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BRIEFING MEMO
Criminal Contempt Proceeding Against Steven Donziger

The ongoing misdemeanor criminal contempt proceeding filed by Judge Lewis A. Kaplan against U.S. human rights attorney Steven Donziger is extraordinary, unprecedented, disturbing, and abusive. Foundational flaws include:

- Charges were drafted in July 2019 by Judge Lewis Kaplan, who for over a decade “has signaled strongly [that] his sympathies lie” with Chevron and “doesn’t disguise his disdain” for Mr. Donziger.¹
- Mr. Donziger was targeted after helping his Indigenous and rural clients in Ecuador win a landmark \$9.5b pollution judgment against Chevron in 2013. That judgment has been affirmed for enforcement purposes by 29 appellate judges in Ecuador and Canada, including the entire Supreme Courts of both countries. Because Chevron refuses to comply with the judgment, the Ecuadorians are still enforcing it against Chevron’s assets.
- The professional prosecutors at the U.S. Attorney’s Office in New York declined to proceed with Judge Kaplan’s contempt charges.
- After the professional public prosecutor rejected the case, Judge Kaplan took the extraordinary step of appointing a private law firm with an attorney-client relationship with Chevron to “prosecute” Mr. Donziger. Three private prosecutors at the firm (Seward & Kissel) have billed taxpayers at least \$464,000; overall costs for the prosecution are easily expected to surpass \$1 million for *misdemeanor charges*.
- The court-mandated budget in New York to pay a lawyer to *defend* a misdemeanor is \$3,200; the Seward firm apparently has an unlimited budget to prosecute Mr. Donziger.
- To control the proceeding, Judge Kaplan hand-picked a colleague to preside rather than use the normal random case assignment procedure. This colleague (Judge Loretta Preska) is a member of the Federalist Society, to which Chevron is a major donor. Preska has refused to recuse herself despite her conflict of interest and illegal appointment.

¹ Paul Barrett, *Chevron Looks to Its Home Court for a Comeback Win*, Bloomberg Businessweek, July 14, 2011, at <https://www.bloomberg.com/news/articles/2011-07-14/chevron-looks-to-its-home-court-for-a-comeback-win>

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- After her appointment, Judge Preska quickly denied Mr. Donziger a jury of his peers — another move of questionable legality. She also repeatedly refused requests to disqualify the Seward law firm because of its own flagrant conflict of interest given its close relationship to Chevron. It also turns out that Judge Preska and the lead private prosecutor from the Seward firm, Rita Glavin, serve on a Fordham Law alumni committee together.
- Judge Preska also put Mr. Donziger on home detention — unprecedented for a federal misdemeanor — and imposed an \$800,000 bond, higher than the one imposed on the police officers who murdered George Floyd. (All four of those officers are out on bail pending trial while Mr. Donziger remains detained.)
- Mr. Donziger has now been detained for *over 18 months* pre-trial in home confinement on contempt charges with a maximum sentence of six months. The longest sentence ever imposed post-conviction on similar charges in New York is 3 months of home confinement. Mr. Donziger already has “served” *six times longer* than this sentence and has not had a trial.
- Mr. Donziger also appears to be the only person in United States history held pre-trial on a non-violent misdemeanor charge for even one day. He has been held 550 days, and counting.
- Mr. Donziger also is the first lawyer ever charged with criminal contempt for making an ethical and legally-supported decision to appeal a discovery order that he turn over his client’s confidential case file to his adversary. (These clients include 30,000 residents from approximately 80 Indigenous and farmer communities in Ecuador’s Amazon). Judge Kaplan ordered this turnover in October 2018.
- The legality of Judge Kaplan’s civil contempt findings against Mr. Donziger based on his refusal to turn over his confidential case materials was under review before the federal appeals court in 2019 when Judge Kaplan charged Mr. Donziger criminally. No other judge ever has charged a lawyer with criminal contempt while a civil appeal of the basis for the charges was pending. The court has yet to rule, making it unclear whether the contempt findings are even lawful.
- Even Judge Preska and the Seward prosecutors have conceded that Mr. Donziger never had criminal intent when he appealed Judge Kaplan’s court orders. Yet to justify his home detention they claim he is a “flight risk” to Ecuador — even though he has a wife and young son, has never missed a court appearance in 30 years of legal practice, has lived in Manhattan for 27 years, has no passport (it was confiscated by the court), has posted (via supporters) an exorbitant \$800,000 bond, and faces a maximum jail term of 6 months.

