INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent, and VERISIGN, INC. and NU DOTCO, LLC. *Amicus Curiae*.	ICDR CASE NO: 01-18-0004-2702

APPENDIX OF LEGAL AUTHORITY OF AMICUS CURIAE NU DOTCO, LLC AND VERISIGN, INC.

12 October 2020

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AUTHORITY NO.	DESCRIPTION
AA-63	11 *Williston on Contracts* § 31:11 (4th ed.)
AA-64	28 C.F.R. § 50.6, Antitrust Division Business Review Procedure
AA-65	*Aceros Prefabricados, S.A. v. TradeArbed, Inc*., 282 F.3d 92 (2d Cir. 2002)
AA-66	*Agility Public Warehousing Company K.S.C. v. Supreme Foodservice GMBH*, 2008 WL 8683417 (S.D.N.Y. 2008)
AA-67	*American Center for Education, Inc. v. Cavnar*, 26 Cal. App. 3d 26 (Cal. Ct. App. 1972)
AA-68	*Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1 (Cal. Ct. App. 1989)
AA-69	*Ass'n of Flight Attendants-CWA v. United Airlines, Inc.*, No. 19-CV-2867, 2020 WL 2085003 (N.D. Ill. Apr. 30, 2020)
AA-70	*Benigno v. United States*, 285 F. Supp. 2d 286 (E.D.N.Y. 2003)
AA-71	Cal. Civ. Jury Instruction 203
AA-72	*CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453 (Cal. Ct. App. 2006)
AA-73	*Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005)
AA-74	*Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014)
AA-75	*Christian Coalition of Florida, Inc. v. U.S.*, 662 F.3d 1182 (11th Cir. 2011)

AUTHORITY NO.	DESCRIPTION
AA-76	*Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495 (9th Cir. 2010)
AA-77	*Continental Airlines, Inc. v. Goodyear Tire & Rubber Co*., 819 F.2d 1519 (9th Cir. 1987)
AA-78	DOJ, Antitrust Division, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (2007)
AA-79	*DotConnectAfrica Trust v. ICANN*, BC607494 (Cal. Sup. Ct. Feb. 3, 2017)
AA-80	*Employers Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906 (Cal. Ct. App. 2008)
AA-81	*Entergy Servs., Inc. v. F.E.R.C*., 568 F.3d 978 (D.C. Cir. 2009)
AA-82	*Erickson v. Aetna Health Plans of California, Inc.*, 71 Cal. App. 4th 646 (Cal. Ct. App. 1999)
AA-83	*Everest Investors 8 v. McNeil Partners*, 114 Cal. App. 4th 411 (Cal. Ct. App. 2003)
AA-84	*Fegistry, LLC, et al. v. ICANN*, ICDR Case No. 01-19-0004-0808 (Aug. 7, 2020)
AA-85	*Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)
AA-86	*Fox Film Corp. v. Springer*, 273 N.Y. 434 (NY Ct. App. 1937)
AA-87	*Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250 (Cal. Ct. App. 1989)

AUTHORITY NO.	DESCRIPTION
AA-88	*Graves v. United States*, 150 U.S. 118 (1893)
AA-89	*Hanifin, Inc. v. Mersen Scotland Holytown, Ltd*., No. CIV.A. 2010-11695, 2012 WL 1252999 (D. Mass. Apr. 12, 2012)
AA-90	*Hernandez v. Dep't of Motor Vehicles*, 49 Cal. App. 5th 928 (Cal. Ct. App. 2020)
AA-91	*Huynh v. Vu*, 4 Cal. Rptr. 3d 595 (Cal. Ct. App. 2003)
AA-92	*I.N.S. v. Orlando Ventura*, 537 U.S. 12 (2002)
AA-93	*In re Ben Franklin Retail Store, Inc.*, 227 B.R. 268 (Bankr. N.D. Ill. 1998)
AA-94	*Mayes v. Bryan*, 139 Cal. App. 4th 1075 (Cal. Ct. App. 2006)
AA-95	*McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)
AA-96	*Meyer Grp., Ltd v. United States*, No. 12-488C, 2014 WL 12513422 (Fed. Cl. Apr. 23, 2014)
AA-97	*Reudy v. Clear Channel Outdoor, Inc.*, 356 Fed. App'x 2 (9th Cir. 2009)
AA-98	*S.E.C. v. Johnson*, 525 F. Supp. 2d 66 (D.D.C. 2007)
AA-99	Sherman Act, 15 U.S.C. § 1

AUTHORITY NO.	DESCRIPTION
AA-100	*South Dakota Pub. Utils. Comm'n v. F.E.R.C*, 934 F.2d 346 (D.C. Cir. 1991)
AA-101	*State ex rel. Harris v. PricewaterhouseCoopers, LLP*, 39 Cal. 4th 1220 (Cal. 2006)
AA-102	*U.S. v. Bensinger*, 430 F.2d 584 (8th Cir. 1970)
AA-103	*U.S. v. Joyce*, 895 F.3d 673 (9th Cir. 2018)
AA-104	*U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005)
AA-105	*U.S. v. W.F. Brinkley & Son Const. Co.*, 783 F.2d 1157 (4th Cir. 1986)
AA-106	*Wisniewski v. Central Manchester Health Authority*, [1998] P.I.Q.R. P324

LEGAL AUTHORITY AA-63

11 Williston on Contracts § 31:11 (4th ed.)

Williston on Contracts | May 2020 Update

Chapter 31. Standards of Interpretation

IV. The Standard of Reasonable Expectation

§ 31:11. Generally

References | Correlation Table

West's Key Number Digest

- West's Key Number Digest, Contracts 143(1), 149

With respect to oral and other informal agreements—those agreements as to which there is no integrated writing—the standard of interpretation which most courts accept, and which is supported by sound principle, is the standard of reasonable expectation, [1] which assigns to words or other manifestations of intention the meaning which the party who used them should reasonably have expected that the other party would understand by them. [2]

Thus, it has been said:

> The negotiations being by letter and between business men, and not being conducted in the phraseology of lawyers, or with the care about expression generally observed in formal documents, it is not safe and would not be fair to test it by any technical rules. It is a case for equitable interpretation, and the proper course is to look at all the circumstances, and then read the arrangement as the defendants were bound to consider it as understood by the plaintiff. [3]

Moreover, when the court is faced with an integrated agreement which, however, contains ambiguous terms, the standard of interpretation is the same as that for oral and informal agreements; that is, the reasonable expectation standard applies in this case as well. [4]

When A offers a promise for B's promise, and B accepts by giving the return promise requested, A is bound not only by any meaning which A knows B will assign to A's words, but also by any meaning which A ought to know that B will assign to A's words. [5] On the other hand, B's assent, even if it consists merely of the word "yes," or the phrase "I will accept," will bind B to the meaning of the words that B reasonably should have supposed A used them. [6] In the words of one court:

> The law will presume that the defendant meant what his language by its terms and under the circumstances in which it was used would fairly be understood to mean, and this presumption is a matter of law and not to be

> rebutted by proof that he intended something more or different which he made no attempt to express and which the plaintiff neither understood nor had reason to understand. [7]

This standard of reasonable expectation is carried forward by the Restatement Second, although the drafters speak in terms of the effect of misunderstanding on the meaning of words rather than in terms of reasonable expectations as such. [8] The Restatement Second provides that when the parties have attached different meanings, the promise or agreement or a term contained within it is interpreted according to the meaning attached by one of them if, when the agreement was made, that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; [9] or the first party had no reason to know of any different meaning attached by the other, and the other party had reason to know the meaning attached by the first party. [10] The result suggested by the Restatement Second is appropriate because, under the circumstances, the misunderstanding is the "fault" of the second party; it knew, or had reason to know (notice), that the first party was acting under a mistake, misunderstanding or misapprehension as to the meaning of the words, and was therefore in a position to clear up or prevent the misunderstanding and unreasonably failed to do so. The innocent first party, therefore, should have the promise, agreement, or term interpreted in accordance with the meaning it assigned to it.

A number of states have also adopted what is, in effect, the standard of reasonable expectation by statutes providing the following or its equivalent:

> When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which a party had reason to suppose the other understood it. [11]

An example of the Restatement Second's approach to the matter is provided by a case [12] involving the alleged breach of an Equal Employment Opportunity Commission ("EEOC") predetermination settlement agreement between a school board and superintendent and a black teacher. After applying and being rejected for a position as a principal in various schools in the defendant's district, the plaintiff filed a charge of racial discrimination with the EEOC. Conciliation efforts resulted in a predetermination settlement agreement in which the board and superintendent promised "to favorably consider [the plaintiff] for the next position for which he is qualified." When the plaintiff was not appointed to the next principal position that became available, he successfully sued to enforce the settlement agreement.

One of the issues raised on appeal was whether the district court was correct in finding that the provision in the predetermination settlement agreement obligated the board and superintendent to appoint plaintiff to the next available administrative position. The court said:

> The Board urges us to conduct a de novo review of the district court's interpretation of the contract language.
>
> We recognize that contract interpretation is generally a question of law and subject to de novo review on appeal. However, we agree with [the plaintiff] that the language at issue is ambiguous. It could mean either 'consider in a favorable light,' which connotes the uncertainty of result the Board insists is implicit in the language, or 'consider with a favorable result,' the interpretation the district court found to govern the agreement. The district court was therefore free to consider extrinsic evidence in construing the agreement …
>
> The district court found that [the plaintiff] used the term 'favorably considered' to explain to the Board and the EEOC that he wanted more than mere consideration. [Plaintiff] testified as follows

> about a conversation among an EEOC representative …, [the superintendent], the Board's attorney … and himself:
>
> [The EEOC representative] told us, first he said, '… what do you want?' He said, 'We are going to try to settle this thing out of Court.' I said, 'Well, I am tired of being considered. I want the job.' He said, 'Well, what do you want?' I said, '[I] need something more stronger [sic] than just "considered." ' I said, 'I want to be favorably considered for the job. I want the job.'
>
> 'And then we were told if a position, an administrative position came open, which I was qualified for, told [the superintendent] to give me the job because if he didn't I was certainly going to let them know.'
>
> [The board's attorney] asked the question, 'Suppose, [the current superintendent] is not the superintendent?' [The EEOC representative] said, 'Well, it is [the superintendent]'s responsibility to let the next superintendent know, so if the position comes open give the job to [the plaintiff].' …
>
> The court found this testimony credible. While [the superintendent] testified that [the EEOC representative] had assured him, when [the plaintiff] was not present, that the Board would not be bound to give [the plaintiff] the next position regardless of the qualifications of others who might apply, there was no evidence that any such understanding was discussed in [the plaintiff's] presence. Thus it was not clearly erroneous for the district court to conclude that the meaning ascribed to the language by the parties as they engaged in joint discussion of the terms of settlement was that [the plaintiff] was to be appointed to the next available administrative position for which he was qualified. Because [the superintendent] and [the board's attorney] did not object to [the plaintiff's] stated understanding of the term 'favorably considered,' the Board is bound by the meaning discussed in the presence of its representatives. [13]

Another interesting application of the Restatement Second approach is presented by a case [14] which turned on the interpretation of two different memoranda of understanding (MOU) between the respondent, a county, and the petitioners, one an association of sheriffs' employees and the other an association of firefighters, regarding salary increases to petitioners' members. The petitioners sought a writ of mandate ordering the respondent to follow the agreements in accordance with the petitioners' interpretation of the agreements.

The trial court had determined that the salary increase formula in the sheriffs' association MOU was ambiguous, that the parties had consented to the formula as a result of a mutual good faith mistake as to its meaning, and that the agreement should therefore be rescinded and renegotiated. The other MOU, between the county and the firefighters, was found by the trial court to be unambiguous and enforceable as written. The appellate court reversed with respect to both of the memoranda, determining that the sheriffs' association MOU was enforceable under the Restatement Second approach according to the understanding of the sheriffs' association, while the firefighters' MOU failed for lack of mutual assent, since it was hopelessly internally inconsistent and contradictory in light of an additional sentence, added after the dispute arose between the county and the sheriffs, the effect of which made it clear only that the two parties attached different meanings to the language, precluding the formation of a contract. With regard to the sheriffs' MOU, after reviewing the extrinsic evidence considered by the trial court, which showed that the parties had attached a different meaning to the formula for determining salary increases, the appellate court said:

> … [A]s expressed in the Restatement Second, Contracts § 20(1), 'There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and amp;para;] (a) neither party knows or has reason to know the meaning attached by the other; or amp;para;] (b) each party knows or each party has reason to know the meaning attached by the

other.' Under these rules no contract is formed if neither party is at fault or if both parties are equally at fault …

Conversely, 'The manifestations of the parties are operative in accordance with the meaning attached to the parties by one of them if … that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.'… Thus, under this rule, a party may be bound by a negligent manifestation of assent, provided the other party is not negligent …

In the present case, the trial court found there was no contract between the County and the Sheriff's Association because the parties each had a mistaken belief as to the meaning of paragraph 7c even though the representatives of both parties 'acted in good faith, based upon a reasonable and justifiable interpretation of Paragraph 7(c).' This finding of good faith is sound since no one argues that the parties subjectively acted otherwise when they negotiated the contract; however, a serious question arises as to whether the County acted reasonably and justifiably in formulating its understanding of the meaning of the language of paragraph 7c. In making our analysis of this issue, we assume that the County is bound by the manifestations of assent as well as the knowledge of its agents … in the negotiating process.

First, we turn to the pertinent language of paragraph 7: '7. The parties agree that, effective the first pay period following July 1, 1985, July 1, 1986, and July 1, 1987, the wages of employees in the unit represented by Association shall be determined as follows:

'a. The survey shall jointly be conducted by the parties comparing the wages of a Deputy II (top step) in Merced County to the wages of a Deputy II (top step, or comparable classification) in nine (9) designated counties… ;

'b. In determining the *average top step pay* for said positions, the *percentage differentials* between first step and top step of Deputy II shall be determined, then *averaged*;

'c. Wage increases, if any, shall be those approximating 90% (90%) of *said average* (July 1985), ninety-five percent (95%) of *said average* (July 1986), and one hundred percent (100%) of *said average* (July 1987), said percentages *to be applied to the actual differential determined by the survey*, then rounded off to the nearest two and one-half percent (2.5%).

…

It is obvious that the phrase 'said average' as used in the first clause of subparagraph 7c has reference to the 'average' determined by the formula provided in subparagraph 7b, but which 'average' in subparagraph 7b does it refer to—the 'average top step pay' for the nine-county deputy II position or the average of the 'percentage differential' between Merced County and the survey salaries? Both concepts are used in subparagraph 7b. The first clause of subparagraph 7c can probably be read in either way. But [the attorney for the sheriffs] was careful in his drafting—he added a second clause to subparagraph 7c which made clear what he intended: 'Said percentages [90, 95 and 100%] to be

applied to the *actual differential* determined by the survey, ….' … Thus, the reasonable interpretation of subparagraph 7c is that the salary increases were to be geared to a specified percentage of the *difference* between the average survey salary and the Merced County salary rather than to a percentage of the average survey salary.

Our holding does not mean that the County did not entertain a contrary subjective meaning but, as we have previously explained, the existence of mutual assent is determined by an objective rather than a subjective standard, i.e., what a reasonable person would believe from the outward manifestations of consent. Here, we have a written integrated contract which reasonably can be interpreted as meaning exactly what the Sheriff's Association intended it to mean. Ordinarily, absent fraud or mistake of fact, the outward manifestations or expression of consent in such a contract is controlling, i.e., mutual assent is gathered from the reasonable meaning of words and the acts of the parties, not from their unexpressed intentions or understanding. …

Furthermore, even if we should conclude that the provisions of paragraph 7c are so ambiguous that either party's intended meaning reasonably can be derived from the language used, the contract should nevertheless be enforced according to the meaning asserted by the Sheriff's Association. The guiding principle in this situation is articulated in Restatement Second, Contracts § 20(2)(b). 'The manifestations of the parties are operative in accordance with the meaning attached to them *by one of the parties* if … that party has no reason to know of any different meaning attached by the other, and *the other has reason to know* the meaning attached by the first party.' … A party may thus be bound by a negligent manifestation of assent if the other party is not equally negligent …

The evidence shows that the County had 'reason to know' the meaning intended by the Sheriff's Association. At the last negotiating session on February 17 [a negotiating] Deputy Sheriff … asked … the County's representative what the practical effect of the wage increase would be if it went into effect immediately. [He] responded by calculating the projected raise at the specified percentage (90%) of the 13.66 differential in pay between the nine-county average and the Merced average … [His] handwritten notes … corroborate [this] testimony. [His] attempted explanation that the calculations were intended only to illustrate the County's 'rounding [off] process' is not convincing; it does not explain his application of the 90% standard to the 13.66 differential. At the very least, [his] conduct reasonably should be deemed to have placed the County on notice of the intended meaning of the Sheriff's Association, i.e., that the pay raise was to be based on the percentage difference between the Merced County deputies' salaries and the average survey salary.

