinion letters for Chevron's foreign affiliates—has absolutely nothing to do with this case."); *see also* SPA-319-21 (rejecting arguments concerning "Chevron's foreign structure" or the implication that privilege issues might impact the special prosecutors' ability to disclose information from Chevron).

J. The Trial and Defense Motion to Dismiss Based on the Appointments Clause

On January 20, 2021, the District Court directed that the trial would begin on May 10, 2021. Dkt. 242. In a May 5, 2021 order, the District Court notified the parties that "[t]rial in this matter will begin on May 10, 2021 at 10:00 a.m." and directed that "Counsel shall appear at 9:45 a.m. on May 10 to discuss trial logistics." JA-289. On May 6, 2021, in denying Donziger's third motion to dismiss, the District Court reiterated that "[t]rial in this matter will begin, as scheduled, on May 10, 2021 at 10:00 a.m." SPA-290.

Trial in this matter commenced on May 10, 2021. Moments before opening statements, Donziger's counsel Martin Garbus claimed "We have learned through a letter from the Department of Justice on Friday that it's declining, Department of Justice was declining to exercise any supervision over the prosecution in this case. This lack of supervision means that the prosecutor is free floating..." JA-125-26. Garbus said he had a written motion on the issue, and the Court stated that it would not rule without briefing. JA-126. The motion was not filed until later that day.

This motion to dismiss was the first time the defense had raised any challenge to the Special Prosecutors under the Appointments Clause. *See* Cr. Dkt. 302; SPA-135-40. The motion attached an April 2, 2021 letter from attorney William Taylor to U.S. Department of Justice ("DOJ") Acting Deputy Attorney General John P. Carlin, which requested that DOJ "order a review of the [criminal contempt] prosecution [of Donziger] and, if necessary direct the special prosecutor to seek an indefinite adjournment of the scheduled May 10, 2021 trial until the review can be completed." Dkt. 302-1 at 22-23. Taylor raised issues regarding the criminal contempt case and argued that the "special prosecutor is—like a court-appointed interim United States Attorney—an 'officer of the Department of Justice under the direction of the Attorney General.'" *Id.* at 21. The motion to dismiss, however, did not include the "letter" from the DOJ that defense counsel had referred to earlier in the day.

On May 12, 2021, Judge Preska informed the defense that the purported letter from DOJ that defense counsel had cited on May 10 was not included in the motion. JA-136-37. On May 13, 2021, defense counsel filed a declaration to supplement the May 10 motion, which finally included the communication referenced on May 10. JA-156. The communication was not a "letter" as represented by defense counsel, but a May 7, 2021 email from Acting Deputy Attorney General John P. Carlin to attorney William Taylor stating: "The

Department has received your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal-court initiated contempt proceedings." *Id.*

On May 14, 2021, Judge Preska explained that the "double hearsay" email did not say what defense counsel proffered to the Court on May 10. JA-151-52. The Court ruled: "There is no point in going on about the discovery, sir. Your moving papers have given the Court absolutely no basis on which to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive Branch." JA-153.

The Special Prosecutors rested on May 14, 2021 after calling seven witnesses. Trial concluded on May 17, 2021, after the defense informed the Court that it would not be calling any witnesses, and Mr. Donziger waived his right to testify. JA-145.

K. Post-Trial Proceedings

After trial, the parties submitted proposed findings of fact. Cr. Dkts. 326, 327, 328. The defense also filed another motion to dismiss based on *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), alleging that the Special Prosecutors were outside of any "chain of command" of supervision by the DOJ. Cr. Dkt. 330.

On July 26, 2021, the District Court found Donziger guilty of all six counts charged in the OTSC. SPA-1. In that decision, the District Court denied

Donziger's post-trial motion to dismiss, determining that because Donziger's Appointments Clause claim was non-jurisdictional, Mr. Donziger waived or forfeited that claim by failing to raise it until the first day of trial, citing to Fed. R. Crim. P. 12(b)(3) and finding the motion untimely. SPA-135-53.

The Court also found that Donziger's motion failed on the merits. SPA-143-53. Among other things, the Court ruled that Fed. R. Crim. P. 42 does not, in any way, limit the Attorney General's discretion to "review the Special Prosecutors' decisions or remove them from their posts" and the fact that the DOJ "may not have supervised the Special Prosecutors to Mr. Donziger's satisfaction... is of no moment." SPA-151-53.

On August 3, 2021, Donziger moved under Rule 33 for a new trial "on the ground that the Special Prosecutor was not subject to the constitutionally required supervision and direction of a principal officer of the Executive Branch at the time the case came before the Court for trial." Cr. Dkt. 351. Donziger again made arguments concerning the Appointments Clause and contended that his May 10, 2021 motion to dismiss was "timely." *Id.* Donziger did not raise any "interbranch appointments" argument.

The District Court denied Donziger's motion on August 23, 2021, finding again that the Appointments Clause argument had been waived, and that, on the

merits "the[] [Special Prosecutors] were not 'free agents' as Mr. Donziger claims." SPA-261-62.

On October 1, 2021, the District Court sentenced Donziger to six months' imprisonment and denied bail pending appeal. Cr. Dkt. 389 (Oct. 1, 2021 Sentencing Tr.) at 60-61. After the Second Circuit affirmed the District Court's denial of bail, Donziger began serving his sentence on October 27, 2021. Dkt. 391.