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- Chevron has used 60 law firms and roughly 2,000 lawyers to try to demonize Mr. Donziger and the Ecuadorian communities who continue to suffer almost unimaginable harm from the company's pollution, including thousands of cancer deaths. Chevron has threatened the affected communities with a "lifetime of litigation" unless they drop their claims.
- In sum, the obviously punitive treatment of Mr. Donziger stems from a) charges that have no precedent in U.S. legal history; and b) appear to be driven by the personal animus of Judge Kaplan and Chevron.

Summary of Specific Charges

The central issue in the contempt case is that Mr. Donziger was charged criminally for appealing an order from Judge Kaplan that he turn over to Chevron his computer and other electronic devices — including his confidential communications with his clients and other attorneys that included discussions of their litigation strategy. Most lawyers believe that any ethical attorney would appeal such an order and refuse to comply with it in the interim given the grave harm that could result, including possible harassment and even death to Ecuadorian Indigenous peoples. Further, once Chevron received the confidential information it could never "unring the bell" and return it even if Mr. Donziger later prevailed on appeal. Courts throughout the United States have consistently recognized this dilemma and allowed lawyers to appeal these types of discovery orders without criminal charges being filed.

In the view of many legal scholars, Judge Kaplan's order that Mr. Donziger turns over his electronic devices violates various privileges and is unprecedented in U.S. legal history. Apparently aware of the lack of a legitimate legal basis for his own discovery order, Judge Kaplan also added *five additional criminal contempt charges* as window dressing in an apparent attempt to try to further criminalize Mr. Donziger.

Here is my view of what appears to be a total lack of legitimate legal basis for the six specific counts of criminal contempt put forth by Judge Kaplan:

Counts One and Two: Kaplan's first two charges relate to Mr. Donziger's open, ethical, and transparent decision to enter into voluntary *civil* contempt before complying with the order by Judge Kaplan directing him to turn over all his electronic devices and online account passwords to Chevron, a company that has ruthlessly attacked Mr. Donziger and generated false and overblown claims against him and his clients for over a decade. Hundreds of lawyers in the United States have followed this procedure for decades to secure a direct appeal of a discovery order and *none other than Mr. Donziger have been charged with criminal contempt*. In a second charge, Judge Kaplan ordered Mr. Donziger to provide a list to Chevron of all of his electronic devices stretching back one decade. Mr. Donziger complied, yet Judge Kaplan claimed he sub-

mitted the list a handful of days too late — a technical violation with no victim and no criminal intent.

Count Three: The third count arises from Mr. Donziger’s failure to surrender his passport per an order by Judge Kaplan. The court’s order was improper on many grounds, including its interference with Mr. Donziger’s constitutional right to travel — a particularly important right in this case as Mr. Donziger regularly traveled to Ecuador and to other countries where he assisted lawyers enforcing the Ecuador judgment. The order was expected to be challenged on appeal. As a “coercive sanction” designed to force Mr. Donziger to comply with a different civil order (related to the turnover of the electronic devices), the passport issue does not stand as a basis for an independent claim of criminal contempt. In any event, there is no precedent in U.S. history for a citizen to be deprived of his right to travel out of the country to try to force compliance with a different civil discovery order.

Counts Four and Five: The fourth and fifth counts not only lack a valid legal basis, they further betray Judge Kaplan’s personal animus: they relate to Mr. Donziger’s alleged failure to execute assignment of his legal fee to Chevron by certain dates several years ago. (Judge Kaplan’s underlying order on this point in my view illegally deprives Mr. Donziger of 25 years of legal fees for his extraordinary labor on behalf of the Ecuadorian communities.) In fact, Mr. Donziger — rather than commit criminal contempt — was actually challenging the legality of the order to assign his fee to Chevron. He was doing this through good faith litigation in which Judge Kaplan actually set briefing schedules. When ultimately Judge Kaplan ruled against him, Mr. Donziger complied with the orders. To be clear, Mr. Donziger *already had fully complied* with the fee transfer orders long before Judge Kaplan later charged him with criminal contempt at the time he was helping his clients enforce the Ecuador judgment. It is in total bad faith, and utterly draconian and unlawful, to charge someone criminally after he had complied in civil court with the order that is the basis for the charge. In fact, I have never seen such a thing in 60 years of legal practice.

Count Six: This count stems from Mr. Donziger’s agreement, in exchange for a small portion of the fee promised by his clients, to receive four private sessions from a well-respected life coach aimed at improving his productivity as a manager on the case. At the time, Mr. Donziger was completely transparent with the life coach that he was barred by Judge Kaplan’s orders from collecting a fee on the case, but that a fee might be paid should legal decisions later change such that it would be permissible. Nevertheless, Judge Kaplan claimed this arrangement was criminal.