Further, [the] insertion of the second clause in paragraph 7c—'said percentages to be applied to the *actual differential* determined by the survey, …' … should have put … the County Counsel, as well as [the Deputy County Administrative Officer], on notice of the meaning intended by the Sheriff's Association. If [the county counsel] had read the contract carefully, he would have realized that the Sheriff's Association had a different understanding of the pay raise than did [the county counsel] and [the Deputy County Administrative Officer]. Thus, the County through its negotiating agents had ample reason to know of the intended meaning of the Sheriff's Association.

The next question is whether the Sheriff's Association had reason to know the meaning attached to paragraph 7c by the County. If the Sheriff's Association had reason to know of the County's interpretation, then the Sheriff's Association would be deemed to be equally negligent with the County in misinterpreting paragraph 7c, and the result would be no contract … We find no evidence

> to support a finding that the Sheriff's Association was negligent in negotiating the contract with the County. The County's argument that the deputies could not reasonably have believed their asserted meaning because the deputies understood they would not achieve parity the first year and that conceivably under their interpretation parity could be achieved the first year because of the process of rounding off to the nearest 2½% is not convincing. The fact that under some conceivable hypothesis the deputies could achieve parity the first year does not foreclose a reasonable belief by the deputies that 'pragmatically' they were to receive a pay increase based on a percentage of the salary differential.
>
> Also the County's argument that [another] subparagraph … of paragraph 7, which prohibits decreases in salaries during the term of the contract, would be redundant if the deputies' interpretation were accepted—hence, the deputies could not have intended their interpretation —does not wash. [That subparagraph] can be viewed simply as an expression of a bargain already made, i.e., no wage decreases during the three-year salary adjustment period. In short, the redundancy … does not foreclose the reasonableness of the deputies' understanding of the meaning of paragraph 7c.

We conclude, therefore, that subparagraph 7c should be interpreted to mean that the percentages apply to the differential between the nine-county average and the Merced County salaries, the interpretation espoused by the Sheriff's Association. [15]

CUMULATIVE SUPPLEMENT

Cases:

When interpreting a contract, the goal is to give effect to the reasonable expectations of the parties. Blair v. Federal Insurance Company, 433 P.3d 1048 (Alaska 2018).

When interpreting a contract, in order to ascertain the parties' reasonable expectations, the court looks to the written agreement and extrinsic evidence regarding the parties' intent at the time the contract was made. Blair v. Federal Insurance Company, 433 P.3d 1048 (Alaska 2018).

Courts interpret settlement agreements as contracts, and the objective of contract interpretation is to determine and enforce the reasonable expectations of the parties. Ivy v. Calais Company, Inc., 397 P.3d 267 (Alaska 2017).

A court's object in interpreting any contract term is to give effect to the reasonable expectations of the parties, and in so doing, the court looks to the language of the disputed provision, the language of other provisions of the contract, relevantextrinsic evidence, and case law interpreting similar provisions; extrinsic evidence may include the nature of the business, the parties' negotiations, and the structure of the agreement. Laybourn v. City of Wasilla, 362 P.3d 447 (Alaska 2015).

Contract interpretation is a question of law that the Supreme Court reviews de novo; when interpreting a contract, the Court's goal is to give effect to the reasonable expectations of the parties. Baker v. Ryan Air, Inc., 345 P.3d 101 (Alaska 2015).

In interpreting a contract, the object is to give effect to the reasonable expectations of the parties; to ascertain these expectations, the court looks to the language of the disputed provision, the language of other provisions of the contract, relevant extrinsic evidence, and case law interpreting similar provisions. Alaska Fur Gallery, Inc. v. First Nat. Bank Alaska, 345 P.3d 76 (Alaska 2015).

The goal of contract interpretation is to give effect to the parties' reasonable expectations which must be gleaned not only from the contract language, but also from extrinsic evidence, including evidence of the parties' conduct, goals sought to be accomplished, and surrounding circumstances when the contract was negotiated. Zamarello v. Reges, 321 P.3d 387 (Alaska 2014).

The goal of contract interpretation is to determine and enforce the reasonable expectations of the parties. Perotti v. Corrections Corp. of America, 290 P.3d 403 (Alaska 2012).

The parties' expectations are assessed by examining the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties. Perotti v. Corrections Corp. of America, 290 P.3d 403 (Alaska 2012).

[END OF SUPPLEMENT]

Footnotes

1 Restatement First, Contracts § 233.

2 **Second Circuit**
Sun Oil Co. v. Dalzell Towing Co., 55 F.2d 63 (C.C.A. 2d Cir. 1932), aff'd, 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311 (1932)
In re Tikijian, 76 B.R. 304 (Bankr. S.D. N.Y. 1987) (citing text)
Tenth Circuit
BA Mortg. Co., Inc. v. Unisal Development, Inc., 469 F. Supp. 1258 (D. Colo. 1979) (citing text)
D.C. Circuit
Samra v. Shaheen Business and Investment Group, Inc., 355 F. Supp. 2d 483 (D.D.C. 2005) (quoting text and Williston; an oral settlement agreement was enforceable despite its ambiguity regarding whether the dismissal of the plaintiff's lawsuit had to occur before the payment by defendant or vice versa; the ambiguity did not make the agreement so uncertain as to render it unenforceable or non-existent, since the court could fulfill the parties' main purpose and their central intent in entering into the agreement by requiring the defendant to deposit the agreed payment with the court, thereby assuring the simultaneous occurrence of the two acts; moreover, applying the standard of reasonable expectations, it was clear that the defendant's agent, who negotiated the settlement on his behalf, understood that the plaintiff would not dismiss her suit until the money was paid)
Ala.
Cf: Title Max of Birmingham, Inc. v. Edwards, 973 So. 2d 1050 (Ala. 2007)
Alaska
Yost v. State, Div. of Corporations, Business And Professional Licensing, 234 P.3d 1264 (Alaska 2010)
Weiner v. Burr, Pease & Kurtz, P.C., 221 P.3d 1 (Alaska 2009) (quoting Williston)
Wolff v. Cunningham, 187 P.3d 479 (Alaska 2008) (applying this rule to promises made by the defendant in a contract which the parties designated a "promissory note")
Monzingo v. Alaska Air Group, Inc., 112 P.3d 655 (Alaska 2005) (applying this rule and other principles of interpretation and construction to an airline's frequent traveler program which specifically allowed the airline to change the terms of the program)
Cf: Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc., 99 P.3d 553 (Alaska 2004)

Dresser Industries, Inc. v. Foss Launch & Tug Co., 560 P.2d 393, 83 A.L.R.3d 512 (Alaska 1977) (quoting the *Day* case, below)
Day v. A & G Const. Co., Inc., 528 P.2d 440 (Alaska 1974) (citing text)
Cal.
El Dora Oil Co. v. Gibson, 201 Cal. 231, 256 P. 550 (1927)
Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 P. 698 (1st Dist. 1930)
Colo.
Thompson v. Maryland Cas. Co., 84 P.3d 496 (Colo. 2004) (in interpreting an insurance contract, the court seeks to give effect to the reasonable expectations of the parties, and thus will give words their ordinary meaning)
Del.
Dunlap v. State Farm Fire and Cas. Co., 878 A.2d 434 (Del. 2005)
D.C.
Akassy v. William Penn Apartments Ltd. Partnership, 891 A.2d 291 (D.C. 2006)
Md.
Myers v. Kayhoe, 391 Md. 188, 892 A.2d 520 (2006) (citing Williston)
Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, LLC, 376 Md. 157, 829 A.2d 540 (2003) (collecting cases)
Mich.
Cf: Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 664 N.W.2d 776 (2003)
Neb.
Davis v. Highway Motor Underwriters, 120 Neb. 734, 235 N.W. 325 (1931)
N.H.
Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 904 A.2d 676 (2006) (citing Williston)
N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 784 A.2d 1166 (2001) (quoting and citing Williston)
N.Y.
Messina v. Lufthansa German Airlines, 47 N.Y.2d 111, 417 N.Y.S.2d 39, 390 N.E.2d 758 (1979) (citing text)
United States Rubber Co. v. Silverstein., 229 N.Y. 168, 128 N.E. 123 (1920)
Ohio
First Nat. Bank v. Periphonics Corp., 1988 WL 5986 (Ohio Ct. App. 2d Dist. Montgomery County 1988) (citing Williston and quoting case law citing Williston; the court said: "[U]nless there are reservations to the contrary, embraced in the interpretative result should be 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included' …)"
Eaton v. Blackburn, dba Gallipolis Business College, 1981 WL 5905 (Ohio Ct. App. 4th Dist. Gallia County 1981) (quoting text)
Pa.
Radio Corp. of Pennsylvania v. Frederick, 99 Pa. Super. 264, 1930 WL 3613 (1930)
R.I.
Frain v. Brady, 48 R.I. 24, 134 A. 645 (1926)
Tex.
Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445 (Tex. 2011)
Hoffer Oil Corporation v. Hughes, 16 S.W.2d 901 (Tex. Civ. App. Fort Worth 1929)
Utah
Peirce v. Peirce, 2000 UT 7, 994 P.2d 193 (Utah 2000) (citing case law citing Williston)
Vt.

Northern Sec. Ins. Co. v. Rosenthal, 186 Vt. 578, 2009 VT 83, 980 A.2d 805 (2009) (the reasonable expectations of the parties is central to the interpretation of all contracts, including insurance contracts; construing a business purpose exclusion)

Va.

Foreign Mission Bd. of Southern Baptist Convention v. Wade, 242 Va. 234, 409 S.E.2d 144 (1991)

Richmond Engineering & Manufacturing Corporation v. Loth, 135 Va. 110, 115 S.E. 774 (1923) (quoting text)

Wash.

Industrial Electric-Seattle, Inc. v. Bosko, 67 Wash. 2d 783, 410 P.2d 10 (1966) (citing text)

Wyo.

Arizona v. City of Sheridan, 408 P.2d 704 (Wyo. 1965) (citing text)

Trial Strategy

Insured's "Reasonable Expectations" as to Coverage of Insurance Policy, 108 Am. Jur. Proof of Facts 3d 351.

3 **Mich.**

Thoubboron v. Lewis, 43 Mich. 635, 5 N.W. 1082 (1880)

4 See § 31:12.

N.H.

Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 904 A.2d 676 (2006) (citing Williston; affirming the trial court's determination, based on an objective standard of reasonable expectations, that a purported agreement for the sale of real property was unenforceable for lack of mutual assent when financing clauses in the agreement and an accompanying addendum were ambiguous and parol evidence, admissible due to the ambiguity, demonstrated that the parties attached different meanings to the disputed clauses)

5 **Second Circuit**

Gates v. Megargel, 266 F. 811 (C.C.A. 2d Cir. 1920)

D.C. Circuit

Samra v. Shaheen Business and Investment Group, Inc., 355 F. Supp. 2d 483 (D.D.C. 2005) (quoting text and Williston)

Fla.

St. Lucie County Bank & Trust Co. v. Aylin, 94 Fla. 528, 114 So. 438 (1927)

N.H.

Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 904 A.2d 676 (2006) (citing Williston)

N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 784 A.2d 1166 (2001) (quoting and citing Williston)

Eleftherion v. Great Falls Mfg. Co., 84 N.H. 32, 146 A. 172 (1929)

N.Y.

Harris v. Allstate Ins. Co., 309 N.Y. 72, 127 N.E.2d 816 (1955) (citing the *Bird* case, below)

Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 13 A.L.R. 875 (1918)

Arthur A. Johnson Corp. v. Indemnity Ins. Co. of North America, 6 A.D.2d 97, 175 N.Y.S.2d 414 (1st Dep't 1958), judgment aff'd, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959)

Independent Trading Co. v. E. Fougera & Co., 192 A.D. 686, 183 N.Y.S. 431 (1st Dep't 1920), aff'd, 233 N.Y. 592, 135 N.E. 931 (1922)

Oswegatchie Light & Power Co. v. Niagra Mohawk Power Corp., 8 Misc. 2d 382, 167 N.Y.S.2d 587 (Sup 1957), judgment aff'd, 7 A.D.2d 666, 179 N.Y.S.2d 671 (3d Dep't 1958) (citing the *Bird* case above)

N.D.

Sansom v. Levich, 62 N.D. 567, 244 N.W. 23 (1932) (citing text)

6 **D.C. Circuit**

Samra v. Shaheen Business and Investment Group, Inc., 355 F. Supp. 2d 483 (D.D.C. 2005) (quoting text and Williston)

Conn.
Hatch v. Douglas, 48 Conn. 116, 1880 WL 2302 (1880)
Neb.
Southern Realty Co. v. Hannon, 89 Neb. 802, 132 N.W. 533 (1911)
N.H.
Foundation for Seacoast Health v. HCA Health Services of New Hampshire, Inc., 157 N.H. 487, 953 A.2d 420 (2008) (quoting and citing the *N.A.P.P.* case, below, quoting and citing text)
Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 904 A.2d 676 (2006) (citing Williston)
N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 784 A.2d 1166 (2001) (quoting and citing Williston)
Vt.
Ballard v. Burton, 64 Vt. 387, 24 A. 769 (1892)
Clark v. Lillie, 39 Vt. 405, 1867 WL 3430 (1867)
Wash.
Industrial Electric-Seattle, Inc. v. Bosko, 67 Wash. 2d 783, 410 P.2d 10 (1966) (citing text)
Paley's Moral Philosophy, Book III, Part I, Chap. 5 (the author deals with this matter from a moral standpoint, and says: "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it)."
Cf: Wald's Pollock on Contracts [3d ed.], 309 (noting that Paley's work does not exactly hit the mark: "Paley is nearly but not entirely right in the rule he has here laid down. … Every assertion, or promise, or declaration of whatever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be fairly presumed to be understood by it)."

7 **Vt.**
Clark v. Lillie, 39 Vt. 405, 1867 WL 3430 (1867)

8 See Restatement Second, Contracts § 201(2), comment d.
For a general discussion of the difference between the original and Second Restatements, see § 31:1.
See also:
Fourth Circuit
Soule v. Retirement Income Plan for Salaried Employees of Rexham Corp., 723 F. Supp. 1138 (W.D. N.C. 1989) (the court, after quoting Restatement Second, Contracts § 201(2), (3), went on to say: "To put it more simply, the language and acts of a party to a contract are to receive such a construction as at the time he supposed the other party would give to them or such a construction as the other party was fairly justified in giving to them, and he will not at a later time be permitted to give them a different operation in consequence of some mental reservation)"

9 Restatement Second, Contracts § 201(2)(a).
See also:
Second Circuit
Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 10 U.C.C. Rep. Serv. 2d 130 (S.D. N.Y. 1989)
Fourth Circuit
Soule v. Retirement Income Plan for Salaried Employees of Rexham Corp., 723 F. Supp. 1138 (W.D. N.C. 1989)
Fifth Circuit
Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 41 U.C.C. Rep. Serv. 38 (5th Cir. 1985)
Sixth Circuit
Manley v. Plasti-Line, Inc., 808 F.2d 468 (6th Cir. 1987)
McConocha v. Blue Cross and Blue Shield Mut. of Ohio, 930 F. Supp. 1182 (N.D. Ohio 1996)
Eighth Circuit
Margalli-Olvera v. I.N.S., 43 F.3d 345 (8th Cir. 1994) (plea agreement)
Centron DPL Co., Inc. v. Tilden Financial Corp., 965 F.2d 673 (8th Cir. 1992)

Nika Corp. v. City of Kansas City, Mo., 582 F. Supp. 343 (W.D. Mo. 1983) (rejected on other grounds by, Credit Acceptance Corp. v. Smith, 991 S.W.2d 720 (Mo. Ct. App. E.D. 1999))

Ninth Circuit

U. S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568, 27 U.C.C. Rep. Serv. 32 (9th Cir. 1978)

Interform Co. v. Mitchell, 575 F.2d 1270 (9th Cir. 1978) (citing text)

Tenth Circuit

In re John Gruss Co., Inc., 22 B.R. 236, 34 U.C.C. Rep. Serv. 1192 (Bankr. D. Kan. 1982) (erroneously citing Restatement Second, Contracts § 227)

Dorchester Exploration, Inc. v. Sunflower Elec. Co-op., Inc., 504 F. Supp. 926 (D. Kan. 1980)

Eleventh Circuit

Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515, 32 Ed. Law Rep. 482 (11th Cir. 1986) (Equal Employment Opportunity Commission predetermination settlement agreement)

D.C. Circuit

Russell v. District of Columbia, 747 F. Supp. 72 (D.D.C. 1990), judgment aff'd, 984 F.2d 1255 (D.C. Cir. 1993)

Ark.

Wedin v. Wedin, 57 Ark. App. 203, 944 S.W.2d 847 (1997)

Cal.

Merced County Sheriff's Employee's Assn. v. County of Merced, 188 Cal. App. 3d 662, 233 Cal. Rptr. 519 (5th Dist. 1987)

Ga.