ARGUMENT

POINT I

DONZIGER'S APPOINTMENTS CLAUSE AND INTERBRANCH APPOINTMENT ARGUMENTS ARE UNTIMELY AND WAIVED

Because Donziger did not raise his Appointments Clause challenge until the first day of trial, well after the pretrial motions deadline, he waived the argument under Fed. R. Crim. P. 12(b)(3)(A). Further, because Donziger did not raise his "interbranch appointment" arguments before the District Court and only made them for the first time on this appeal, those arguments are similarly waived.

A. Applicable Law

Under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, a motion alleging a defect in instituting the prosecution must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits. *See* Fed. R. Crim. P. 12(b)(3)(A). If such a motion is not made prior to trial, it is untimely. Fed. R. Crim. P. 12(c)(3). When

such a motion is made in an untimely fashion before the district court, it must be denied absent a showing of good cause. *United States v. O'Brien*, 926 F.3d 57, 82-84 (2d Cir. 2019); *United States v. Crowley*, 236 F.3d 104, 110 and n.8 (2d Cir. 2000); *see also United States v. Suescun*, 237 F.3d 1284, 1286-88 (11th Cir. 2001). Failure to show good cause results in forfeiture of the claim. As the Supreme Court explained in *Davis v. United States*:

> If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial.

411 U.S. 233, 241 (1973).

The amendments to Rule 12 of the Federal Rules of Criminal Procedure, and the elimination of the word "waiver" from the Rule, did not change the operative standard. *See United States v. Mulholland*, 628 F. App'x 40, 42 n.2 (2d Cir. 2015) (summary order) (citing *United States v. McMillian*, 786 F.3d 630, 636 and n.3 (7th Cir. 2015)); *accord United States v. Bowline*, 917 F.3d 1227, 1237 (10th Cir. 2019) (collecting cases, and concluding that "we will not review an untimely Rule 12 argument absent good cause.") *cert. denied Bowline v. United States*, No. 19-5563, 2020 U.S. LEXIS 947 (Feb. 24, 2020); *see also Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than

that a constitutional right may be forfeited . . .by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

Plain error review is unavailable if a defendant fails to show "good cause" for not raising a Rule 12(b)(3) argument until at or after trial. *See United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (finding complete waiver of an untimely suppression argument absent a showing of cause); *Bowline*, 917 F.3d at 1237; *see also United States v. Simmons*, No. 08-CR-1280, 2020 U.S. Dist. LEXIS 202878, at *8 (S.D.N.Y. Oct. 29, 2020) ("Second Circuit case law seems fairly clear that under Rule 12, as amended in 2014, a party's failure to raise a 12(b)(3) issue before trial constitutes a complete waiver of that issue absent a showing of good cause . . ."). "A strategic decision by counsel not to pursue a claim, inadvertence of one's attorney, and an attorney's failure to timely consult with his client are all insufficient to establish cause." *Yousef*, 327 F.3d at 125. This Court has noted it reviews a district court's grant or denial of relief from the failure to raise issues by a pretrial motion for abuse of discretion or clear legal error. *See Crowley*, 236 F.3d at 110 (construing former Rule 12(f)).

Nonetheless, if plain error review applied, appellant must demonstrate "three threshold requirements":

> *First*, there must be an error. *Second*, the error must be plain. *Third*, the error must affect "substantial rights," which generally means that there must be "a reasonable

> probability that, but for the error, the outcome of the proceeding would have been different.

Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (emphasis in original). "If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 2096-97 (internal quotations and citations omitted). Plain error "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (citation and internal quotation marks omitted). The appellant "bears the burden of persuasion on appeal to show that the district court committed plain error." *United States v. Gore*, 154 F.3d 34, 42 (2d Cir. 1998). "The defendant has the burden of establishing each of the four requirements for plain-error relief." *Greer*, 141 S. Ct. at 2097.

B. Discussion

The District Court correctly concluded that Donziger's challenge to the appointment of the Special Prosecutors was untimely, because "any defect in the. . .appointment would have (or at the very least should have) been apparent from the outset of this case, *i.e.*, from the moment the Special Prosecutors were appointed by Judge Kaplan on July 31, 2019." SPA-142. Donziger's Appointments Clause argument made on the first day of trial, and his "interbranch appointment" argument made for the first time on this appeal, both suffer from this defect. These

are issues that could have (or at the very least should have) been made by the pretrial motions deadline, "before the court, the witnesses, and the parties ha[d] gone to the burden and expense of a trial." *See Davis*, 411 U.S. at 241; *see also* JA-82 (setting pretrial motions deadline at February 27, 2020)

The choice not to raise the argument until the first day of trial was strategic, as the details were plainly available from the outset of the case. JA-59. On April 2, 2021, William Taylor sent a 22-page letter on Donziger's behalf requesting that DOJ review this case and, tellingly, seeking an "indefinite adjournment of the scheduled May 10, 2021 trial. JA-102-123; *see also* JA-122 (arguing the "constitutionally-required oversight of the special prosecutor in Mr. Donziger's case must come from the Department of Justice."). Even at that late date, more than a year after the pretrial motions deadline had expired, the defense could have raised their Appointments Clause or interbranch appointment claims prior to the commencement of trial – but they did not do so. The basis for their claims was reasonably available from the outset, and could be determined without a trial on the merits. Those arguments are untimely and waived.

Second Circuit authority amply supports this conclusion. Just as the constitutional claims in *O'Brien* challenging Congress's delegation of authority to designate certain substances as controlled substances – which "posits that the targeted conduct has been designated a crime by an entity not constitutionally

authorized to say that any person may be prosecuted for that conduct"—were rejected as untimely by the Second Circuit because such a claim relates to a defect in the institution of the prosecution (or the failure to charge a cognizable offense) (926 F.3d at 83-84), so too are Donziger's objections to the authority of the Special Prosecutors to prosecute the criminal contempt charges on the ground that their appointment is violative of the Appointments Clause or suggesting that a different prosecutor should have prosecuted the charges.