The global human rights community increasingly has been sounding the alarm over Mr. Donziger’s obvious mistreatment by U.S. courts. Consider:

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- Fifty-five Nobel Prize Laureates have now issued statements in support of Mr. Donziger demanding his freedom and the dismissal of the criminal contempt case.²
- In May 2020, a letter circulated by the National Lawyers Guild echoing the same concerns was signed by over 475 leading human rights organizations and advocates.³
- A prominent human rights subcommittee of the European Parliament held a hearing on the case and numerous national and regional bar associations have issued statements.⁴
- Two distinguished retired federal judges, Hons. Nancy Gertner and Mark Bennett took the unusual step of publishing an Op-Ed on the ongoing case, saying that they were “deeply troubled” by the “grave risk” to core due process principles raised by developments in Mr. Donziger’s case, as well as the significant “negative international attention to our legal system” the case had generated.⁵
- The case is now being monitored by leading international human rights organizations, including Lawyers’ Rights Watch Canada, which issued a lengthy report on some of its observations in October 2020,⁶ as well as a case-specific Monitoring Committee including renowned civil rights litigator Michael Tigar, Nadine Strossen (former ACLU President), Simon Taylor (Co-founder of Global Witness), Jeanne Mirer (President of the International Association of Demo-

² See, e.g. Jonathan Watts, *Nobel laureates condemn ‘judicial harassment’ of environmental lawyer*, The Guardian, Apr. 18, 2020, at <https://www.theguardian.com/world/2020/apr/18/nobel-laureates-condemn-judicial-harassment-of-environmental-lawyer>; Full Statement of 55 Nobel Laureates In Support of U.S. Human Rights Lawyer Steven Donziger, at <https://bit.ly/2YIYaOt>.

³ See “Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger,” International Association of Democratic Lawyers, May 18, 2020, at <https://bit.ly/3cf5LXm>; see also *Brief of Amici Curiae International Association Of Democratic Lawyers and National Lawyers Guild*, No. 20-1940 (2d Cir. Jun. 30, 2020), at <https://bit.ly/3tbz8A2>.

⁴ See, e.g., Letter to Reps. James McGovern and Christopher Smith dated July 16, 2020, at <https://bit.ly/36jQLDX>.

⁵ Hons. Nancy Gertner and Mark Bennett, *Criminal Contempt Charges In Donziger Case Are Excessive*, Law360, July 13, 2020, at <https://bit.ly/3acMtiV>.

⁶ See *United States v. Steven Donziger: Report of Monitors of a hearing in New York*, Lawyers’ Rights Watch Canada, Oct. 27, 2020, at <https://www.lrwc.org/united-states-v-steven-donziger-report-of-monitors-of-a-hearing-in-new-york-5-october-2020/>

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cratic Lawyers); Charles Nesson (Harvard Law Professor), and Christopher “Kip” Hale (leading international war crimes prosecutor).⁷

- Traditional press and social media are following the case closely.⁸

I have been representing Mr. Donziger pro bono for several years and will continue to fight for his fair treatment. After carefully studying all aspects of the case, I consider Mr. Donziger to be one of the world’s most effective and courageous human rights lawyers and his treatment by Judge Kaplan, Judge Preska, and the private prosecutors to be a deprivation of his constitutional rights under U.S. and international law. I am available for further discussion with journalists upon request.

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⁷ See Jason Grant, Committee Formed to Monitor Steven Donziger's Contempt Trial for Due Process Violations, New York Law Journal, Aug. 19, 2020, at <https://www.law.com/newyorklawjournal/2020/08/19/committee-formed-to-monitor-steven-donzigers-contempt-trial-for-due-process-violations/>.

⁸ See, e.g., James North, A New Justice Movement Emerges to Defend Steven Donziger, The Nation, Sept. 10, 2020, at <https://www.thenation.com/article/activism/a-new-justice-movement-emerges-to-defend-steven-donziger/>; Walker Bragman & David Sirota, *The Government Gave Big Oil the Power to Prosecute Its Biggest Critic*, The American Prospect, July 14, 2020, at <https://prospect.org/power/chevron-big-oil-power-prosecute-its-biggest-critic/>; Sharon Lerner, *How The Environmental Lawyer Who Won A Massive Judgment Against Chevron Lost Everything*, The Intercept, Jan. 29, 2020, at <https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/>.