Jack V. Heard Contractors, Inc. v. A. L. Adams Const. Co., 155 Ga. App. 409, 271 S.E.2d 222 (1980) (overruled on other grounds by, Southeast Ceramics, Inc. v. Klem, 156 Ga. App. 636, 275 S.E.2d 723 (1980))

Iowa

M-Z Enterprises, Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408 (Iowa 1982)

Tex.

Cf: Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445 (Tex. 2011)

Wash.

Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990)

10 Restatement Second, Contracts § 201(2)(b).

See also:

Sixth Circuit

Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994), decision aff'd, 92 F.3d 1425, 35 Fed. R. Serv. 3d 1258, 1996 FED App. 0265P (6th Cir. 1996), reh'g en banc granted, judgment vacated on other grounds, 102 F.3d 204 (6th Cir. 1996) and on reh'g en banc, 133 F.3d 388, 39 Fed. R. Serv. 3d 788, 1998 FED App. 0004P (6th Cir. 1998) and aff'd in part, vacated in part on other grounds, rev'd in part on other grounds, 133 F.3d 388, 39 Fed. R. Serv. 3d 788, 1998 FED App. 0004P (6th Cir. 1998)

Manley v. Plasti-Line, Inc., 808 F.2d 468 (6th Cir. 1987)

Second Circuit

In re U.S. Air Duct Corp., 38 B.R. 1008 (N.D. N.Y. 1984)

Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 10 U.C.C. Rep. Serv. 2d 130 (S.D. N.Y. 1989)

Third Circuit

In re Hub Recycling, Inc., 106 B.R. 372 (D.N.J. 1989)

Fourth Circuit

Soule v. Retirement Income Plan for Salaried Employees of Rexham Corp., 723 F. Supp. 1138 (W.D. N.C. 1989)

Eighth Circuit

Margalli-Olvera v. I.N.S., 43 F.3d 345 (8th Cir. 1994) (a plea agreement)
Centron DPL Co., Inc. v. Tilden Financial Corp., 965 F.2d 673 (8th Cir. 1992)
Wright v. Newman, 598 F. Supp. 1178 (W.D. Mo. 1984), judgment aff'd, 767 F.2d 460 (8th Cir. 1985)
Nika Corp. v. City of Kansas City, Mo., 582 F. Supp. 343 (W.D. Mo. 1983) (rejected on other grounds by, Credit Acceptance Corp. v. Smith, 991 S.W.2d 720 (Mo. Ct. App. E.D. 1999))

Ninth Circuit

U. S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568, 27 U.C.C. Rep. Serv. 32 (9th Cir. 1978)

Tenth Circuit

In re John Gruss Co., Inc., 22 B.R. 236, 34 U.C.C. Rep. Serv. 1192 (Bankr. D. Kan. 1982) (erroneously citing Restatement Second, Contracts § 227)
Dorchester Exploration, Inc. v. Sunflower Elec. Co-op., Inc., 504 F. Supp. 926 (D. Kan. 1980)

Eleventh Circuit

In re Prime Motor Inns, Inc., 167 B.R. 261 (Bankr. S.D. Fla. 1994)

D.C. Circuit

Russell v. District of Columbia, 747 F. Supp. 72 (D.D.C. 1990), judgment aff'd, 984 F.2d 1255 (D.C. Cir. 1993)

Claims Court

Merrick v. U.S., 18 Cl. Ct. 718, 1989 WL 141679 (1989)

Cal.

Merced County Sheriff's Employee's Assn. v. County of Merced, 188 Cal. App. 3d 662, 233 Cal. Rptr. 519, 124 L.R.R.M. (BNA) 3093 (5th Dist. 1987)

Ga.

Jack V. Heard Contractors, Inc. v. A. L. Adams Const. Co., 155 Ga. App. 409, 271 S.E.2d 222 (1980) (overruled on other grounds by, Southeast Ceramics, Inc. v. Klem, 156 Ga. App. 636, 275 S.E.2d 723 (1980))

Iowa

M-Z Enterprises, Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408 (Iowa 1982)

Mich.

Scholz v. Montgomery Ward & Co., Inc., 437 Mich. 83, 468 N.W.2d 845 (1991)

N.C.

Joyner v. Adams, 87 N.C. App. 570, 361 S.E.2d 902 (1987)

Wash.

Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990)

11 See, e.g.:
Iowa Code Ann. § 622.22.
Mont. Code Ann. § 28-3-306(2).
Nebraska Revised Statutes § 25-1217.
Oregon Revised Statutes § 42.260.
See also:

Iowa

Comptograph Co. v. Burroughs Adding Mach. Co., 179 Iowa 83, 159 N.W. 465 (1916) (the court said: "[T]he Code [now codified at Iowa Code Ann. § 622.22] provides that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it, but it has been held under this that the statute cannot be invoked to show that a written contract was according to the understanding and intent of the parties to be performed in a way different from that expressed in the contract itself)"

12 **Eleventh Circuit**

Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515, 32 Ed. Law Rep. 482 (11th Cir. 1986)

13 **Eleventh Circuit**

Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515, 32 Ed. Law Rep. 482 (11th Cir. 1986) (citing Restatement Second, Contracts § 201 andEmor, Inc. v. Cyprus Mines Corp., 467 F.2d 770 (3d Cir. 1972)for the proposition that "If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning)"

14 **Cal.**

Merced County Sheriff's Employee's Assn. v. County of Merced, 188 Cal. App. 3d 662, 233 Cal. Rptr. 519 (5th Dist. 1987)

15 **Cal.**

Merced County Sheriff's Employee's Assn. v. County of Merced, 188 Cal. App. 3d 662, 233 Cal. Rptr. 519 (5th Dist. 1987)

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Code of Federal Regulations
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 50. Statements of Policy (Refs & Annos)

28 C.F.R. § 50.6

§ 50.6 Antitrust Division business review procedure.

Currentness

Although the Department of Justice is not authorized to give advisory opinions to private parties, for several decades the Antitrust Division has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions. This originated with a "railroad release" procedure under which the Division would forego the initiation of criminal antitrust proceedings. The procedure was subsequently expanded to encompass a "merger clearance" procedure under which the Division would state its present enforcement intention with respect to a merger or acquisition; and the Department issued a written statement entitled "Business Review Procedure." That statement has been revised several times.

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, DC 20530.

2. The Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.

3. The Division may, in its discretion, refuse to consider a request.

4. A business review letter shall have no application to any party which does not join in the request therefor.

5. The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may thereafter request in order to review the matter. Such additional information, if furnished orally, shall be promptly confirmed in writing. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

6. No oral clearance, release or other statement purporting to bind the enforcement discretion of the Division may be given. The requesting party may rely upon only a written business review letter signed by the Assistant Attorney General in charge of the Antitrust Division or his delegate.

7. (a) If the business conduct for which review is requested is subject to approval by a regulatory agency, a review request may be considered before agency approval has been obtained only where it appears that exceptional and unnecessary burdens

might otherwise be imposed on the party or parties requesting review, or where the agency specifically requests that a party or parties request review. However, any business review letter issued in these as in any other circumstances will state only the Department's present enforcement intentions under the antitrust laws. It shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision. In particular, the issuance of such a letter is not to be represented to mean that the Division believes that there are no anticompetitive consequences warranting agency consideration.

(b) The submission of a request for a business review, or its pendency, shall in no way alter any responsibility of any party to comply with the Premerger Notification provisions of the Antitrust Improvements Act of 1976, 15 U.S.C. 18A, and the regulations promulgated thereunder, 16 CFR, part 801.

8. After review of a request submitted hereunder the Division may: state its present enforcement intention with respect to the proposed business conduct; decline to pass on the request; or take such other position or action as it considers appropriate.

9. A business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. As to a stated present intention not to bring an action, however, the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of presenting the request.

10. (a) Simultaneously upon notifying the requesting party of and Division action described in paragraph 8, the business review request, and the Division's letter in response shall be indexed and placed in a file available to the public upon request.

(b) On that date or within thirty days after the date upon which the Division takes any action as described in paragraph 8, the information supplied to support the business review request and any other information supplied by the requesting party in connection with the transaction that is the subject of the business review request, shall be indexed and placed in a file with the request and the Division's letter, available to the public upon request. This file shall remain open for one year, after which time it shall be closed and the documents either returned to the requesting party or otherwise disposed of, at the discretion of the Antitrust Division.

(c) Prior to the time the information described in subparagraphs (a) and (b) is indexed and made publicly available in accordance with the terms of that subparagraph, the requesting party may ask the Division to delay making public some or all of such information. However the requesting party must: (1) Specify precisely the documents or parts thereof that he asks not be made public; (2) state the minimum period of time during which nondisclosure is considered necessary; and (3) justify the request for non-disclosure, both as to content and time, by showing good cause therefor, including a showing that disclosure would have a detrimental effect upon the requesting party's operations or relationships with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders, or competitors. The Department of Justice, in its discretion, shall make the final determination as to whether good cause for non-disclosure has been shown.

(d) Nothing contained in subparagraphs (a), (b) and (c) shall limit the Division's right, in its discretion, to issue a press release describing generally the identity of the requesting party or parties and the nature of action taken by the Division upon the request.

(e) This paragraph reflects a policy determination by the Justice Department and is subject to any limitations on public disclosure arising from statutory restrictions, Executive Order, or the national interest.

11. Any requesting party may withdraw a request for review at any time. The Division remains free, however, to submit such comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information whether submitted pursuant to this procedure or otherwise, does not in any way limit or stop the Division from taking such action at such time thereafter as it deems appropriate. The Division reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all governmental purposes.

Credits

[42 FR 11831, Mar. 1, 1977]

SOURCE: 50 FR 51677, Dec. 19, 1985; 51 FR 27022, July 29, 1986; 53 FR 8452, March 15, 1988; 56 FR 32327, July 16, 1991; Order No. 2013–96, 61 FR 13764, March 28, 1996; 61 FR 49260, Sept. 19, 1996; Order No. 2667–2003, 68 FR 18120, April 15, 2003; Order No. 2807–2006, 71 FR 11160, March 6, 2006; Order No. 3314–2011, 76 FR 76042, Dec. 6, 2011; Order No. 3420–2014, 79 FR 10990, Feb. 27, 2014, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 et seq., 1973c; and Pub.L. 107–273, 116 Stat. 1758, 1824.

Notes of Decisions (5)

Current through October 1, 2020, 85 FR 62140, except Title 7, which is current through September 24, 2020, 85 FR 60333.

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ror", and at that time they were not even aware of Dougherty's opposition papers. We note that Dougherty does not rely only on the alleged close timing and relationship between his service of opposition papers and the Board's revocation of his permit. He also alleges that the entire chronology of events spanning a period of over five years displays a general pattern of egregious treatment by the Board. We believe these are issues of fact that cannot properly be determined on a motion to dismiss.

We therefore conclude that Dougherty's proposed amended complaint adequately sets forth specific facts, which if proven, can support a finding of retaliatory motive. Therefore, Dougherty has stated a legally cognizable First Amendment claim under § 1983, and the district court erred in denying his motion to amend the complaint as futile.

III. Conclusion

For the reasons stated above, we affirm the district court's dismissal of Dougherty's initial complaint due to lack of ripeness under *Williamson*. We reverse the district court's denial of Dougherty's motion for leave to amend the complaint to include a First Amendment claim of retaliation.[7] We remand to the district court for proceedings not inconsistent with this opinion.[8]

ACEROS PREFABRICADOS, S.A., Plaintiff–Appellee,

v.

TRADEARBED, INC., Defendant–Appellant.

Docket No. 01–7475.

United States Court of Appeals, Second Circuit.

Argued Aug. 6, 2001.

Decided Feb. 13, 2002.

Contractor brought action against steel manufacturer alleging breach of contract. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., denied manufacturer's motion to stay action pending

7. The proposed amended complaint also alleged additional equal protection and due process claims based upon the additional factual allegations discussed above in Part 2. Equal protection and due process claims are subject to the *Williamson* ripeness test, as discussed in Part 1, and these proposed additional claims are not ripe due to Dougherty's failure to apply for a variance and receive a "final decision" from the Board. Therefore, Dougherty can proceed in the district court only on his First Amendment claim.

8. We note that defendants, in a motion for stay of proceedings, have brought to our attention the request of the Commonwealth Court of Pennsylvania, in an order dated October 3, 2000, for federal court comity regarding its 90–day stay of all Pennsylvania-court proceedings in which Reliance Insurance company, which is subject to that court's Order of Liquidation, is obligated to defend a party. Defendants' attorneys have represented that Reliance has retained them to defend the defendants in this litigation. The motion came when the issues on appeal had been fully briefed, oral argument was only days away, and the impact on Reliance's assets occasioned by our going ahead with oral argument appeared to be de minimis. In addition, the 90–day period requested by the Pennsylvania court has since expired. Under the circumstances, we decline to grant defendants' motion. Upon remand, any request for a further stay should be brought to the attention of the district court.

arbitration, 2001 WL 303731. Manufacturer appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) usage of trade doctrine provided basis for incorporation by reference of arbitration provisions into contract, and (2) contractor failed to establish surprise or hardship by incorporation of arbitration clause by reference into contract.

Vacated and remanded.

1. Contracts ⚿2

New York substantive law governed issues of contract formation presented in breach of contract case brought by customer against steel manufacturer, since parties' briefs assumed that New York law governed and such implied consent was sufficient to establish choice of law.

2. Arbitration ⚿23.25

The Court of Appeals reviews de novo a district court's legal conclusion that parties to a contract did not contractually bind themselves to arbitrate disputes and the Court reviews factual findings underlying those conclusions for clear error.

3. Arbitration ⚿6.2

Arbitration provisions proposed in steel manufacturer's confirmation orders were incorporated by reference and became part of contract with contractor; although contractor asserted that documents that contained arbitration clause were not enclosed with order confirmations nor mentioned by manufacturer, manufacturer could rely on usage of trade doctrine because arbitration was standard practice within steel industry. N.Y.McKinney's Uniform Commercial Code §§ 1–205(2), 2–207.

4. Contracts ⚿166

Under New York law, parties to a contract are plainly free to incorporate by reference, and bind themselves inter sese to, terms that may be found in other agreements.

5. Arbitration ⚿6.1

Contractor's signature, that appeared less that two inches above space provided by manufacturer's order confirmation form for acceptance, was express acceptance of confirmation order and all terms that were incorporated by reference which included arbitration clause, although signature did not appear in exact place designated for acceptance in contract.

6. Arbitration ⚿2.1
Federal Courts ⚿403

While state law generally governs issues of contract interpretation in cases arising under the Federal Arbitration Act (FAA), disparate treatment of arbitration provisions is not permitted. 9 U.S.C.A. § 1 et seq.

7. Arbitration ⚿23.10

Unlike nonarbitration agreements, which need only be proven by a preponderance of the evidence, New York law requires a higher degree of proof for arbitration agreements.

8. Arbitration ⚿23.10

Arbitration agreements do not, as a matter of law, constitute material alterations to a contract; rather, the question of their inclusion in a contract is answered by examining, on a case by case basis, their materiality under a preponderance of the evidence standard as a court would examine any other agreement. N.Y.McKinney's Uniform Commercial Code § 2–207(2)(b).

9. Sales ⚿22(4), 23(4)

The burden of proving the materiality of an alteration of a contract must fall on the party that opposes inclusion since the Uniform Commercial Code (UCC) presumes that between merchants additional

terms will be included in a contract; thus, if neither party introduced any evidence, the proposed additional term would, become part of the contract. N.Y.McKinney's Uniform Commercial Code § 2–207(2).

10. Arbitration ⚿6.2

Arbitration provision that was incorporated by reference into contract between steel manufacturer and contractor did not materially alter contract; contractor failed to submit any evidence demonstrating either subjective or objective surprise at inclusion of arbitration clause and manufacturer submitted unrebutted evidence that arbitration was standard practice within the steel industry. N.Y.McKinney's Uniform Commercial Code § 2–207(2)(b).

11. Arbitration ⚿23.10

Contractor failed to establish surprise or hardship by incorporation of arbitration clause by reference into contract with steel manufacturer; although contractor stated that "addition of an arbitration clause which contractor did not accept and never saw until long after the parties had negotiated the terms and entered into their contract would result in surprise and hardship to contractor," statement fell far short of meeting burden of proof required to show surprise because it was conclusory and unsupported.

12. Sales ⚿22(4), 23(4)

The party asserting surprise or hardship, due to the inclusion of a term in a contract between merchants, has the burden of establishing the elements of surprise or hardship, not merely stating that they are present. N.Y.McKinney's Uniform Commercial Code § 2–207(2).

13. Arbitration ⚿6.2

Under New York law, an arbitration agreement does not result in surprise or hardship where arbitration is the custom and practice within the relevant industry. N.Y.McKinney's Uniform Commercial Code § 1–205(2).

14. Customs and Usages ⚿12(1)

It is not necessary for both parties to be consciously aware of trade usage; it is enough if the trade usage is such as to justify an expectation of its observance. N.Y.McKinney's Uniform Commercial Code § 1–205(2).