Donziger contends that his timing is earlier than in other cases such as *Lucia v. SEC*, *United States v. Ryder* and *Arthrex*, but those cases involve challenges to the constitutional validity of the appointment of an officer who *adjudicates* a defendant's case. This derives from *Ryder*, in which the Supreme Court declined to apply the *de facto* officer doctrine and permit an Appointments Clause challenge to proceed because the "petitioner challenged the composition of the Coast Guard Court of Military Review. . .on direct review. . . petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder v. United States*, 515 U.S. 177, 182 (1995). In *Lucia*, the challenge to the administrative law judges of the SEC was likewise raised before the Commission on review of the initial decision, 138 S. Ct. 2044, 2053 (2018), and in *Arthrex* the Supreme Court took up review because the decision of the Federal Circuit taking up the Appointments Clause challenge had "satisfied no one." 141 S. Ct. at 1978.

In any event, a timeliness issue was not litigated in *Lucia* or *Arthrex*, and most importantly, none of those cases are criminal matters that concerned defects in instituting the prosecution.

Donziger also argues that because the Special Prosecutors never raised an untimeliness objection before the District Court, the prosecution waived any claim of procedural forfeiture. *See* Def. Br. at 45 (citing *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994)). The defense is wrong. In *Quiroz*, the government had neglected to *argue on appeal* that a defendant had failed to preserve a particular argument in the District Court, thus waiving its waiver argument. *Quiroz*, 22 F.3d at 491.[4] Here, the District Court correctly found that Donziger failed to comply with Fed. R. Crim. P. 12(b)(3) and had submitted an untimely motion (that is in any event without merit). SPA-142-43.

The defense suggestion, per *Eberhart* and *Johns-Manville*, that "a court has no obligation to raise the untimeliness issue on its own motion" fails to grapple with the requirement that a defendant is required first to establish "good cause" in order for the district court to consider an untimely motion. Fed. R. Crim. P.

[4] The other cases cited by Donziger are likewise distinguishable. *See United States v. Waite*, 12 F.4th 204, 211 (2d Cir. 2021) (concerning whether a defendant's appeal was timely under Fed. R. App. P. 4(b) and noting "the government has affirmatively waived reliance on untimeliness as a basis for dismissing Waite's appeal."); *United States v. Kantor*, 853 F. App'x 723, 725 n.2 (2d Cir. 2021) (same, where the government "opposed the appeal only on the merits").

12(c)(3). And even if "good cause" had been established, Donziger cannot overcome plain error review.

As for Donziger's contention that the alleged constitutional violation was not "a defect in instituting the prosecution," Def. Br. at 47, the District Court correctly found that Donziger's "Appointments Clause contention alleges 'a defect in instituting the prosecution,'" and should have been made pretrial. SPA-143; Cr. Dkt. 386 at 11-13; *see also* Fed. R. Crim. P. 12(b)(3)(A), 2014 Amendment Committee Notes ("The amendment adds a *nonexclusive* list of commonly raised claims under [motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information"].) (emphasis added); *see also* SPA-143 & n.500 (citing *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362 (1963)) (finding motion untimely despite not being enumerated in Rule 12)). Donziger's challenge falls squarely within this rule. While the defense contends that it relied on "the intervening decision in *Arthrex*," that decision was based on jurisprudence outlined in the defense's April 2, 2021 letter, dating back at least to *Edmond v. United States*, 520 U.S. 651 (1997).

Further, Donziger's claim that his Appointments Clause argument based on the lack of DOJ supervision was not "reasonably available" until DOJ "turned down" his April 2, 2021 request is similarly meritless. The May 7, 2021 email from DOJ official John Carlin said nothing about whether the Special Prosecutors

were within the Executive Branch chain-of-command and subject to the Attorney General's supervision. Notably, as discussed in more detail *infra*, DOJ did not disavow Mr. Taylor's argument in his April 2, 2021 letter that under 28 U.S.C. § 516 "[f]ederal law confers oversight over litigation in which the United States has an interest on the Attorney General." Dkt. 302-1 at 20. The April 2 letter to DOJ demonstrates that the defense knew that, by statute, the Attorney General supervises the conduct of litigation in which the United States is a party or is interested. Nothing about the Carlin email declining "to intervene" in this criminal contempt case in the manner requested by Mr. Taylor changed the fact that Donziger had his Appointments Clause argument readily available to him before May 10, and certainly before April 2 when he asked DOJ—under its oversight power over litigation by the United States—to review the prosecution and direct the Special Prosecutors to seek an "indefinite adjournment" of the trial until completion of the review.

The Appointments Clause challenge was reasonably available to the defense from the moment the Special Prosecutors were appointed pursuant to Rule 42, but the defense chose tactically to delay until the first day of trial. Further, the defense did not even provide their full written motion and the materials on which that motion was based until trial proceedings were well underway. *See* JA-126, 129, 132, 136, 143, 145-154 (colloquy on motion); *id.* at JA-145-46 ("the

communication that you reference is not a formal memorandum or even a letter . . . it's an email message. . . .sent to a Mr. William Taylor, who then forwarded it to Mr. Donziger."); *see also* SPA-259 ("To say that Mr. Donziger waited until the last possible minute would be a monumental understatement.").

For the same reasons, the Appointments Clause challenges that the Special Prosecutors were not appointed "by law" or that the interbranch appointment of the Special Prosecutors raises separation-of-power concerns, raised for the first time on this appeal, are likewise hopelessly untimely.