15. Customs and Usages ⚿15(1)

Usage of trade is relevant not only to the interpretation of express contract terms, but may itself constitute contract terms; thus, standard industry practices are always relevant when interpreting contracts governed by the Uniform Commercial Code (UCC). N.Y.McKinney's Uniform Commercial Code § 1–205(2).

Elliot Silverman, McDermott, Will & Emery, New York, NY, for Defendant–Appellant.

David W. Mockbee, Mockbee Hall & Drake, P.A., Jackson, MS (Mary Elizabeth Hall, Mockbee Hall & Drake, P.A., Jackson, MS, on the brief, Denis B. Frind, Michael I. Silverstein, Altieri, Kushner, Miuccio & Frind, P.C., New York, NY, of counsel), for Plaintiff–Appellee.

Before: MINER, CALABRESI, and CABRANES, Circuit Judges.

MINER, Circuit Judge.

Defendant-appellant TradeArbed, Inc. ("TA") appeals from an order entered on March 28, 2001 in the United States District Court for the Southern District of New York (McKenna, *J.*) denying its motion to stay the action pending arbitration pursuant to the Federal Arbitration Act, 9

U.S.C. § 3 (the "FAA"),[1] and to dismiss the action pursuant to Federal Rule of Civil Procedure 12.[2] Before the district court, TA argued that it entered into three separate contracts to sell steel to plaintiff-appellee Aceros Prefabricados, S.A. ("Aceros") through three confirmation orders dated January 17, 2000, January 28, 2000, and March 9, 2000, each of which operated as a separate acceptance of Aceros' prior offers to purchase steel. TA further claimed that Aceros bound itself to the arbitration provision that was incorporated by reference into each of the confirmation orders. The district court rejected TA's argument, holding instead that (1) an earlier letter from TA to Aceros, dated January 12, 2000 (the "January 12 letter"), constituted TA's acceptance of Aceros' offers, thereby forming a single contract on that date; and (2) the arbitration provisions were proposed additional terms that materially altered the contract and therefore that they did not become part of that contract. *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 2001 WL 303731, at *2 (S.D.N.Y. Mar.8, 2001) ("*Aceros*"). Accordingly, the court denied TA's motion to stay the action pending arbitration. The court also denied TA's motion for reconsideration. *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 2001 WL 428245, at *1 (S.D.N.Y. Apr. 26, 2001).

On appeal, TA argues that the district court erred in finding that Aceros was not bound by the arbitration provisions. TA contends that this is so regardless of the date of contract formation. Specifically, TA claims that if January 12 is deemed the date of contract formation, Aceros is bound to arbitrate its disputes with TA because (1) the arbitration provisions do not materially alter the contract; and/or (2) Aceros expressly accepted the second confirmation order, thereby agreeing to modify the original contract to include arbitration. If, instead, the first of three contracts was formed by the January 17 confirmation order, TA claims that the arbitration provisions still became part of the contracts because (1) Aceros signed one order confirmation and retained the others without objection, and (2) even without Aceros' express acceptance of one order confirmation, retention without protest is sufficient to bind Aceros to the arbitration provisions. As a consequence, TA requests that the district court's order be reversed and the case remanded with instructions to stay the action pending arbitration.

For the reasons that follow, we vacate and remand.

BACKGROUND

On December 17, 1999, TA, an affiliate of the world's largest steel manufacturer, and Aceros, a major Central American contractor, began exchanging letters, most of them written in Spanish, in connection with Aceros' prospective purchase of steel from TA. This correspondence included a

1. 9 U.S.C. § 3 provides:
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

2. The district court noted that 9 U.S.C. § 3 directs a court to stay, not dismiss, an action pending arbitration, and therefore focused only on whether it should stay the proceeding not dismiss it. *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 2001 WL 303731, at *1 n. 1 (S.D.N.Y. Mar. 28, 2001)

list from Aceros of the products it desired, and several purchase orders from Aceros that included tonnages and proposed prices. The parties agree that, prior to the January 12 letter from TA to Aceros, no contract had been formed. They disagree, however, as to the significance of the January 12 letter. The January 12 letter states that TA "hereby confirm[s] the orders for beams as follows." The parties dispute the proper English translation of the letter's next sentence. Aceros asserts that it reads: "We hereby confirm that the above-mentioned orders will be shipped in the next few days." In contrast, TA contends that the correct translation is: "The confirmations of the above-mentioned orders will be shipped in the next few days."

Aceros argues that the January 12 letter demonstrates TA's intent to contract and therefore constituted an acceptance of Aceros' prior offers, resulting in a binding contract between the parties as of that date. TA maintains that it accepted Aceros' offers only when it sent three confirmation orders dated January 17, 2000, January 28, 2000, and March 9, 2000, that each confirmation constituted a separate acceptance, and that the parties therefore entered into three distinct contracts for the sale and purchase of steel. Each of the three confirmation orders was sent with a cover sheet stating that the confirmation "includes the sale terms and conditions for the [steel]", and the last page of each confirmation order contains a "[n]ote" that provides: "Subject to terms stated on General Conditions of Sale enclosed. Your failure to object to any term within 10 days of receipt of this contract shall be deemed an acceptance by you." Aceros contends, and TA does not dispute, that the General Conditions of Sale were not included with any of the three confirmation orders. Nonetheless, the General Conditions of Sale contain the following arbitration provision: "Any controversy arising under or in connection with the contract shall be submitted to arbitration in New York City in accordance with the rules then obtaining of the American Arbitration Association." Aceros did not sign or return the January 17 confirmation, and it is undisputed that Aceros never objected to any term in any of the confirmation orders. It is also undisputed that an Aceros agent accepted the January 28 confirmation order, by writing "[a]ceptado" on and signing each of the four pages of the confirmation order and then mailing it back to TA. As with the first confirmation order, Aceros neither signed nor returned the third confirmation order dated March 9.

On December 11, 2000, Aceros commenced this diversity action against TA for breach of contract. On January 5, 2001, relying on the arbitration clause, TA moved to stay the action pending arbitration pursuant to section 3 of the FAA or to dismiss the action pursuant to Rule 12 of the Federal Rules of Civil Procedure. Aceros responded that the arbitration clause was not part of the parties' agreement as memorialized on January 12 because the General Conditions of Sale were (1) not accepted by Aceros; (2) not incorporated by reference into the confirmation orders; and (3) not enclosed with the confirmation orders as the orders themselves stated.

In a memorandum and order dated March 27, 2001, the district court denied TA's motion. *Aceros,* 2001 WL 303731, at *3. The court found that the January 12 letter evidenced the formation of a contract between the parties because while all prior correspondence from TA to Aceros contained language indicating an intent not to be bound, such as "pending confirmation from our principals" or "pending confirmation from our main office," the January 12 letter did not contain any similarly limiting

language. *Id.* at *2. In reaching its conclusion, the court relied, without explanation, on Aceros' translation of the disputed confirmation language. Having found a contract formed by the January 12 letter, the court viewed the terms of the January 17, January 28, and March 9 confirmation orders—among them, the requirement to arbitrate disputes—as proposals for additional terms to the contract. *Id.* Without any mention of Aceros' acceptance of the January 28 confirmation order, the court held, as a matter of law, that an arbitration provision materially alters legal rights under a contract, and therefore that the arbitration clause was not part of the parties' agreement. *Id.*

On April 4, 2001, TA filed a motion requesting that the court reconsider its order denying TA's motion to stay the case pending arbitration. In seeking reconsideration, TA contended that the district court erroneously relied on Aceros' translation of the January 12 letter rather than the translation offered in an affidavit of TA's vice president. In a memorandum and order dated April 23, 2001, the district court denied the motion for reconsideration. The court held that (1) the "self-serving affidavit of [TA's vice president] does not undermine the Court's reliance on the translation provided by [Aceros]," and (2) even under TA's proposed translation, "the language not disputed is sufficient to support" the court's denial of TA's motion to stay the proceedings. *Aceros Prefabricados,* 2001 WL 428245, at *1. This interlocutory appeal followed.

DISCUSSION

[1, 2] We have jurisdiction to hear this interlocutory appeal pursuant to section 16(a) of the FAA.[3] We review *de novo* the district court's legal conclusion that the parties did not contractually bind themselves to arbitrate disputes, *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Manufacturing Co.,* 189 F.3d 289, 295 (2d Cir.1999), and review factual findings underlying those conclusions for clear error. *Id.* In regard to the contract at issue, we apply New York law.[4]

[3, 4] Aceros maintains that it could not have accepted the arbitration clause because the General Conditions of Sale (which include the arbitration clause) were not enclosed with the order confirmations nor mentioned by TA. That the General Conditions of Sale were not themselves included with the order confirmations does not render the arbitration provisions invalid. Applying New York law, we have found that "[p]arties to a contract are plainly free to incorporate by reference, and bind themselves *inter sese* to, terms that may be found in other agreements." *Ronan Assocs. v. Local 94–94A–94B, Int'l Union of Operating Eng'rs,* 24 F.3d 447, 449 (2d Cir.1994). Indeed, we have specifically found that parties were bound to arbitrate under arbitration clauses they never signed, where those clauses were contained in other documents that were incorporated by reference. *See, e.g., id.* (finding employment contract incorporated by reference union collective bargaining agreement including right to compel arbitration of questions of discharge); *Pro-*

3. Section 16(a) provides that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A).

4. The parties' briefs assume that New York substantive law governs the issues of contract formation presented here, and such "implied consent . . . is sufficient to establish choice of law." *Krumme v. WestPoint Stevens Inc.,* 238 F.3d 133, 138 (2d Cir.2000) (quotation marks and citation omitted).

gressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 47 (2d Cir.1993) (finding insurance contract incorporated by reference separate document that included arbitration provision binding the parties to arbitrate). Thus, TA's failure to include the General Conditions of Sale with the confirmation orders does not prevent those terms from being included in its contract with Aceros.

The district court held that the January 12 letter constituted an acceptance by TA of Aceros' offers to purchase steel, thereby forming a contract between the parties. For the reasons discussed below, we conclude that whether the January 12 letter formed a single contract or the confirmation orders formed three separate contracts, the parties are bound by the arbitration provisions. We therefore find it unnecessary to determine the precise moment of contract formation.

Under the New York Uniform Commercial Code (the "UCC") an expression of acceptance or written confirmation that sets forth terms in addition to those initially agreed upon will not defeat formation of a binding contract. *See* N.Y. U.C.C. § 2–207(1) (McKinney 1993).[5] Instead, a contract will be found and the additional terms (in this case, the General Conditions of Sale, including the arbitration clause) are then treated as "proposals" for addition to the contract. *Id.* § 2–207(2). This analysis applies to both expressions of acceptance that form the contract, *see id.* § 2–207(1); *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 223 (2d Cir.2000) ("[Plaintiff's] fax is effective to form a contract as an acceptance—even though it stated or referenced additional terms . . . .") (applying New York law), and written confirmations of agreements already reached, *see* N.Y. U.C.C. § 2–207(1); *J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc.*, 277 A.D.2d 128, 128, 717 N.Y.S.2d 37, 38 (1st Dep't 2000) (resolving issue of whether a "clause in a confirmation invoice constitutes a material alteration of an existing contract between merchants within the meaning of UCC 2–207"). An Official Comment to section 2–207 makes clear the applicability of that provision to these two situations:

> Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained *either in the writing intended to close the deal or in a later confirmation* falls within subsection (2) and must be regarded as a proposal for an added term . . . .

N.Y. U.C.C. § 2–207 cmt. 2 (emphasis added). Therefore, were we to find that the contract between Aceros and TA was formed on January 12, as Aceros claims and as the district court held, then the three confirmation orders would constitute written confirmations stating terms additional to the January 12 agreement, and analysis would proceed under section 2–207(2).

Were we to agree instead with TA's argument that each of its order confirmations served as a separate acceptance of individual prior offers by Aceros to purchase steel, the confirmations would then constitute acceptances proposing additional terms and analysis would likewise proceed under section 2–207(2), albeit of three

5. Section 2–207(1) of the UCC provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

N.Y. U.C.C. § 2–207(1).

individual contracts.[6] Both contract formation scenarios lead us to the same conclusion regarding the parties' obligation to arbitrate disputes.

[5] We therefore turn to an examination of whether the arbitration provisions are part of the parties' contract pursuant to section 2–207(2).[7] It is undisputed that both TA and Aceros are merchants for the purposes of the UCC. *See id.* § 2–104(1). Under the UCC, proposed additional terms become part of a contract between merchants unless one of three statutory exceptions is satisfied. *See id.* § 2–207(2).[8] Aceros invokes only the "material alteration" exception of section 2–207(2)(b), which prohibits inclusion in a contract of a proposed additional term that would "materially alter" the contract unless the other party agrees. *Id.* § 2–207(2)(b). Aceros agreed to arbitrate disputes in regard to goods shipped under the January 28 confirmation order when it wrote "[a]ceptado" on and signed every page of that confirmation order and mailed it back to TA.[9] Aceros therefore bound itself to arbitrate disputes arising out of that order of goods. In contrast, neither the January 17 nor the March 9 confirmation order was expressly accepted by Aceros, and we must therefore determine whether the arbitration clause, as a proposed additional term in those two confirmation orders, is included in the parties' contract.

[6, 7] The district court stated that "[a]s a matter of law, an arbitration provision materially alters ones' [sic] legal rights under a contract." *Aceros,* 2001 WL 303731, at *2. The two authorities cited by the district court, *DeMarco California Fabrics, Inc. v. Nygard International, Ltd.*, No. 90 CIV. 0461, 1990 WL 48073, at *3 (S.D.N.Y. Apr.10, 1990), and *J.J.'s Mae,* 277 A.D.2d 128, 128, 717 N.Y.S.2d 37, in turn relied on the 1978 New York Court of Appeals case, *Marlene Industries Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978). *Marlene Industries* restated the so-called New York rule that "parties to a commercial transaction will

6. We reject TA's claim that Aceros' express acceptance of the one confirmation order that pertained to only one shipment of goods could operate to bind it both backward in time, to the January 17 order, and forward in time, to the March 9 order.

7. For the sake of clarity, we refer to the contractual status between the parties as involving a single ''contract'' with the understanding that this designation also encompasses the theory that the confirmation orders formed three separate contracts.

8. Section 2–207(2) of the UCC provides:

> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

N.Y. U.C.C. § 2–207(2).

9. Aceros claims that even this acceptance is ineffective to bind it to arbitrate disputes as to that shipment of goods because it did not sign ''in the space provided as required by [TA's] order confirmation form.'' We reject this argument. The last page of the order contains the ''[n]ote'' that subjects the order to the General Conditions of Sale. At the end of the note are the words ''ACCEPTED BY:''. Rather than signing the order in the small space provided, an Aceros agent wrote ''[a]ceptado'' and signed his name less than two inches above that particular location. This is clearly an effective acceptance of that confirmation order and all the terms incorporated by reference. In any event, even if Aceros had not expressly accepted this confirmation order, it would nonetheless be bound to arbitration for the same reasons it is bound as to the other two confirmation orders.

not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate." *Id.* at 333, 408 N.Y.S.2d 410, 380 N.E.2d 239 (internal quotation marks omitted). Thus, unlike nonarbitration agreements, which need only be proven by a preponderance of the evidence, New York law requires a higher degree of proof for arbitration agreements. *See Progressive Cas.,* 991 F.2d at 46; *Schubtex, Inc. v. Allen Snyder, Inc.,* 49 N.Y.2d 1, 6, 399 N.E.2d 1154, 424 N.Y.S.2d 133 (1979). While state law generally governs issues of contract interpretation in cases arising under the FAA, *Progressive Cas.,* 991 F.2d at 46, such disparate treatment of arbitration provisions is not permitted. *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987).

[8] In *Perry,* the Supreme Court held that under the FAA "[a] court may not, . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Id.* at 492 n. 9, 107 S.Ct. 2520. Following the dictates of *Perry,* we have considered the rule cited in *Marlene Industries* "preempted by the FAA because of its discriminatory treatment of arbitration provisions." *Chelsea Square Textiles,* 189 F.3d at 296 n. 5; *see also Progressive Cas.,* 991 F.2d at 46 ("Because *Perry* prohibits . . . discriminatory treatment of arbitration agreements, the rule set forth in *Marlene Industries* is preempted."). Thus, contrary to the district court's holding, arbitration agreements do not, as a matter of law, constitute material alterations to a contract; rather, the question of their inclusion in a contract under section 2–207(2)(b) is answered by examining, on a case-by-case basis, their materiality under a preponderance of the evidence standard as we would examine any other agreement. *See Hatzlachh Supply Inc. v. Moishe's Elecs., Inc.,* 828 F.Supp. 178, 183 (S.D.N.Y. 1993), *vacated on other grounds by,* 848 F.Supp. 25 (S.D.N.Y.1994).

[9, 10] "[T]he burden of proving the materiality of the alteration must fall on the party that opposes inclusion." *Bayway Ref.,* 215 F.3d at 223. This is so because the UCC presumes that between merchants additional terms will be included in a contract. *Id.* Thus, "if neither party introduced any evidence, the [proposed additional term] would, by the plain language of § 2–207(2), become part of the contract." *Id.* Aceros was therefore required to establish that the arbitration provision constituted a material alteration to its contract with TA.

A material alteration is one that would "result in surprise or hardship if incorporated without express awareness by the other party." N.Y. U.C.C. § 2–207 cmt. 4; *Bayway Ref.,* 215 F.3d at 224. Surprise includes both a subjective element of what a party actually knew and an objective element of what a party should have known. *Id.* We have stated that "[a] profession of surprise and raised eyebrows are not enough." *Id.* Instead, "[t]o carry [its] burden . . . [the nonassenting] party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term." *Id.*

[11, 12] Aceros has failed to submit any evidence demonstrating either subjective or objective surprise at the inclusion of an arbitration clause in its contract with TA. Aceros' sole reference to either surprise or hardship is supplied in an affidavit of its founder and general manager stating that "the addition of an arbitration clause

which [Aceros] did not accept and never saw until long after the parties had negotiated the terms and entered into their contract would result in surprise and hardship to [Aceros]." This conclusory, unsupported statement falls far short of meeting the burden of proof required to show surprise and therefore the materiality of a proposed additional term. *Id.* at 224–25. In the absence of any evidence indicating Aceros' surprise as to the inclusion of the arbitration provision, it has failed to establish that such a provision constitutes a material alteration of the contract. In a footnote in its brief on appeal, Aceros "submits that surprise and hardship are self-evident where, as here, there was no reference to nor mention by [TA] to arbitration until after suit was filed." This claim ignores the fact that Aceros has the burden of *establishing* the elements of surprise or hardship, not merely stating that they are present. As with the statement in the affidavit, this assertion is conclusory and unsupported by any evidence in the record.

In *Bayway Refining,* we noted that while Official Comment 4 to section 2–207 seems to suggest that hardship is an independent ground for finding that an alteration is material, there are cases indicating that hardship is not an element separate from surprise but rather a "consequence" of material alteration. *Id.* at 226 (citing *Union Carbide Corp. v. Oscar Mayer Foods Corp.,* 947 F.2d 1333, 1336 (7th Cir. 1991); *Suzy Phillips Originals, Inc. v. Coville, Inc.,* 939 F.Supp. 1012, 1017 (E.D.N.Y.1996); and *In re Chateaugay Corp.,* 162 B.R. 949, 957 (Bankr.S.D.N.Y. 1994)). We declined in *Bayway Refining* to decide whether hardship is an independent ground in the material alteration analysis because even if it were, the party resisting arbitration there failed to raise a genuine issue of material fact as to hardship sufficient to survive a motion for summary judgment. Likewise, here we need not make such a determination because-for the same reason Aceros has failed to establish surprise, the lack of any evidence supporting this claim—it has also failed to establish that it would suffer any hardship in being bound to arbitration.

[13] Moreover, TA's vice-president submitted an affidavit indicating that he has been employed in the steel business for more than thirty years and that "[a]rbitration clauses, like the one here, are commonplace and the norm in the industry and have been for a very long time." Aceros did not rebut this assertion. Under New York law, an arbitration agreement does not result in surprise or hardship where arbitration is the custom and practice within the relevant industry. *See Chelsea Square Textiles,* 189 F.3d at 296 ("[E]vidence of trade usage and course of dealings between parties supported ... finding of an agreement to arbitrate.") (citing *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.,* 67 F.3d 20, 25 (2d Cir.1995)); *Schubtex,* 49 N.Y.2d at 6, 399 N.E.2d 1154, 424 N.Y.S.2d 133 ("[A] provision for arbitration [can] ... be implied from a course of past conduct or the custom and practice in the industry."). The logic of this rule is obvious: a merchant in a given industry will have, by definition, a difficult time establishing either subjective or objective "surprise" regarding a proposed contract term that is standard in that industry.

The Official Comments to section 2–207 recognize the importance of trade practices to the material alteration analysis. Official Comment 4 lists "typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship." N.Y. U.C.C. § 2–207 cmt. 4. A provision to arbitrate disputes is not among them. While the list is not exhaustive, the

common thread among the examples provided is that they all constitute provisions that significantly deviate from industry norms. *See id.; see also Daisy Indust. v. Kmart Corp.,* No. 96 CIV. 4211, 1999 WL 1043964, at *8 (S.D.N.Y. Nov. 17, 1999) ("Most of the examples set forth in the comment significantly alter standard industry practice such that a party not used to operating under the additional terms would be surprised."); *Suzy Phillips Originals, Inc. v. Coville, Inc.,* 939 F.Supp. 1012, 1017 (E.D.N.Y.1996) ("[The] examples of clauses which materially alter a contract ... all ... have in common that they significantly alter standard industry practice and thus could surprise a buyer who would not have expected to be operating under such terms."). Conversely, among the "[e]xamples of clauses which involve no element of unreasonable surprise," Official Comment 5 lists proposed terms that are "within customary limits," "within the range of trade practice[s]," and "within ... customary trade tolerances." N.Y. U.C.C. § 2–207 cmt. 5.

[14, 15] Although most of our cases that discuss trade usage in the context of section 2–207(2)(b) disputes deal with the textile industry, *see, e.g., Chelsea Square Textiles,* 189 F.3d 289; *Pervel Indust., Inc. v. T M Wallcovering, Inc.,* 871 F.2d 7 (2d Cir.1989), there is nothing in those cases or in the UCC to indicate that consideration of trade usage is limited to that industry. *Cf. Bayway Ref.,* 215 F.3d at 225 (finding that proposed additional term was part of the parties' contract because inclusion of such term was commonplace in the petroleum industry). Indeed, the importance of industry practices in the interpretation of contracts for the sale of goods permeates the entire UCC. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* § 3–3 (2d ed. 1980). This is clear from its definition of "usage of trade": "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." N.Y. U.C.C. § 1–205(2). Moreover, "it is not necessary for both parties to be consciously aware of the trade usage. It is enough if the trade usage is such as to 'justify an expectation' of its observance." White & Summers, *supra.* Furthermore, "[usage of trade is] relevant not only to the interpretation of express contract terms, but may [itself] constitute contract terms." *Id.* Thus, standard industry practices are always relevant when interpreting contracts governed by the UCC, and Aceros failed to rebut TA's assertion that arbitration provisions are commonplace in the steel industry.

Aceros did not submit any evidence of surprise or hardship and therefore has failed to demonstrate that the inclusion of an arbitration provision in its contract with TA constitutes a material alteration under section 2–207(2)(b). Moreover, TA submitted unrebutted evidence that arbitration is standard practice within the steel industry, thereby precluding Aceros from establishing surprise or hardship. Accordingly, we hold that the arbitration provisions proposed in TA's confirmation orders became part of the contract, and that Aceros and TA are therefore required to arbitrate their disputes.

CONCLUSION

For the foregoing reasons, the order appealed from is vacated, and the action is remanded to the district court for further proceedings consistent with this opinion.

LEGAL AUTHORITY AA-66

2008 WL 8683417 (S.D.N.Y.) (Arbitration Award)
United States District Court, S.D. New York.

AGILITY PUBLIC WAREHOUSING COMPANY K.S.C. et al,
v.
SUPREME FOODSERVICE GMBH.

Nos. 11CV07375, 50181T0032108.

July 31, 2008.

Editor's Note: This document was acquired from a Court file.

Case Type: Other
Award Amount: $0
Attorney for Petitioner: Alden Lewis Atkins; Steven Robert Paradise
Attorney for Respondent: n/a
Award Date: 04/21/2011
Arbitrator: Robert B. Davidson, Hon. Milton Mollen (Ret.), James M. Rhodes

Partial Final Award

Arbitrator: Robert B. Davidson, Hon. Milton Mollen (Ret.), James M. Rhodes

AMERICAN ARBITRATION ASSOCIATION

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

On or about July 31, 2008, the Claimants in this arbitration, Public Warehousing Company K.S.C. ("PWC")[1] and Professional Contract Administrators, Inc. ("PCA"), filed a Notice of Arbitration with the American Arbitration Association naming Supreme Foodservice AG ("Supreme AG") and Supreme Foodservice GmbH & Co. KG (Supreme GmbH") (collectively, "Supreme") as parties respondent. PWC is a Kuwaiti company. PCA is a corporation organized and existing under the laws of the State of Arizona. Supreme AG is a Swiss company, and Supreme GmbH is a German company and a wholly-owned subsidiary of Supreme AG. The Respondents describe Supreme GmbH, which does business in Dubai, as the Dubai branch of a German company. Supreme AG has its headquarters in Switzerland.

The dispute arises out of a Services Agreement dated as of October 25, 2004 among Supreme AG, PWC and PCA ("the Services Agreement"). Under the Services Agreement, PWC and PCA, collectively called the "Contractor" in the Services Agreement, agreed to provide professional consulting, procurement and technical support services to Supreme in connection with Supreme's effort to procure and then perform a certain "Prime Vendor Contract" ("the PVC"). A prime vendor contract (a "PV contract") is a contract between a food vendor on the one hand and the U.S. Department of Defense ("the DOD"), operating through the Defense Supply Center Philadelphia ("the "DSCP") on the other,[2] which calls for the provision of food to U.S. troops and support personnel stationed in various parts of the world. These contracts can be extremely profitable for the vendors selected and there is keen competition for a prime vendor contract.

At the time of the negotiation of the Services Agreement, PWC was the DSCP's prime vendor contractor for the provision of food and related supplies to the U.S. troops stationed in Iraq, Kuwait and Jordan.[3] Supreme had experience in the food business and acted as a supplier for private companies, and as the contractor for governmental entities that did not require the volumes required of a prime vendor. Thus, Supreme at one time acted as a supply contractor to United Nations peacekeeping

forces in Mozambique and the Balkans (Tr. 2634-35) and acted as a supply contractor to the British Ministry of Defense supplying troops stationed outside of the U.K., including Afghanistan. Supreme, however, had never acted as a prime food vendor. PCA was a smaller company that described itself as a food service professional consultancy (Tr. 301) providing advice and counseling to food supply contractors.

Typically, PCA advises a prospective PV contractor on the form and content of the bid, including the pricing of the so-called "market basket" required of all bidders, and then PCA assists in the ramp up and performance of the PV contract once awarded. This advice involves, among other things, warehouse logistics, supply chain information (including pricing and the identity of major suppliers) and IT advice.

Supreme had never been awarded a prime vendor contract, but aspired to become the prime vendor for the provision of food and related supplies to U.S. troops in "Zone 3", i.e. Afghanistan. DOD regulations forbid a prime vendor operating under an existing PV contract - such as PWC and PCA-- from being awarded a second prime vendor contract. Thus, PWC and PCA were foreclosed from bidding for, and being awarded, the Afghanistan PVC. They were not foreclosed, however, from partnering with an eligible bidder, such as Supreme, in bidding for another PV contract. After discussions, the parties decided to partner in a bid that Supreme, with the Contractors' help, would make for the Afghanistan PVC. The Services Agreement sets forth the terms of their contractual relationship.

The Services Agreement, which in accordance with Article 11 is to be governed and construed in accordance with the internal laws of the State of New York, appoints the Contractor to act as an independent contractor in connection with the performance and completion of the Services." Services Agreement, Article 1. The "Services" to be performed are set forth in Appendix A to the Services Agreement. Appendix A, which consists of five single spaced pages, is detailed and covers virtually all aspects of the procurement and post-procurement process. Relevant to the issues in this arbitration, the Services include the Contractor's provision of "consulting, advice, assistance and any other support, knowledge or expertise to assist, aid and promote the Company's ability to procure the Prime Vendor Contract [for Afghanistan]" (Appendix A, para. 1). PWC and PCA agree to assist in the preparation of the bid for the PVC. *Id,* para. 2. Once the PVC may be awarded, PWC and PCA agree to "provide product sources, prices and purchasing conditions to [Supreme] for all items required under the Prime Vendor Contract, where the sources, prices and conditions shall be identical to those available to the Contractor [in its capacity as the PVC for Iraq]." *Id.,* para. 3(b).

In consideration for Contractor's performance of the Services, the Services Agreement provides for Supreme to pay the Contractor "a monthly service fee *("Monthly Service Fee")* equal to 3.5% multiplied by the Net Revenues from the Prime Vendor Contract." Section 2.01(a). The Monthly Service Fee is to be divided equally between PWC and PCA. Id. Section 2.01(a) then provides:

Notwithstanding anything to the contrary herein, in the event that the Prime Vendor Contract is awarded to the Company [Supreme] at any time, the Company acknowledges and agrees that, of the Monthly Service Fees, 1.75%, multiplied by the Net Revenues from the Prime Vendor Contract shall be consideration for the Contractor's services as set forth in Appendix A hereto, and shall survive the expiration or termination of this Agreement (including, without limitation, any termination pursuant to Article 7 [including a termination 'For Cause" as there defined]) and shall only terminate upon the earlier of the termination or expiration of the Prime Vendor Contract under which the Revenues from the Prime Vendor Contract are generated.

"Net Revenues from the Prime Vendor Contract" is defined on page 2 of the Services Agreement. It means, for any relevant period:

[T]he net revenue derived or accruing from the Prime Vendor Contract and paid to Company, as determined from the management accounts of the Company prepared in accordance with IAS [International Accounting Standards] and certified by independent public accountants of international standing selected by the Company.

The Services Agreement further provides for arbitration in the event of a dispute. Specifically, Section 12.01 provides that in the event of "[a]ny dispute, difference, controversy, or claim of any kind whatsoever that arises or occurs between the Parties... shall be finally settled under the Rules of the American Arbitration Association (the "AAA"), by a panel of three arbitrators..."

The Facts

A brief recitation of the facts is necessary for an understanding of the nature of the parties' dispute.

A PVC is awarded after a formal and structured bidding process. The government, through the DSCP[4] first publishes a detailed solicitation which invites interested parties to submit a bid. By solicitation dated September 3, 2004 (the "Solicitation"), the DSCP invited bids for the prime vendor contracts relating to five zones located in the Middle East. Zone 3 was Afghanistan. The Solicitation is over 400 pages long and sets forth in great detail the requirements that a bidder must complete to be considered for a prime vendor contract. It also sets forth the key contractual terms to which a successful bidder must agree.

One of the things that a bidder must submit as part of the application is a "market basket" consisting of approximately 70 designated food items, each with a price that the bidder represents that it can achieve. These market basket prices are not necessarily the prices at which the military will purchase the food items, but the market basket component of the bid is important as it confirms a bidder's ability to achieve best prices when filling an order. A bidder also must provide the government with additional information that assures the DSCP that, if successful, the bidder will be capable of performance.

Delivering food and related items to U. S. military forces, especially in a war zone, is a complex and demanding business. There are hundreds of separate food items which a prime vendor must make available for purchase through a catalog that it maintains. About 60% of all of the food items in the catalogue are "hard-spec'd", *i.e.,* are branded food items dictated by the government. Thus, a prime vendor, for example, may only be permitted to supply "Heinz ketchup" or "Campbell's vegetable soup". Because just about all food items, other than highly perishable items, must, by law, be sourced from the U.S., prime vendors must purchase food products from U.S. sources and transport them to warehouses overseas. The shipping time typically takes as much as 60 days from delivery by ship to a warehouse in Kuwait or Kabul for onward carriage to one of the large military bases in the country, or to so-called "FOBs" or Forward Operating Bases.

This fact of life requires that prime vendors order large quantities of food in advance, and then store it in warehouses awaiting orders to deliver. In addition to products coming from the United States, the prime vendor must also supply "LMR" or "Local Market Ready" products. Included in this category are such things as fresh fruits and vegetables, also known as "FF&V", milk, eggs and bakery products. Unlike items shipped from the U. S., LMR items must be procured locally and delivered daily.

A prime vendor must also have the logistical resources-- buyers, warehouses, refrigerated trucks, reliable local sources of supply, etc. to buy, store and deliver the food wherever and whenever it is required. The PV must also have the accounting and computer systems which enable it to process orders, ship, warehouse, deliver and invoice. This is largely accomplished through computer systems and programs maintained or mandated by the DSCP for this purpose.

A prime vendor must also bear considerable risks in the procurement and delivery process. The government pays only for what is actually delivered and what it actually orders and uses. Such risks as spoilage, loss caused by excess stock or by food ordered and stored past its expiration date, and various other risks of loss, both combat-related and non combat-related, must be borne by the prime vendor.

The cost of the food is a pass-through expense to the government. A PV charges the food at cost and is reimbursed. A PV makes a profit by charging a so-called "distribution fee" (called a "Distribution Price" at page 24/411 of the Solicitation). The Distribution Price (or distribution fee) is defined "as a firm fixed price, offered as a dollar amount, which represents all elements of the unit price, *other than* the delivered price." *Id.* Emphasis in original.[5] A distribution fee is earned on each unit sold, whether that unit be a carton of cereal, or a case of soda, or a crate of bananas. There are over 50 different distribution fees that the government recognizes and pays depending upon the unit delivered, the expense associated with a delivery (refrigerated items, for example, warrant a higher distribution fee than a dry box that is not subject to spoilage), or the value of the product delivered (for example, steaks and lobsters will, in general, garner a higher distribution fee than, say, a box of canned beans). The Solicitation (at page 40/411) outlined circumstances in which excellent performance by a prime vendor could result in an increase in distribution fees, while poor performance would have the opposite effect.