Finally, even under a plain error standard, for the reasons set forth above, and *infra*, there was no plain error. Indeed, given the Supreme Court precedent in *Young* upholding that a court may appoint a private attorney to prosecute a criminal contempt, there could be no plain error.

POINT II

THE SPECIAL PROSECUTORS ARE NOT "OFFICERS" SUBJECT TO THE APPOINTMENTS CLAUSE

The DOJ's lengthy *Amicus Curiae* Brief in Support of Appellee argues that the Special Prosecutors, appointed pursuant to Rule 42(b) to prosecute only this criminal contempt case, are not "officers" subject to the Appointments Clause. As set forth in *Lucia*, "an individual must occupy a 'continuing' position established by law to qualify as an officer." 138 S. Ct. at 2051. That is the case here, as a person vested with sovereign authority on an "'occasional or temporary'" basis does not

hold an "office," and therefore is not an "officer" within the meaning of the Appointments Clause. *Id.* at 2051. If the Special Prosecutors are not officers, "the Appointments Clause cares not a whit about who named them." *Id.*

The Special Prosecutors agree with the DOJ that they are not "Officers" subject to the Appointments Clause for the reasons set forth by DOJ, and the Special Prosecutors adopt DOJ's arguments by reference herein. The Special Prosecutors have been appointed only to prosecute Steven Donziger in the criminal contempt charges set forth in the OTSC. As such, this is a temporary and narrow assignment exercising sovereign authority. Thus, the Special Prosecutors are not "officers."

POINT III

EVEN IF THE SPECIAL PROSECUTORS WERE "OFFICERS," THE SPECIAL PROSECUTORS ARE SUBJECT TO THE ATTORNEY GENERAL'S SUPERVISION BY STATUTE

While Rule 42(a)(3) specifically requires the District Court to appoint an attorney to prosecute criminal contempt charges if the DOJ declines, such an judicially-appointed attorney is still subject to statutory supervision by the Attorney General pursuant to 28 U.S.C. §§ 516, 519. Because of that legal framework, the Special Prosecutors are necessarily subject to supervision by the Attorney General within the Executive Branch chain-of-command.

A. Applicable Law

1. The Judiciary's Appointment Power

Courts possess the inherent authority to initiate contempt proceedings, and to appoint a private attorney to prosecute contempt charges. *Young*, 481 U.S. at 793; *id.* at 795-96 ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.") (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

The independent power of the judiciary to punish contempts of its authority did not originate with *Young* but, as set out in numerous precedents, is well settled. *See Int'l Union v. Bagwell*, 512 U.S. 821, 831 (1994) ("Courts. . . have embraced an inherent contempt authority. . . as a power 'necessary to the exercise of all others'") (citations omitted) (quoting *United States v. Hudson*, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812)). In *Ex Parte Robinson*, for example, the Supreme Court explained:

> The power to punish for contempts is inherent in all courts . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

86 U.S. (19 Wall.) 505, 510 (1873). As stated in *Young*, this encompasses the authority to appoint an attorney to prosecute a contempt action where necessary to

do so, "without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory.'" 481 U.S. at 796.

Further, the appointment of the Special Prosecutors in this case "was expressly compelled by Rule 42(a)(2), which was promulgated by the Supreme Court and adopted by Congress pursuant to the Rules Enabling Act, 28 U.S.C. § 2072." Dkt. 346 at 141 n. 509 (SPA-145). Indeed, the Federal Rules of Criminal Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [their] mandate[s] than they do to disregard constitutional or statutory provisions." *Bank of N.S. v. United States*, 487 U.S. 250, 254-55 (1988) (holding federal court may not invoke supervisory power to circumvent Fed. R. Crim. P. 52(a)).

2. The Appointments Clause

The Appointments Clause provides that the President shall nominate, with the advice and consent of the Senate, "Officers of the United States" and that "Congress may by law, vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

The Supreme Court's recent Appointments Clause jurisprudence is primarily focused on ensuring that adjudicators within the Executive Branch remain within a chain of command ultimately responsible and accountable to the President and the

people. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (concerning administrative patent judges, and finding that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch"); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (holding that the structure of the CFPB violates the separation of powers); *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018) (holding that Securities and Exchange Commission administrative law judges ("ALJs") were "Officers of the United States" subject to the Appointments Clause where those ALJs held a continuing position established by law, received a career appointment to a position created by statute, and exercised "nearly all the tools of federal trial judges" to take testimony, conduct trials, make rulings on evidence and enforce compliance with discovery orders); *Edmond*, 520 U.S. at 666 (judges of the Coast Guard Court of Criminal Appeals); *Ryder*, 515 U.S. at 180 (appellate military judges on the Coast Guard Court of Military Review); *Freytag v. C.I.R.*, 501 U.S. 868, 881-82 (1991) (special trial judges appointed by the Chief Judge of the Tax Court).

Indeed, in this regard the Supreme Court in *Arthrex* expressly limited the reach of its holding, noting that "we do not address supervision outside the context of adjudication." 141 S. Ct. at 1986.

3. The Attorney General's Supervisory Authority over Litigation in which the United States is a Party

The Attorney General is the head of the Department of Justice and has supervisory power over all litigation to which the United States is a party. 28 U.S.C. §§ 503, 509, 516, 519. 28 U.S.C. § 516 provides that "Except as otherwise authorized by law, the conduct of litigation in which the United States. . .is a party. . .is reserved to officers of the Department of Justice, under the direction of the Attorney General." And 28 U.S.C. § 519 provides in relevant part that, "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States. . .is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

B. Discussion

Donziger contends either that (1) the Special Prosecutors lacked constitutional authority to act as inferior officers because they were not subject to any supervision or direction by a principal officer, within the meaning of the Appointments Clause; or (2) that the Special Prosecutors lacked constitutional authority as inferior officers because Congress did not authorize the appointment; or that (3) the prosecution was inconsistent with aspects of the Supreme Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787. Def. Br. at 2. These arguments are unavailing.

Assuming *arguendo* that the Special Prosecutors are "officers" subject to the Appointments Clause, there is statutory supervision by the Attorney General (as Donziger's counsel argued in the April 2, 2021 letter to DOJ) and that suffices for purposes of the Appointments Clause.

As a preliminary matter, the Special Prosecutors' limited functions do not animate the same type or degree of concerns addressed in *Arthrex* and other Appointments Clause cases. The powers of the Special Prosecutors are nothing like the patent judges in *Arthrex,* the SEC administrative law judges in *Lucia*, the military judges in *Edmond* or *Ryder*, or the special trial judges of the Tax Court in *Freytag*. Those judges generally issued binding decisions on behalf of the Executive Branch. And, unlike concerns flagged in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), or *Free Enter. Fund v. Pub. Co. Acct'g Oversight Bd.*, 561 U.S. 477 (2010), there are no restrictions on the Special Prosecutors' removal from their appointed role.

In any event, the District Court correctly found that "the Special Prosecutors can be supervised, in the constitutional sense, by the Attorney General." SPA-146. In Rule 42, Congress authorized a method of appointment for inferior officers, and that, once appointed, the Special Prosecutors "are exercising Executive Power and are subject to the Attorney General's control and supervision." SPA-147. And the District Court is plainly correct that, based on the explicit guidance in *Young* and in

Rule 42, "Judge Kaplan's appointment of the Special Prosecutors was constitutionally permissible." SPA-145.

Once appointed, the District Court correctly found that Rule 42 provides no restriction or limitation on DOJ's ability to supervise the Special Prosecutors. SPA-151 ("The Court is aware of no legal rule that would in any way prevent the DOJ or the USAO from reviewing the Special Prosecutors' decisions or removing them from office."). This is fully consistent with the Attorney General's statutory mandate to supervise all litigation in which the United States is a party. *Supra* at 39 (citing 28 U.S.C. §§ 503, 509, 516, 519).

This was also the express position in the defense's April 2, 2021 request to DOJ, JA-120-21, and the statutory framework is dispositive. SPA-152 ("'[W]hat matters is that a [superior officer] have the discretion to review decisions' by the inferior officer. In the Appointments Clause context, the standard is "cannot," not "did not.").

Here, the defense's Appointments Clause arguments are based on nothing more than an email that states only that DOJ "decline[d] to intervene in the federal-court initiated contempt proceedings." SPA-151-52. As the District Court found, this "does not even put a dent in the governing legal scheme." SPA-152. Even if it were applicable, contrary to Donziger's claim, the Appointments Clause does not

require "active" supervision.[5] As in *Arthrex*, "the exercise of executive power by inferior officers must *at some level* be subject to the direction and supervision of an officer." *Arthrex*, 141 S. Ct. at 1988.

Finally, the defense arguments concerning the supposed absence of statutory authorization overlooks the District Court's analysis that Federal Rule of Criminal Procedure 42 "authorized—in fact, mandated—Judge Kaplan to appoint an attorney to prosecute the criminal contempt charges" SPA-144. Not only did *Arthrex* avoid any mention of or call *Young* into question in any way, the District Court also identified that Rule 42(a)(2) "expressly compel[s]" the appointment procedure. SPA-145 & n.509. This suffices to satisfy the Appointments Clause reference to appointment "by law." *See id.*

The interbranch appointment and separation-of-powers concerns raised by the defense, if not untimely, are also meritless under applicable Supreme Court and Circuit precedent. *Mistretta v. United States*, 488 U.S. 361, 388 (1989) ("Congress expressly has authorized this Court to establish rules for the conduct of its own

[5] Donziger also argues, without citation to the record, that his argument is supported by the Special Prosecutor's "denial that she was subject to supervision." Def. Br. at 38-39. That is inaccurate. *See* JA-157. The District Court already addressed this contention, stating: "And, contrary to Mr. Donziger's claim, in no way whatsoever is the Special Prosecutors' attempt to distinguish Arthrex 'a dispositive admission' that they were not "subject to supervision and direction prior to trial.'" SPA-260 (citing Dkt. 361 at 3). Nevertheless, the statutory framework controls and makes clear that the Attorney General has supervisory authority.

business and to prescribe rules of procedure for lower federal courts in. . .criminal cases. . .”); *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (finding “no inherent incongruity about a court having the power to appoint prosecutorial officers.”); *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 990 (2d Cir. 1991) (“an officer’s performance of traditionally recognized executive functions -- such as prosecution -- does not mean that he or she must be appointed by the executive”) (citing *Morrison*, 487 U.S. at 675-77); *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) (construing analogous statute and noting “. . .it is unreasonable to think that merely making an interim appointment impermissibly entangles judges in the functioning of the Executive Branch.”).

As for Donziger’s claim that Rule 42(a) is a “substantive” rule and not a procedural one, that argument is meritless because no “executive office” has been created. This is a temporary and narrow assignment to exercise sovereign authority in a particular case. Further, as set forth above, the Attorney General has statutory authority to supervise the prosecution.