A prime vendor will also earn income from so-called "off invoice allowances" which a food seller will either pay or credit for purchases in bulk, or in consideration of the PV's prepayment or prompt payment of an invoice. These allowances, credits or discounts are also sometimes referred to as "sheltered income" and can represent a substantial component of a PV contractor's overall profit. The government permits a PV contractor to retain certain of these allowances and not others, which must be passed on to the government in the form of lower prices.

The distribution fees that a PV contractor earns, when added to the various discounts and allowances that it keeps, makes a prime vendor contract extremely valuable. Supreme declined to produce its financial statements, but it is apparent that Supreme earned millions in profits acting as the PV contractor for Afghanistan. This was in no small measure also a function of the huge military build-up in Afghanistan that caused the income that Supreme earned under its PVC to rise considerably. Expanded U.S. military operations in Afghanistan also gave Supreme an opportunity to earn considerable additional income from the transportation of food supplies to troops operating in forward operating bases and for the additional packing services required.[6]

Supreme responded to the DSCP's tender in a so-called Proposal on November 16, 2004. Supreme's Proposal, among other things, included the required market basket prices and a myriad of other detailed information. About half of the market basket prices Supreme submitted in its Proposal were sourced by or through PWC or PCA.

On June 3, 2005, the DSCP awarded the PVC for Zone 3 to Supreme, and Supreme, with PWC's and PCA's assistance, began its performance. According to various witnesses, PWC and PCA assisted Supreme in the initial stages of its performance under the PVC in various ways, including: 7
● Introducing Supreme to various suppliers, distributors and consolidators;[7]

● Assisting Supreme in the design of its warehouses and in the implementation of its inventory control systems. This assistance included the secondment of PWC personnel to assist onsite;
● Assisting Supreme in its invoicing and educating it in the procedures necessary to be paid;

● Assisting Supreme in the setting up of its computer systems to enable it to store, deliver and invoice the orders received from the military;

● Giving Supreme price information or referring Supreme to certain vendors;

● Initially selling Supreme food from PWC's own stock to enable Supreme to begin its performance of the PVC during the ramp up period.

Supreme generally agrees that PWC and PCA rendered assistance in the bidding process and in the initial stages of its performance. Supreme contends, however, that neither PWC, nor PCA, ever responded fully or appropriately to Supreme's requests for pricing information and, indeed - as will be explained in detail below - acted dishonestly in the provision of the pricing information that it did provide.

Commencing in early 2006, PWC billed Supreme under the Services Agreement based on 3.5% of the total amount of the invoices paid by the government, i.e., the gross amount less any returns, rejections or other deductions taken by the military for whatever reason. Supreme, after checking PWC's calculations, paid these invoices from the first billing through November 2007.

By late 2007, Supreme began to question the continuing value of its business relationship with PWC and PCA. Supreme had, by now, established its own supply chain and implemented the systems required to purchase and deliver the orders that it received from the military, and its attempts to obtain pricing information from its partners were met with only limited success. In this period, news of a criminal investigation into PWC's procurement practices was also widely publicized, and Supreme understood that the DSCP was not likely to award another Iraq prime vendor contract to PWC.

On January 28, 2008 Supreme's Armin Schroeder, after a meeting attended by Supreme's top executives and its counsel, sent an email to PWC's Stephen Lubrano and PCA's Eric Sandlin, stating that "Supreme is currently analyzing and optimizing our supply chain including the purchasing segment and we are therefore in need of updated information and support as outlined in our Services Agreement, dated 25 October 2004." Supreme then requested, among other things, the following information: "Contact details of possible sources, Current Pricing including product price, length of fixed pricing, factors under which price is adjusted such as volume, Payment terms and other Purchasing Conditions." At the time of the sending of the email, PWC's prime vendor contract for Zone 1 (Iraq) was ending, and the marketplace anticipated a tender from the government and a new contract to be awarded to a successful bidder. PWC and PCA intended to re-bid for the PVC for Zone 1. PWC believed that Supreme would likely be a competitor for that business, either directly or- if forbidden to bid because it was already acting as a PV contractor in Zone 3-- as a partner with another aspiring PV contractor. PWC thus viewed Supreme's request for prices set forth in its letter January 28th as a pretext for obtaining price information that it could then use in competition with PWC and PCA.

Further correspondence ensued including additional demands by Supreme for a substantive response and PWC's further email of February 13, 2008 in which it refused to supply the information for, among other reasons, the fact that PWC was bound by confidentiality clauses in its own agreements with its suppliers. In its responsive letter of February 15, 2008 Supreme pointed out that Paragraph 3(c) of the Appendix to the Services Agreement obligated PWC to exert its Best Efforts "to obtain releases or waivers from any existing confidentiality agreements or obligations as regards the provision of information to [Supreme]..." and that PWC had offered no proof that it was either bound by confidentiality agreements or had exerted its Best Efforts to obtain the necessary waivers. Supreme's letter then gave Claimants a Notice of Material Breach under Article 7.02 of the Services Agreement and the requisite 30 day opportunity to cure under that section. PWC still failed to supply the pricing information and, by letter dated March 26, 2008, Supreme sent its notice stating, among other things that "[W]e hereby inform you that the [Services Agreement] including any amendments hereto is terminated for cause under Section 7.02 of the [Services] Agreement."

PCA and PWC protested the termination. They also pointed out that Article 2.01(a) of the Services Agreement provides for a continuing payment to Claimants of 1.75% of the Net Revenue earned by Supreme through the life of the PVC notwithstanding the Services Agreement's termination for cause. Supreme refused to make any further payments to PWC and PCA, and this arbitration followed.

Procedural History

The plaintiff commenced this proceeding by Notice of Arbitration dated July 31,2008 ("the Notice"). The Notice alleged that Supreme had breached the Services Agreement by wrongfully terminating the contract and then failing to continue the required payments. It alleged that Supreme owed Claimants about $2 million for services from December 2007 through March 2008, and that amounts would continue to accrue through termination of the PVC. By letter dated August 26,2009, Claimants alerted the Tribunal to the fact that it had underestimated its damages and described certain additional sums that it would be seeking in the arbitration.

Supreme filed a Statement of Defense dated September 17,2008 ("the SOD"). The SOD alleged that PWC committed a material breach of the Services Agreement by failing to respond with price information in response to Supreme's various letters, and that Supreme had rightfully terminated the Services Agreement for cause. The SOD also described the Side Agreement relating to transportation fees earned by Supreme and alleged that any continuing Monthly Service Fees payable for these services fell outside of the Services Agreement and therefore ceased as of the date of termination

Claimants appointed James M. Rhodes as its party-appointed arbitrator. Supreme appointed the Hon. Milton Mollen (Ret.) as its party-appointed arbitrator. The ICDR confirmed these appointments. Upon the recommendation of Messrs. Rhodes and Mollen, the ICDR also confirmed the appointment of Robert B. Davidson as Chair of the Tribunal. The panel was duly constituted in February 2009.

A preliminary hearing was conducted on March 25,2009 with counsel for the parties present, and a schedule was set for the arbitration. Also at that hearing, Supreme requested the right to file an Amended Answer and Counterclaims. That request was granted, and a schedule was set for the filing and service of amended pleadings.

On or about March 27,2009, Supreme served an Amended Statement of Defense and Counterclaims ("the Amended SOD"). The Amended SOD repeated the substance of the original SOD but added a demand for the return of Monthly Service Fees allegedly overpaid. The Amended SOD alleged that the 3.5% in Monthly Service Fees had been mistakenly calculated and paid by Supreme on the basis of gross revenue rather than Net Revenue as required under the Services Agreement, and that this mistake "resulted in dramatic overpayments to [Claimants] by Supreme, and must be refunded" Amended SOD, page 4. The Amended SOD requested appropriate refunds in amounts to be determined for these allegedly mistaken overpayments, and sought damages as well in compensation for the Claimants' poor performance of their contractual obligations. Specifically, Supreme recited counterclaims: (A) sounding in breach of contract and breach of the duty of good faith and fair dealing; (B) for overpayments under both the Services Agreement and the Side Agreement; and (C) for "breaches from the outset demonstrating a substantial failure of consideration" Amended SOD, page 5.

The parties exchanged documents and various disputes related thereto were resolved by the Tribunal. Both sides filed written witness statements by fact witnesses in lieu of direct testimony and submitted expert reports.

On November 9,2009, an Indictment against PWC was filed in the United States District Court for the Northern District of Georgia ("the Indictment"). The Indictment, which would figure prominently in the arbitration, accuses PWC of a "Major Fraud Against the United States" in connection with PWC's procurement and performance of its own prime vendor contract for Zone 1.[8] As it relates to the issues in this arbitration, the Indictment accuses PWC of providing to the government a number of invoices in its market basket that did not represent genuine prices but, instead, prices that PWC fraudulently arranged to be provided to give the government a false impression of PWC's buying power and to thereby induce the DSCP to award the prime vendor contract for Zone 1 to PWC. The Indictment further accuses PWC of arranging for illegal kickbacks from an affiliated company, The Sultan Company, or T.S.C. In that regard, PWC is accused of making a "Preferred Supplier" arrangement with T.S.C. for the provision of LMR products to PWC. In return, another agreement between PWC and T.S.C. provided for T.S.C. to kickback to PWC 10% of T.S.C.'s total invoices. The Indictment alleges that this kickback scheme was illegal as any price reductions were required to be passed through to the government. Other illegal arrangements by which PWC effectively overcharged the government are also described (Indictment, paragraphs 38 et seq.) PCA, although not indicted, is named in the Indictment and described by its actions as a facilitator or co-conspirator.

Immediately after the unsealing of the Indictment, Supreme sought leave to file a Second Amended Statement of Defense and Counterclaims ("the Second Amended SOD") to assert an equitable claim for rescission based on its contention that the Claimants fraudulently induced Supreme to enter into the Services Agreement by making promises that they intended to fulfill only by illegal means. The Tribunal granted its permission on December 17,2009. In its Second Amended SOD Supreme described the Indictment and, based on its accusations, asserted an additional counterclaim sounding in fraudulent inducement and for rescission of the Services Agreement. Among the false promises that the Claimants were accused of making were that the Claimants will "guarantee bid success, significantly reduce procurement expense, and maximize Supreme's profit"; that "[t]he sheer volume of current food procurement facilitates and [sic] ability to leverage suitable payment terms... presents an unmatched buying power...; that the Claimants "will allow Supreme to compose, win and implement the contract in the most cost effective manner possible"; and that the Claimants "will select the correct products and assist Supreme in obtaining market basket pricing for the bid and the subsequent product catalog." Second Amended SOD, Part D at page 6. The Claimants denied the allegations of the Second Amended SOD.

As the date for the hearings approached, the Claimants sought a stay of the arbitration to enable the criminal proceedings to run their course. Supreme opposed that application and the panel refused to adjourn the scheduled hearings. Supreme also demanded that certain PWC officers who had not submitted written witness statements nonetheless appear and give testimony in the arbitration. These included: Charles Tobias (Toby) Switzer, PWC's General Manager of the Prime Vendor Program; Stephen Lubrano, PWC's Assistant General Manager, Commercial; Tarek Aziz Sultan Al-Essa, PWC's Board Chairman and Managing Director; and Emad AlSaleh, PWC's Deputy General Manager. By Order of January 21,2010 the Tribunal resolved certain outstanding document disputes and, among other things, ordered as follows:
The parties shall advise by the close of business on Monday, January 25,2010, whether the witnesses who have not submitted witness statements and whose appearance has been requested by the other party will be made available at the hearing for testimony, either in person or via video teleconference. If a party declines to produce a current employee requested by the other side, then adverse inferences may be drawn by the panel if deemed appropriate...

Upon the Claimants' failure to assure Supreme that the requested witnesses would appear and testify, Supreme then moved to preclude the Claimants from offering any evidence related to topics on which the missing witnesses would be expected to testify and further moved to compel the production of various documents. The motions were decided on January 29,2010 when the Tribunal ruled:
After considering the correspondence that has been submitted, the Tribunal denies Supreme's Motions: (i) to preclude the Claimants from offering certain evidence; and (ii) to compel the production of certain specified documents.

This is an arbitration. As such, each party is entitled to present the proofs that support their respective positions. If some evidence is unavailable because of the non-appearance of particular witnesses, the panel will make such inferences as it may deem appropriate. There will be, however, no order of preclusion.

As to the motion to compel, the Tribunal, in its last Order, compelled only the production of the so-called "Indictment Documents." The Tribunal is entitled to call for the production of additional documents in the course of the hearings if it so wishes. No further production will be ordered at this stage.

Two weeks of hearings were conducted in New York City on February 1-5 and 8-15, 2010. Thirteen witnesses testified. They included: **Matthew W. Plake,** Senior Manager, Contract Administration for PWC's prime vendor contract in Zone 3; **Denzil Patrick D'Sa,** Senior Operations Manager for the PV Program at PWC; **Bruce Comer,** President of PCA; **Joseph Alvarez,** Director of Supreme's U.S. DOD Division who was involved with Supreme's operations under the PVC; **Daniel R. Crichton,** former Senior Manager, Customer Service at PWC and, at the time of his testimony, a contract consultant to PCA; **David E. Neff,** a consultant for PCA from June 2005 to December 2008; **Jean Content,** Director of Contract Administration in the Logistics Division of Supreme; **Michael Lane,** Senior Financial Controller at one of the companies in the Supreme group. Mr. Lane had involvement in invoicing and payment under the Services Agreement; **Armin Schroeder,** Director of Purchasing in Supreme's Logistics Division; **Michael Gans,** one of the two principals of Supreme who participated in the negotiation of the Services Agreement and in the payment of PWC's invoices under the Services Agreement; **Stephen Orenstein,** the chief principal executive officer of Supreme; **Lee M. Dewey,** an accountant with BDO Consulting who testified as to issues associated with the presentation of "net revenues" in accordance with International Accounting Standards; and **Richard Walck,** a damages expert called by the Claimants.

The parties waived any time limitations on the panel's rendering of an Award.

The parties thereafter submitted detailed briefs. After review, the Tribunal called for oral argument and this was conducted on July 29, 2010. Certain additional calculations were requested and those were provided by the parties in August 2010. This prompted further correspondence relating to the calculations.

On May 10, 2010 Supreme informed the Tribunal of a communication that it had received from the DSCP alerting it that the government may seek a refund for alleged overcharges relating to the charges billed for supplemental transportation and delivery services under the PVC. At the Tribunal's invitation, the Claimants commented on the substance and relevancy of this communication.

By letter dated January 4, 2011, Claimants informed the Tribunal that the DLA had, in mid-December 2010, granted Supreme a two year extension of its PVC through December 2012. Claimants in that letter asked the Tribunal to reopen the record to enable the prospective Award to deal with the extension. Specifically, Claimants asked the Tribunal:
(a) To declare in its Award that Claimants are entitled to Monthly Service Fees continuing through the end of Supreme's Prime Vendor Contract, as extended, in an amount to be determined. Claimants also ask that the Tribunal retain jurisdiction, or establish such other procedures as the Tribunal deems appropriate, to determine the amount of damages if the parties are unable to resolve this issue by applying the reasoning of the Award.

(b) Alternatively, to declare in its Award that Claimants were unable to raise their claim for damages in the extension period until after the evidence was closed, and therefore that Claimants are not barred from recovering the Monthly Service Fees for the extension period in a separate, subsequent arbitration proceeding.

By letter dated January 12, 2011, Supreme objected to any reopening of the record to either consider any claims premised upon the two-year extension, or to take further evidence. In its letter, Supreme argued that the PVC extension could well have been anticipated and raised prior to the closing of the hearings and should not now be the subject of any rulings or relief by the Tribunal in the Award that it will issue.

By letter dated January 14, 2011, Claimants responded to Supreme's letter, requesting that the Tribunal make its final award on the claims submitted, while protecting Claimants' right to seek fees for the extension period before this Tribunal in subsequent proceedings or in another arbitration; or, in the alternative, that the Tribunal clarify in the Award that it considered Claimants' claims for Monthly Service Fees through December 2010 and did not resolve any claims for fees for the extension period, and responding to other arguments made by Supreme.

Supreme replied by letter dated January 19, 2011, and again asked that the Tribunal deny all relief requested by Claimants.