POINT IV

THE CRIMINAL CONTEMPT CHARGES ARE NOT EXCESSIVE OR UNWARRANTED

Judge Kaplan filed the OTSC charging Donziger with six counts of criminal contempt after Donziger’s repeated disobedience of court orders dating back to 2014, and Donziger’s continued refusal to comply with clear and unambiguous

court orders absent extensive motion practice. Because of Donziger's history of disobeying court orders over years, Judge Kaplan's decision to charge him with criminal contempt on just some of his violations was well within his discretion given the unique circumstances of this case and contemptuous conduct at issue.

Contrary to Donziger's complaints, the Special Prosecutors were not beholden to Chevron and Seward & Kissel's past legal work for Chevron in 2016 and again 2018—totalling approximately $30,000—was *de minimis* and bore no relevance to the charges. As for the transfer of the criminal contempt charges to Judge Preska, the transfer took place in compliance with the local rules.

A. Applicable Law

It is well-settled that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). "The remedy of the party witness wishing to appeal is to refuse to answer and subject himself to criminal contempt; that of the non-party witness is to refuse to answer and subject himself to civil or criminal contempt." *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,* 591 F.2d 174, 177 (2d Cir. 1979) (quoting *Kaufman v. Edelstein*, 539 F.2d 811, 813-14 (2d Cir. 1976)). A party cannot challenge a District Court's order by violating it, "[i]nstead, he must move to vacate or modify the order, or seek relief in [the Second Circuit]." *United States v.*

Cutler, 58 F.3d 825, 832 (2d Cir. 1995). If a party fails to move to vacate or modify the order, or seek relief in the Second Circuit, "ignores the order, and is held in contempt, he may not challenge the order unless it was transparently invalid or exceeded the district court's jurisdiction." *Id*.; *see also United States v. Crawford*, 329 F.3d 131, 138 (2d Cir. 2003) (under the collateral bar doctrine, "a party may not challenge a district court's order by violating it.").

Title 18 U.S.C. § 401(3) empowers a federal court "to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). "Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures." *United Mine Workers*, 330 U.S. at 298-99. "[T]he choice of sanctions--civil or criminal--is vested in the discretion of the District Court," *Dinler v. City of N.Y. (In re City of N.Y.)*, 607 F.3d 923, 934 (2d Cir. 2010). Courts "may impose criminal contempt sanctions, or civil contempt sanctions, *or both*" and "the determination of the appropriate response is committed largely to the court's discretion." *In re Weiss*, 703 F.2d 653, 664 (2d Cir. 1983) (emphasis added); *see also Universal City Studios, Inc. v. N.Y. Broadway Int'l Corp.*, 705 F.2d 94, 96 & n.1 (2d Cir. 1983); *In re Irving*, 600 F.2d 1027, 1031 (2d Cir. 1979) ("In responding to a single contemptuous act, a court

may well impose both criminal and civil sanctions wishing to vindicate its authority and to compel compliance."); JA-95-98 (dismissing motion for reconsideration). This is true because criminal contempt serves to vindicate the authority of the court and to punish "retrospectively for a 'completed act of disobedience.'" *See Bagwell*, 512 U.S. at 828-29. Civil contempt, on the other hand, is remedial rather than punitive, intended to coerce future compliance with a court order. *Id.* A civil contempt contemnor thus "carr[ies] the key[] of [his] prison in [his] own pockets," while a criminal contempt contemnor has, in effect, thrown away that key. *Id.*

B. Discussion

Donziger asserts the "prosecution was not limited to the 'least possible power adequate to the end proposed'" claiming that (1) "[c]ivil contempt was sufficient to put an end to four of the six violations alleged," (2) "three of the violations…were permissibly committed to trigger appealable civil contempt orders," and (3) there is "evidence…of serious questions [of] legitimacy of federal judicial proceedings." Def. Br. at 32, 61 (quoting *Young*, 481 U.S. at 801). These arguments are meritless.

1. The District Court Did Not Abuse Its Discretion in By Charging Criminal Contempt to Vindicate the Court's Authority

Judge Kaplan instituted criminal contempt proceedings as a last resort after years of disobedience of courts orders by Donziger, and Judge Kaplan only charged six counts of criminal contempt despite numerous other willful violations of courts orders. Judge Kaplan carefully determined after years of noncompliance, findings of civil contempt, and coercive fines and sanctions, that certain aspects of Donziger's longstanding contemptuous conduct warranted criminal contempt charges.

The very cases to which Donziger cites provide for the court's "authority to initiate a prosecution for criminal contempt," and that a "judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *See, e.g.*, Def. Br. at 61-62 (citing *Shillitani*, 384 U.S. at 371 n.9; *Young*, 481 U.S. at 801. Donziger's repeated disobedience demonstrated "good reason" that a "civil remedy [was] inappropriate." As the District Court noted, a court's "vindicating its authority by punishing past violations of its orders *is…a permissible end*" for criminal contempt. SPA-242-43 (emphasis added) (citing *Young*, 481 U.S. at 801).

To the extent Donziger claims he "already yielded to civil contempt sanctions," or that he was "no longer in violation of the orders listed in Counts

[One, Four, Five, and Six]" at the time of the OSC, Def. Br. at 9, 64, any purging of civil contempt does not warrant reversal. Criminal contempt serves to punish "retrospectively for a 'completed act of disobedience.'" *Bagwell*, 512 U.S at 828. The charges were properly brought against completed acts of disobedience.