The Relevance of the Indictment and the Missing Witnesses to the Issues in the Arbitration

Supreme argues that the existence of the Indictment and the PWC witnesses' refusal to appear and testify entitle them to certain adverse inferences[9]. Supreme argues first that, by failing to appear with witnesses to rebut the allegations in the Indictment, PWC and PCA have effectively admitted the truth of those allegations. This in turn (argues Supreme) leads to the conclusion that - in performing their obligations under the Services Agreement - PWC and PCA acted in the same illegal manner as they are accused of acting in the procurement and performance of their own prime vendor contract for Zone 1. Supreme then contends that this means that: (i) Supreme was fraudulently induced to enter into the Services Agreement and should now be entitled to rescind or, at the least, be excused from further performance; or (ii) at a minimum, the Services Agreement is unenforceable in accordance with New York law as either an illegal contract or a contract that was never intended to be performed except by corrupt means.

Supreme further argues that Lubrano's and Switzer's failure to testify about the negotiations surrounding the Services Agreement leaves unrebutted, and effectively admitted, Supreme's testimony with regard to what the parties' intended by the phrase "Net Revenues".

Supreme also contends that PWC's failure to produce its officers for testimony in the arbitration effectively constitutes an admission that PWC and PCA breached the Services Agreement by failing to assist Supreme in obtaining best pricing and terms from suppliers (and by failing to seek waivers from those suppliers with whom PWC may have had confidentiality agreements to enable such information to be communicated to Supreme).

Finally, Supreme seeks sanctions against PWC and PCA. It reiterates its prior pre-hearing motion that sought to preclude any evidence supportive of the Claimants' claims on which the four witnesses would have been expected to testify. That pre-hearing motion was denied. In the same vein, Supreme asks that "[t]he Tribunal should (1) dismiss PWC/PCA's case; or (2) strike its answer to the counterclaims". (Supreme's Post-Hearing Brief at page 8). Supreme also urges the panel to strike Claimants' answer by reason of PWC's alleged withholding of relevant documents.[10]

The adverse inferences that the Tribunal is being asked to make will be dealt with below in the context of the issues to which they relate. There are, however, several basic propositions that should guide the analysis.

First, this is an arbitration being conducted under the AAA Commercial Rules, as those Rules may be supplemented by the ICDR Arbitration Rules. It is not a court proceeding. The Tribunal has no authority under either the AAA or ICDR Rules to impose draconian sanctions on a party even if it was so inclined. Thus, the Tribunal will not revisit its prior order denying the Respondents' motion to preclude the Claimants from offering any evidence on topics about which the missing witnesses would have been expected to testify, and will not effectively default a party because of perceived discovery abuses. Each side could (and did) present substantial testimonial and documentary evidence. To the extent that one side or the other failed to present a witness, the panel will consider the making of an adverse inference if appropriate. The drawing of such an inference is not in the nature of a sanction but within the panel's permissible discretion when viewing the evidence as a whole.

Second, one must separate the inferences that might be drawn from the mere existence of the Indictment from the inferences that might be drawn from the lack of testimony from the missing witnesses. An indictment, of course, is not a conviction. It is merely an accusation in which the Grand Jury has determined that the facts recited in the Indictment, if unexplained, would warrant a criminal conviction. *Levy v. Chasnoff, 245 A.D.607, 609-610, 283 N.Y.S. 891 (1st Dep't 1935*). An indictment, standing alone, is usually insufficient to warrant entry of a judgment against the alleged malefactor, even if he or she declines to testify. *Steinbrecher v. Wapnick, 24 N.Y.2d 354, 248 N.Y. 2d 419 (1969).*[11] Exceptions exist in those cases where a plaintiff refuses to answer questions at a pre-trial deposition and thereby prevents the defendant from mounting a defense *(Nasca v. Town of Brookhaven, 10 A.D.3d 415, 416 (2d Dep't 2004))* or where a defendant refuses to engage in any pre-trial discovery and then seeks to offer evidence once the plaintiff amasses a fully documented and persuasive motion for summary judgment *(SEC v. Benson, 657 F.Supp 1122 (S.D.N.Y. 1987)* in which the SEC fully proved its entitlement to a judgment while the defendant, accused of diverting funds in violation of numerous provisions of the Federal securities laws, refused to provide any evidence in pre-trial proceedings and was thereafter precluded from offering evidence in opposition to the SEC's motion).

Third, the existence of the Indictment only gets Supreme so far in enabling the panel to draw inferences about PWC's and PCA's conduct in their dealings with respect to the Services Agreement. The Indictment does not purport to cover PWC's conduct in connection with its performance of the Services Agreement. That Agreement relates in any event to Zone 3. The Indictment relates solely to PWC's activities in connection with its own prime vendor contract for Zone 1. While the Indictment deals with certain facts that are arguably germane to the issues in this arbitration, at least as they relate to certain specific activity (such as the use of a few market basket prices in Supreme's bid for Zone 3 and allegations regarding PWC's attempts to obtain lower prices for itself from vendors and consolidators with whom Supreme also did business) most of the Indictment contains allegations that are specific only to the Iraq contract.[12] Put another way, if, hypothetically, PWC were found guilty of the crimes with which they are charged, this would, even assuming the applicability of the Federal Rules of Evidence (which are not applicable in this arbitration), only constitute similar bad acts and not admissions requiring, or supporting, the entry of judgment in favor of Supreme.[13]

Supreme cites cases dealing with the consequences of a civil litigant's invocation of the Fifth Amendment privilege. There is a basis for this as the missing PWC witnesses - while never actually asserting the Fifth Amendment privilege-- quite clearly declined to appear to avoid answering questions under oath at the arbitration that might in some way impact upon the pending criminal proceeding.[14] Viewing this as, in effect, a party's reliance upon the Fifth Amendment also has implications. PWC's witnesses did not simply refuse to appear and testify without good reason. The cases are rife with admonitions to the trier of fact not to penalize unduly a civil litigant who, in essence, is compelled to choose between mounting a defense or waiving the privilege. ("When a defendant fails to present evidence on his own behalf in a civil case... but chooses instead to assert his constitutional privilege, he places himself at an obvious disadvantage.... The fact that a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege does not, however, mean that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to a judgment.") *Steinbrecher, supra,* at 365.

It is important to recognize, however, that PWC, the indicted party, is one of the Claimants in this arbitration, not one of the Respondents. Accordingly, the Tribunal must be vigilant to guard against the possibility that Supreme may be unduly or unfairly prejudiced by its inability to cross-examine a missing witness. In that regard, a party may not "use the privilege as an instrument of attack." *Levine v. Bornstein, 13 Misc.2d 161, 164, aff'd 7 A. D. 2d 995 (2d Dep't), aff'd, 6 N. Y.2d 892 (1959).* See also, *Serafino v. Hasbro, 82 F.3d 515, 518 (2d Cir. 1996)* ("[W]hile a trial court should strive to accommodate a party's Fifth Amendment interests [citation omitted], it also must ensure that the opposing party is not unduly disadvantaged."); *Nasca v. Town of Brookhaven, supra at page 416* ("Although the plaintiffs have the right to invoke the Fifth Amendment privilege against self-incrimination, they cannot wield it as a sword.")

Yet another element to the panel's consideration was explained by Judge Breitel in his dissent in *Steinbrecher.* The nub of the dissent in that case was that the defendant there used the privilege tactically and not just defensively. As the dissent there explained *(24 N.Y.2d at 371):*
A defendant, or any party, should not be able to use the privilege in a duplicitous way... Therefore, defendant's tactics should be viewed as having shaped the result - a waiver of the privilege in this action.

In this case, the Claimants sought a stay of the arbitration to permit the Indictment to run its course. Supreme strongly

resisted that application and insisted that the hearing go forward. In view of Supreme's opposition, the Claimants' application was denied. Thus, in one sense, Supreme's insistence that the case be heard sooner rather than later helped to orchestrate the situation that the panel now faces.

While the failure of certain PWC witnesses to appear may have been precipitated by the Indictment and the denial of the stay, the operative fact is that certain witnesses with knowledge did not testify. For the reasons set forth above, this does not translate into an automatic win or loss by one party or the other. Instead, the failure of a witness to testify "may be considered by a jury in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert." *Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 42 (1980), quoted in, Access Capital, Inc. v. DeCicco, 3012 A.D.2d 48, 52, 752 N.Y.S.2d 658 (1st Dep't 2002).*
In other words, a "party who asserts the privilege against self-incrimination must bear the consequence of lack of evidence," [citation omitted], and the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation.

United States v. Certain Real Property and Premises, 55 F.3d 78, 83 (2d Cir. 1995) (emphasis added).

The Tribunal's goal is to do justice based on the facts as they appear. This requires the panel to assess the evidence, or lack of it, as a whole and make a determination. The absence of a witness who chose not to appear will be part of this assessment. The mere absence of one or more witnesses, however, will not, *ipso facto,* determine an issue adversely to the party who declined to offer those witnesses if the weight of the evidence, taken as a whole (including whatever adverse inferences that might be drawn) leads to a different conclusion. The parties in this case produced a considerable amount of documentary and testimonial evidence and all of it will be duly considered.

Supreme's Causes of Action for Fraudulent Inducement and Rescission

Supreme charges that the Claimants fraudulently induced it to enter into the Services Agreement. The false representations are said to arise out of written statements by Claimants in which they represented that they would provide "the strength of unlimited food procurement capacity" and would "leverage suitable payment terms and present an unmatched buying power" and would "select the correct products and assist Supreme in obtaining market basket pricing for the bid." Supreme alleges that these statements and similar oral representations were untrue (and known to be untrue) when made and that - if PWC/PCA had been honest - Supreme would have never entered into the Services Agreement. Supreme asks for the remedy of rescission and a return of all monies paid to Claimants under the Services Agreement.

Supreme's fraudulent inducement claim, at least to the extent it is based on the Claimants' alleged intent not to perform the Services Agreement, must be denied. *Raymond Weil, S.A. v. Theron, 585 F.Supp.2d 472, 481-482 (S.D.N.Y. 2008).* Further, Claimants in fact performed at least some of their contractual obligations, and Supreme cites no case that an undisclosed intent to perform a contractual obligation in a corrupt or dishonest way can support a claim of fraudulent inducement. Unlike in certain contracts, *see, e.g., FCI Group, Inc. v. City of New York, 54 A.D.3d 171, 862 N.Y.S.2d 352 (1st Dep't 2008),* where a specific contractual covenant provided that the contractor would perform its obligations ethically, the Services Agreement has no such provision.

Moreover, "damages" is a necessary element of a fraud cause of action. Supreme must prove that it suffered some damage arising out of the allegedly fraudulent representations or omissions. Supreme seeks to fulfill that element of the tort by alleging that, because of fraudulent market basket prices presumably supplied by PWC and PCA, Supreme was unwittingly exposed to the risk of prosecution and other adverse governmental action. Supreme further alleges that it would not have entered into the Services Agreement if it had known that PWC never intended to perform honestly.

It is difficult to fathom, however, how the Claimants alleged wrongdoing caused damages to Supreme. One of Supreme's allegations is that PWC engaged in wrongful behavior by giving Supreme market basket prices that were fraudulent and artificially low. This, Supreme argues, caused damage because it exposed Supreme to a claim of fraud by the government. As events have played out, however, Supreme has not only not been accused of any wrongdoing in the presentation of its market basket, but has been granted a contract extension. Thus, Supreme has, if anything, received a significant benefit from its use

of market basket prices that it received from the Claimants.

Supreme has not lost money acting as the DOD's prime vendor contractor in Afghanistan. Corner's testimony was largely unopposed that Supreme - who had never been a prime vendor prior to being selected for Afghanistan - obtained the contract only with PWC's and PCA's support and assistance. Certainly, Supreme offered no compelling testimony to the contrary. At the time that PWC and PCA assisted in the work-up of Supreme's bid and offered their assistance in obtaining market basket and other prices, the DSCP thought highly of PWC's performance in Iraq.[15] This undoubtedly lent credibility to Supreme's bid.

Supreme bears the burden of proof with respect to each element of its fraud cause of action, and it cannot carry that burden at least with regard to the element of damages.

Moreover, rescission is now unavailable as a remedy. Rescission is an equitable remedy that must be pursued without unreasonable delay. The relief anticipates returning the parties to the status quo ante. That is obviously impossible now that Supreme has obtained the PVC for Zone 3 and earned considerable revenue from its efforts. In addition, the parties have performed at least some of their mutual obligations under the Services Agreement and Supreme has now terminated the contract. Supreme read press reports in October 2007 concerning the facts underlying the alleged fraud. It then took steps to terminate the Services Agreement and not to rescind. Indeed, it did not seek rescission until November 2009. The delay is fatal to the rescission claim. See, generally, cases cited at Claimants' Post-Hearing Memorial, pages 39-40.

The Faithless Servant Doctrine

Supreme also relies on the faithless servant doctrine as a defense to PWC/PCA's claims. Under New York law, the disloyal or faithless performance of an agent's duties bars the agent from any compensation. *Phansalkar v. Anderson Weinroth 7 Co., 244 F.3d 184, 208 (2d Cir. 2003).* The doctrine also applies to independent contractors, such as PWC/PCA. See, e.g., *Sequa Corp. v. GBJ Corp., 156F.3d 136, 146-147 (2d Cir. 1998).* Supreme contends that the Claimants effectively forfeited their right to any compensation after their disloyalty began. Supreme cites New York law to the effect that harm to the principal is not an element that need be proven, and the Claimants should be barred from any recovery because of their actions that included their failure to act honestly in the performance of their duties under the Services Agreement as well as their failure to give the lowest food prices to Supreme.

Claimants contend that the doctrine is inapplicable because it applies only when the servant acts in an employment or agency capacity, or when the agent has violated a fiduciary duty within the scope of his relationship with the principal. *Phansalkar, supra; G. K. Alan Assoc. v. Lazzari, 66 A.D. 3d 830, 833 (2d Dep't 2009).* Because Claimants were independent contractors (Services Agreement, Sec. 10,03), they owed no fiduciary duty to Supreme and, at most, any transgressions constituted only breaches of the Services Agreement. In addition, they distinguish the cases cited by Supreme under the theory that any alleged misconduct must "substantially violate[ ] the contract of service" and "permeate the employee's service in its most material and substantial part" *(Phansalkar, 344 F. 3d at 201-202),* and contend that Supreme has not met that test.

The "faithless servant" doctrine under New York law is a strict rule of forfeiture that compels a faithless servant not only to forego any claim for unpaid compensation, but to disgorge any monies received during the period of disloyalty. *Phansalkar, supra.* The cases reflect, however, that the doctrine only applies to an employee or agent (or one in that position). Here, Section 10.03 of the Services Agreement defines PWC/PCA as an independent contractor and that "[n]othing contained in this Agreement shall be construed to create between the Parties an association, trust, partnership, joint venture or other business entity, *or impose any trust or partnership or similar duty on any Party."* (emphasis added). This statement is consistent with the parties' actual relationship under the Services Agreement. That relationship bespeaks of a contractual relationship and not one akin to principal-servant.

The Services Agreement does not create an employment relationship as in Phansalkar. Nor did the Services Agreement create an agency or similar relationship by which Supreme paid Claimants on a commission basis for tasks that the Claimants separately performed as in *Compsolve v. Neighbor, 18Misc.3d 1104, 2007 WL 4442412 (S. Ct. Erie Co. 2007),* or *Sequa Corp. v. GBJ Corp., 156 F.3d 136 (2d Cir. 1998).* Those cases in which the courts applied the doctrine to the principal's benefit arose in the context of one of those relationships. *See also, G.K. Alan Assoc. v. Lazzari, 66 A.D.3d 830, 833, 887*

N.Y.S.2d 233 (2d Dep't 2009) ("[W]e uphold the Supreme Court' s determination that the consulting agreement gave rise to an agency relationship between Alan and the Corporations, as well as between Alan and Lazzari.")

The Courts define "Agency" as "a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act." *Id.,* citation omitted. In this situation, not only did the parties disclaim any such relationship (Services Agreement, Section 10.03), but Claimants were not paid based on commissions that they earned task-by-task. Instead, the Services Agreement is more like a finder's fee arrangement payable over time based on the contract's value, coupled with contractual obligations that, if breached, permit a termination which, in turn, reduces the fee going forward. It is, in essence, a contractual relationship with bargained-for consequences in the event of breach. It is not the type of relationship to which the faithless servant doctrine applies.

The Alleged Unenforceability of the Services Agreement as Either an illegal Contract or a Contract That Cannot be Performed Except by Illegal Means

Citing the New York Court of Appeals case of *McConnell v. Commonwealth Pictures Corporation,* 7N.Y.2d 465, 166 N.E.2d 494 (1960), and two subsequent Appellate Division cases, *FCI Group, Inc. v. City of New York,* 54 A.D.3d 171, 862 N.Y.S. 2d 352 (*1st Dep't* 2008) and R.A.C. *Group v. Board of Education,* 21 A.D.3d 243, 799 N.Y.S.2d 559 (*2d Dep't* 2005), Supreme argues that the Claimants' corrupt performance of the Services Agreement bars their recovery.