Moreover, contrary to Donziger's claim that the conduct had been purged, (Br. at 9), that is not the case. With respect to Count Six, Donziger pledged a portion of his contingency interest to David Zelman to obtain approximately $14,000 worth of services—which Donziger obtained in 2016 and 2017. The fact, in April 2019 after Chevron's contempt motion, that Zelman canceled the portion of their agreement that granted a portion of Donziger's contingency interest as payment for services is of no moment. Indeed, during post-judgment discovery, Donziger also failed to produce his communications evidencing his transaction with Mr. Zelman, even though they were responsive to Chevron's Document Request No. 30 and Judge Kaplan had ordered him to comply with that request by June 15, 2018. SPA-230-33; *see also* SPA-39 (citing GX 2010 at pp. 21-32). Judge Kaplan was well within his discretion in charging Donziger with criminal contempt for the David Zelman transaction.

As for Count One, there has not been a determination that the various Donziger declarations have purged his contempt of the Protocol Order. Donziger provided declarations on May 29, 2019, June 3, 2019, and June 29, 2019. Civ.

Dkts. 2230-1, 2230-2, 2250-2. Whether those declarations comply with the Protocol Order has not been determined. *See* Civ. Dkts. 2229 (raising objections to paragraph 4 compliance); 2257 (referring dispute to Magistrate Judge Robert W. Lehrburger); 2331, 2447 (attempting to schedule hearing to determine Donziger's compliance); 2459 (adjourning hearing *sine die*).

With respect to Count Two, Donziger remains in noncompliance with the portion of the Protocol Order requiring him to surrender his devices for imaging to this day.

With respect to Counts Four and Five, "the fact that Mr. Donziger ultimately acquiesced to Judge Kaplan's orders before he was criminally charged does not mean that Judge Kaplan was then forced to ignore the years of alleged noncompliance up to the purges." JA-98 & n.4. Donziger refused to comply with the RICO Judgment's specific order that he assign his contingency fee interest for more than four years--March 2014 to August 2018. Not only did he refuse to comply, but Donziger *entered into another 2017 ADF Agreement to supersede the 2011 Agreement so that he could ensure his contingency fee interest would survive and be paid by the ADF.* And Donziger only produced the 2017 agreement after the existence of that agreement came up in response to specific questions at his deposition. Further, Donziger only executed the assignments of his contingency fee

interests after motion practice. Judge Kaplan did not abuse his discretion in charging Donziger within criminal contempt for this conduct.

2. Donziger Risked Criminal Contempt Sanctions for His Disobedience Regardless of His Claimed Intent to Seek Appellate Review

Donziger's argument that "three of the violations [Counts One, Two, and Three]…were permissibly committed to trigger appealable civil contempt orders" and that "restraint instructs against charging criminal contempt for permissibly taking civil contempt of the same orders to obtain appellate review of his 'foundational objection' to discovery premised on an invalid civil contempt theory ," Def. Br. at 2, 32, 63, is both factually incorrect and directly contradicted by Supreme Court and Second Circuit precedent.

As a preliminary matter, Donziger's contention that he "presented the challenge to the original contempt theory on which Chevron based its broad discovery requests" for "three of the violations," Counts One, Two, and Three, is factually incorrect. Def. Br. at 18, 32, 64; *see id.* at 9. Donziger never sought appellate relief from, or challenged on appeal the orders underlying Counts One through Three.

Specifically, in his September 9, 2019 appellate brief appealing from the civil contempt findings, Donziger only cited to two appellate issues, neither of which concern any of the criminal contempt Counts: (1) whether Judge Kaplan's

civil contempt finding for Donziger's participation in litigation financing efforts and payment of his fees out of that finding was based on an unclear and unambiguous order and thus an abuse of discretion; and (2) whether Judge Kaplan's "subsequent modification and expansion of the injunctive relief" granted in the March 4, 2014 RICO Judgment was an "abuse of discretion and a violation of the mandate rule of the law of the case doctrine." 2d Cir. No. 19-1584, Dkt. 48 at 8. Nowhere in his September 9, 2019 appellate brief did Donziger challenge the March 5, 2019 Protocol Order forming the basis of Counts One and Two. *See id*.

Similarly, Donziger never challenged on appeal the June 11, 2019 Passport Order, which he was charged with disobeying in Count Three. And despite Donziger's claim that he planned to seek an emergency stay in the Second Circuit, he never did so. *See* Cr. Dkt. 317 (Trial Tr.) at 654; GX 2234 at 15 n.6.

Donziger's contention that "appellate review [] subsequently vindicated Appellant's foundational objection to the scope of discovery," or that this "Court agreed that the civil contempt theory was invalid," Def. Br. at 2, 18, 64, misrepresents both the scope of post-judgment discovery in the Civil Case and this Court's findings on appeal from the civil contempt findings. The breadth of post-judgment discovery was specifically "directed to identifying assets with respect to which the judgment [against Donziger] may be enforced and related matters" and

Mr. Donziger's compliance with Paragraph 5 of the RICO Judgment. GX 2009, 2088.

The Paragraph 5 Compliance discovery was not limited to discovery on the issue of whether Donziger had sold others' non-enjoined interests in the Ecuadorian judgment to finance litigation activities. The Paragraph 5 Compliance discovery also encompassed whether Donziger had impermissibly monetized his *own interest* in violation of Paragraph 5. Indeed, third-party discovery obtained from David Zelman conclusively determined that Donziger had done so despite his repeated statements to Judge Kaplan that he was not selling his own interests. *See, e.g.*, GX 2010 at 18-19 ("I am not selling my shares, because that is obviously prohibited by your Honor's RICO Judgment.") (May 8, 2018 Hearing); *id*. at 21, 31.

Contrary to Donziger's assertion that this Court "vindicated [his] foundational objection to the scope of discovery" on appeal, Def. Br. at 2, this Court *affirmed* Judge Kaplan's civil contempt findings in every respect with one exception, reversing the "contempt finding as to Donziger's sale of interests in the Ecuadorian Judgment *other than of interests in his contingent share of that judgment*," which is not at issue in this case. Indeed, this Court affirmed Judge Kaplan's contempt finding with respect to Donziger's assigning a portion of his own contingency interest to David Zelman, and Donziger never challenged that

finding on appeal. *Chevron Corp. v. Donziger*, 990 F.3d at 214 (emphasis added). This Court stated:

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

SPA-123-24 (emphasis in original) (citing 990 F.3d at 214); *see also* SPA-124 n.434 (Judge Preska stating that "it is exceedingly difficult to square the Court of Appeals' language with Mr. Donziger's trial counsel's claim that "Mr. Donziger's core contentions as to the unlawfulness of that discovery process have now been affirmed by the Second Circuit.…the Court of Appeals did no such thing.").

Further, Donziger concedes his appellate "brief failed to draw this Court's attention to the link between the invalid contempt theory and the validity of the discovery orders," but seeks to excuse his failure by faulting "his own ineptitude as a *pro se* litigant" Def. Br. at 18, 64. Donziger's well-written appellate brief made strategic decisions as to the particular orders he wanted to challenge on appeal and

which he did not. Donziger's decisions not to seek a stay, mandamus relief, or even expedited appellate briefing (and being on notice from Judge Kaplan that he did not have a stay), demonstrate his strategic decision-making.

Finally, Donziger's attempt to point to the "the fact that Appellant had a proper *purpose* to obtain appellate review," Def. Br. at 64-65 (emphasis added), also fails. SPA-240 ("The law of criminal contempt provides no safe harbor for conscientious objectors."). Donziger ignores that a contemnor who willfully fails to comply with a court order risks civil and/or criminal contempt sanctions, in the court's discretion. *Maness*, 419 U.S. at 458 (emphasis added); SPA-295-299. As Judge Preska concluded, Second Circuit and Supreme Court precedent "sanction an avenue whereby a litigant may obtain review of certain court orders by refusing to comply and risking contempt. But they do not limit a court's discretion as to what flavor of contempt to impose." SPA-300; *see also, e.g.*, *Del Carmen Montan v. Am. Airlines, Inc. (In re Air Crash at Belle Harbor)*, 490 F.3d 99, 104 (2d Cir. 2007) (finding a party witness that wishes to appeal must subject himself to criminal contempt); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 574 (2d Cir. 2005) (finding persons wishing to contest a subpoena must usually disobey, "be held in civil or criminal contempt" and then appeal. . ."); *In re Grand Jury Witness*, 835 F.2d 437, 440 (2d Cir. 1987) (same); *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d

431, 439 (2d Cir. 1987) (same); *Universal City Studios*, 705 F.2d at 96 (same); *Weiss*, 703 F.2d at 664 (same).

3. Judge Kaplan Properly Initiated the Criminal Contempt Proceedings, the Case was Properly Transferred to Judge Preska, and the Special Prosecutors' Appointment Complied with *Young*

Donziger cites to a hodgepodge of "evidence" he claims "serious[ly] questions" the "legitimacy of federal judicial proceedings," including that "[n]o grand jury…reviewed the charges," "no petit jury…weighed the evidence," "[t]he judge who issued the OSC picked the judge who presided over the criminal case without recusing himself," "[h]e chose a private prosecutor who…had ties to Chevron," and "[he] overrode the U.S. Attorney's decision to decline the prosecution." Def. Br. at 60-61. The criminal contempt proceedings were properly initiated and prosecuted.

First, Judge Kaplan initiated the criminal contempt proceeding under proper procedure and applicable authority. SPA-141 & n.494; *Bagwell*, 512 U.S. at 831; *Robinson*, 86 U.S. at 510. The District Court also correctly found that Judge Kaplan followed applicable procedure concerning recusal under Fed. R. Crim. P. 42. SPA-158; SPA-312-13 (citing *Goldfine v. United States*, 268 F.2d 941, 947 (1st Cir. 1959) (noting Rule 42 has no mandatory disqualification provision and that it is "routine" for the judge who issues the disobeyed order to preside over the contempt trial)). Moreover, the District Court has at least three times correctly

rejected Donziger's argument that the Special Prosecutors are not disinterested for a purported "failure to disclose immediately that Chevron had been a Seward client as recently as 2018." SPA-128-29. The Special Prosecutors were properly appointed and Seward's prior *de minimis* work for Chevron was not disqualifying.

While Donziger again complains about the transfer of this criminal contempt case to Judge Preska, the transfer properly occurred pursuant to Rule 14(b) of the Southern District Rules for the Division of Business Among District Judges. Further, random assignment was not required for charges instituted by Order to Show Cause. The prosecution took place in complete compliance with Rule 42 and pursuant to *Young*.

Finally, Donziger (albeit in a footnote) claims that he was statutorily entitled to a jury trial on Counts One and Two—regardless of the fact that Judge Preska determined the maximum penalty would be no more than six months—because those criminal contempts constituted "objection of justice" under 18 U.S.C. § 1503. Br. at 60 n.15. Donziger's argument fails for the reasons set forth by the District Court in its September 3, 2020 renewed request for a jury trial. Cr. Dkt. 163 at 3-6. Donziger's charged contempt in those counts does not violate 18 U.S.C. § 1503 because it does not satisfy the *mens rea* requirement "that the defendant corruptly intended to impede the administration of [the] judicial proceeding." *United States v. Quattrone*, 441 F. 3d. 153, 170 (2d Cir. 2006).

CONCLUSION

The District Court's judgment should be affirmed.

Dated: November 17, 2021
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1 because this brief contains 13,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in the text and footnotes.

s/Rita M. Glavin
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