In *McConnell,* the defendant, a motion picture distributor, contracted with the plaintiff, an agent, for the agent to receive a commission if he could negotiate a contract with a motion picture producer which would allow the defendant to distribute the producer's motion pictures. The plaintiff-agent successfully negotiated the contract with the producer and the defendant earned money distributing the motion pictures. After paying the plaintiff an initial payment under the agency contract, the defendant refused to pay anything further. The agent then sued on his contract. The defendant contended that the contract should not be enforced because the plaintiff had procured the distribution contract by bribery. The Court of Appeals (two judges dissenting) upheld the defense.

Thus, *McConnell* stands for the proposition that a court in New York will not enforce a contract, even one legal and enforceable on its face, if that contract - or the benefits to be received under that contract - were procured by bribery or other illicit means.

The situation at hand, however, is distinguishable from the facts in *McConnell.* Unlike in *McConnell,* PWC in this case is not accused of wrongdoing with reference to either the Services Agreement or the prime vendor contract for Afghanistan. The Indictment does not relate to PWC's conduct in connection with either of these agreements. Instead, it relates solely to PWC's alleged conduct in acquiring and performing its own prime vendor contract for Zone 1 (Iraq). There is no accusation that PCA or PWC bribed anyone at Supreme to obtain the Services Agreement. Nor is there any accusation that PCA or PWC bribed anyone at the DSCP to obtain the PVC for Supreme. Supreme asks the Tribunal to infer such illegal activity from the mere existence of the Indictment and from the failure of several PWC witnesses to testify. Neither the existence of the Indictment, nor the inability to cross-examine the missing PWC witnesses, however, proves that PWC and/or PCA "corruptly" procured or performed either the Services Agreement or the prime vendor contract for Zone 3.

The Indictment accuses PWC of providing to the government a number of artificially low market basket prices as part of its bid for the prime vendor contract for *Zone I.*[16] Supreme points to the fact that PWC offered some of those same market basket items to Supreme for use in Supreme's bid for Zone 3 and then surmises that these were also low and did not represent real prices. Assuming that Supreme obtained its PVC by submitting these prices, Supreme concludes that its PVC was obtained by fraudulent means thereby exposing it to the risk of claims asserted by the government. As explained above (at footnote 15), however, the proof was insufficient that the market basket prices that *Supreme* submitted to the government were in any way fraudulent. The fact that Supreme was offered and accepted an extension of its PVC is further proof that nothing was amiss in the way it bid for, and performed, its PVC for Afghanistan.

The cases other than *McConnell* that Supreme cites are distinguishable. In *FCI Group, supra,* the plaintiff, a contractor, sued to recover the amount due under a contract with the City of New York. There, the plaintiff attempted to bribe city officials in

return for their approval of a change order that would have increased the fees payable to the contractor. The contract between the parties contained a specific clause that permitted the City to void the contract if the contractor acted unethically or attempted to bribe a City employee. *54 A.D. 3d at 174.* Relying on that clause, the City cancelled the contract and refused to pay the balance allegedly due. The contract also contained an arbitration clause providing for the arbitration of "[a]ll disputes... that arise under, or by virtue of, this Contract." *Id. at 174.* Relying on the arbitration agreement, the contractor moved to dismiss the City's defense based on the contract clause cited above, and to compel arbitration. The City itself moved for summary judgment. Finding that the arbitration agreement was narrow and that it did not cover the City's defense, the Appellate Division reversed the trial court and granted summary judgment to the City. Quoting *McConnell,* the court in *FCI Group* stated *(54 A.D.3d at 177):*
To constitute a valid defense to an action on a contract, the alleged illegality must be "central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract" [citing *McConnell].*

Supreme attempts to bring itself into the above rule by claiming that: (i) the Indictment, coupled with the presumed testimony from the missing witnesses, proves that PWC never intended honestly to perform its contractual obligation to provide Supreme with accurate and best pricing information; and (ii) access to pricing and vendor information were the dominant reasons that it entered into the Services Agreement. Supreme is correct that Lubrano or Switzer may well have had relevant information about the *bona fides* of the food prices given to Supreme. The inference, therefore, may be drawn that Supreme was not given PWC's best prices or given access to vendors or consolidators under the same terms as enjoyed by PWC. This has its implications as will be discussed below with reference to Supreme's claim of breach. It does not, however, support a finding that the entire Services Agreement is unenforceable.

According to the FCI Group court's reading of McConnell, the illegality "must be central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract." The dominant part of PWC's and PCA's performance under the Services Agreement, however, was in its efforts in assisting Supreme in winning the bid and in performing the PVC during the ramp-up period. The provision of best pricing and the like may have been viewed as important to Supreme, but the evidence is that Supreme quickly developed its own supplier relationships and relied only occasionally on PWC's advice and recommendations. There was limited evidence presented of Supreme's specific requests to PWC for pricing or vendor advice prior to the flurry of correspondence which began in late January 2008. According to the evidence, Supreme made requests for pricing information during the period June 2005 through September 2006, and these requests were met by PWC. (CX-508, CX-506, RX-60, RX-522, CX-844, CX-504, CX-1410, CX-535, RX-77 and EX-1267). Significantly, Supreme never sought to terminate the Services Agreement for PWC's failure to provide pricing or vendor information until it learned of the investigation into PWC's conduct in the press. It then initiated the January 28, 2008 correspondence that culminated in the Notice of Termination in late March 2008. This is consistent with the Claimants' contention that they performed (or at least substantially performed) their contract obligations to Supreme's satisfaction until news of the government's investigation prompted Supreme to terminate the contract.

Supreme argues that it had no way of knowing that PWC was not giving it the best prices and supplier information until the investigation came to light which prompted Supreme to send its correspondence beginning in late January 2008. This may be true, but the fact remains that Supreme only infrequently asked PWC for pricing and vendor information after the initial stages of the Claimants' performance under the PVC.

By contrast, a substantial amount of evidence was presented by PWC and PCA regarding its efforts to assist Supreme in acquiring and initially performing its obligations to the government. These included the provision of low (Supreme says, too low) market basket prices - only, at most, for a few items that are described in the Indictment and that Supreme utilized in its bid-- and ramp-up assistance. This included warehousing design and systems assistance and the sale of food to Supreme from PWC's stock in the ramp-up period. PWC and PCA even assigned two employees, Messrs. Crichton and Neff, to take alternate shifts at Supreme's warehouse in Kabul and to assist with the logistics. This help was much needed and appreciated. CX-229 and CX-759.

Indeed, the Services Agreement implicitly recognizes that Supreme's need for assistance would be greatest in the early months of the Services Agreement, when Supreme had to win its bid and then ramp-up quickly for performance. In order to avoid Supreme's ability to cut off the Monthly Service Fees payable under the Services Agreement once Supreme developed its own supply chain and no longer needed PWC and PCA, the Services Agreement, at the Claimants' insistence, provides in

Section 2.01(a), quoted above at page 4, that half of the Monthly Service Fee "shall survive the expiration or termination of this Agreement (including, without limitation, any termination [including one for an uncured material breach] pursuant to Article 7) ..."[17] The very existence of this provision militates for the conclusion that the Claimants' performance in the early stages of the Services Agreement was understood to be of greatest benefit to Supreme.[18]

The situation here is not like the facts in *McConnell,* but is closer to the case of *National Union Fire Ins. Co. v. Robert Christopher Assocs., 257 A.D.2d 1 (1st Dep't 1999)* cited by Claimants. There, the defendants invested in a real estate venture and, as part of their investment, bought a financial performance bond from the plaintiff. After the defendants defaulted on payments due the sponsor, the plaintiff paid on the bond and sought reimbursement from the defendants. The defendants contended that they need not reimburse the bonding company because they were defrauded by the sponsor of the project into investing in the underlying investment. In declining to overturn the grant of summary judgment for the plaintiff, the court rejected the defendants' reliance on *McConnell* because "the fraud asserted by defendants is not associated with the immediate transaction with the guarantor." *257 A.D.2d at 8-9.* Similarly, the fraud that Supreme alleges is not associated with the Services Agreement. Nor is it associated with Supreme 's Afghanistan prime vendor contract except as Supreme argues that the Tribunal should infer such fraud solely by reason of the Indictment relating to PWC's Iraq prime vendor contract, and the failure of several PWC witnesses to testify. The connection is simply too attenuated to permit the Tribunal to invoke *McConnell* to void an otherwise lawful agreement.

Another Court of Appeals case, *Lloyd Capital Corp. v. Pat Henchar, Inc., 80 N.Y.2d 124, 603 N.E.2d 246 (1992) is instructive. In Lloyd Capital,* the Court of Appeals affirmed a decision that enforced a loan agreement that violated Federal Small Business Administration ("SBA") regulations. In doing so, the Court explained (80 N.Y.2d at 128):
As a general rule also, forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as "a sword for personal gain rather than a shield for the public good" [citation omitted.]. Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law.

As in *Lloyd Capital,* Supreme essentially seeks to wield an illegality defense as a sword for private gain. In doing so, it asks the Tribunal to punish PWC for its *alleged* criminal behavior in respect of a different government contract. It would be inappropriate under these circumstances for the Tribunal to relieve Supreme of its contract obligations.

The Payments Called for Under the Services Agreement

The major dispute between the parties involves the correct calculation of the Service Fees payable to the Claimants under the Services Agreement. Article 2(a) of the Services Agreement defines the Monthly Service Fee as "equal to 3.5% multiplied by the Net Revenues from the Prime Vendor Contract." The contract definition of "Net Revenues from the Prime Vendor Contract" sheds little light on the intended meaning of the phrase. That definition simply provides generally that "Net Revenues" are equal to "the net revenues derived or accruing from the Prime Vendor Contract and paid to Company [Supreme]." *Id.* at page 2. Supreme argues that the term "Net Revenues" refers only to the distribution fees that Supreme earns for delivering food under the PVC, i.e. the component of its invoicing to the government that represents its own earnings. PWC and PCA on the other hand contend that the term "Net Revenues" means the totality of payments to Supreme by the government, which is equal to the cost of the food delivered and paid for by the government plus Supreme's distribution fees.

In support of its position, Supreme refers to the term "net" as opposed to "gross", a term that Supreme contends is unambiguous. It also refers to some of the negotiating history including Comer's acquiescence in a change of language from one of the contract drafts from "gross" to "net". It further points out that it would never have agreed to a 3.5% fee applied to both the cost of the food delivered and the distribution fees that it was charging. The cost of food is a pass-through expense to the prime vendor. Thus, the cost of the food delivered is irrelevant to Supreme which might make more or less on a distribution fee that relates to a particular food item (for example, the distribution fee for delivering lobsters might be more than the distribution fee for delivering cereal), but earns no mark-up or profit on the sale of the food itself. Supreme demonstrated at the hearings that it would be possible - depending on the cost of the food and the attendant distribution fee - for it to actually lose money if it was compelled to pay 3.5% of the total invoiced amount rather than only 3.5% of its

distribution fee.

Claimants on the other hand contend that both the contract's language and the parties' own course of performance confirm that the 3.5% was correctly applied to the cost of the food sold and paid for plus the earned distribution fees. Comer testified that he had no objection to the change in the contract language from "gross" to "net" because the change simply meant that Supreme would pay 3.5% on the amount that it actually collected from the government as opposed to the amount that it billed. Claimants further rely on the fact that Supreme always paid 3.5% of the total invoiced and paid by the government, and not merely 3.5% of the distribution fees earned in the ordinary course of the contract's performance. Thus, Supreme by its consistent course of performance (argues the Claimants) confirmed the common understanding of the parties. Claimants further contend that Supreme itself defines "net income" as inclusive of all revenue received from the government and not just the distribution fees. Supreme never disclosed its certified financial statements, but its own expert, Mr. Dewey, testified that he had spoken to the audit partner from PricewaterhouseCoopers that performed the audit of Supreme's financial statements, and that the audit partner reported that Supreme itself records revenue on the basis of the gross billing to the government which include the cost of goods (Dewey, Tr. 2407).

Claimants also rely on language contained in Section 2.02(a) of the Services Agreement. That section, entitled "Calculation and Payment of Monthly Service Fees" provides (emphasis supplied) :
As soon as practicable at the end of each month, the Company shall prepare and submit to the Contractor a written calculation of the Monthly Service Fee and the payable in respect of the previous month (each, a *"Calculation"*), *together with the bank deposit confirmation, in support of such Calculation.*

Claimants argue that the above contract provision only makes sense if the Monthly Service Fee was to be calculated on the food price plus the distribution fees as a "bank deposit confirmation" would only prove a total payment that Supreme received from the government and not just the receipt of distribution fees.

After a careful review of the evidence, the Tribunal concludes that parties intended to apply the Monthly Service Fee to the total amount of the paid invoices for food (equal to the cost of the food delivered and paid for plus the distribution fees) and not simply to the distribution fees. This is not only consistent with the contract language, but is apparent through an analysis of the parties' course of performance in the ordinary course of their business. Indeed, the evidence reflects that top executives at Supreme knowingly approved of the method of calculation at the time that PWC began sending its invoices for payment thus confirming that the parties' course of performance conformed to the parties' intentions at the time the contract was negotiated and signed. In addition, Supreme's executives met with counsel prior to sending its January 28, 2008 letter demanding price information from PWC, and one would expect that a review of the parties' entire contractual performance would have been discussed at that point. Yet, neither Supreme's January 28, 2008 letter, nor its ultimate termination letter of March 26, 2008 mention any overpayment error that Supreme may have committed.

New York has long had a rule of contract construction that provides that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling influence." *Old Colony Trust Co. v. City of Omaha, 230 U.S.100, 118 (1913), quoted in Federal Ins. Co. v. American Ins. Co., 258 A.D.2d 39, 44 (1st Dep't 1999).* The parties' course of dealing is considered the "most persuasive evidence of the[ir] agreed intention." *Id.* The Restatement rule is the same. As explained in *Restatement (Second) of Contracts, Sec. 202, comment g (1981):* "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." This general rule gains even more force in the instant case because of the lateness of Supreme's argument that "Net Revenue" does not include the net amount paid by the government for food. Supreme's interpretation first appeared in an Amended Answer to the Claimants' Demand for Arbitration filed in March 2009, six months after Supreme filed its original Statement of Defense in September 2008. While this fact is certainly not determinative of the issue, it is telling that - even in response to the Claimants' arbitration demand - Supreme did not assert that it had a colorable defense based on the contract language.

Moreover, at the time PWC billed Supreme and Supreme ultimately paid, Supreme's top accounting and other executives reviewed and approved the calculation as Claimants in this proceeding contend it should be made.

In March 2006, Michael Lane, Supreme's Senior Financial Controller, wrote to PCA's Martin Morawski requesting that PCA

invoice Supreme directly based on Supreme's "receipts ex DSCP." (CX-447). Two month later, Lane developed a chart showing how to calculate the fees which he sent both to PCA and to Supreme's principals. The chart calculated the fees payable on "Food Sales NET" which was the invoiced amount less "DSCP Deductions." (CX-45 at page 3830). In August 2006, the parties met to reconcile the payments to be made. The minutes of that meeting confirm that Supreme would pay based on its "Collection" from DSCP. (CX-47). The following month, PCA's invoice showed that PCA was billing Supreme based on Supreme's "total sales." (CX-44). And, of course, Supreme actually paid PWC's invoices (as adjusted) based on 3.5% of Supreme's receipts from the government.

Supreme's internal correspondence confirms that Supreme's top management did not simply rubber stamp this method of calculation but approved it after careful review. As Supreme's Financial Controller, Stephan Heierli, wrote to Lane in March 2006, "We said that we pay based on our payments received. This means the following... We add up all payments received during [any] month and calculate the commission related to received payments. This amoun[t] will then be paid to PCA/PWC ..." (CX-90) After discussing the fees with Orenstein, Supreme's second in command, Heierli then wrote:" We should emphasize that we agreed to pay the service fee based on received payments." (CX-1075 at 1888). In August of that year, Orenstein agreed that Supreme should pay "based on what we get paid." (CX-1264 at 6549). Lane testified that Orenstein and Heierli approved the payments every month (Tr. 1241-1242) and that Heierli "spent a considerable amount of time reviewing these calculations" even to the point of catching a $5,800 error in one month. (CX 857, 859 Tr. 1273-5) Supreme conceded that, because its cash flow was very tight, both Heierli and Orenstein carefully monitored the cash going in and out. In sum, it is apparent that the payments to the Claimants were made at the time with full appreciation of the method of calculation that was used.

In light of this evidence, Supreme's argument based on an alleged mistake must be rejected. There is no documentary evidence that the 3.5% actually paid to PWC on the total of the cost of the food plus the distribution fees.was done mistakenly. The only evidence to the contrary is in the statements of Supreme's own witnesses.).

The fact that none of PWC's negotiators appeared and testified will not preclude the Claimants from prevailing on the basis of the documentary and other evidence marshaled in support of their position. Surely, the failure of either Switzer or Lubrano to appear and discuss the contract negotiations may lead to an adverse inference with respect to their testimony. The Claimants' interpretation of the manner of payment called for in the Services Agreement, however, is not dependent in any meaningful way on the testimony of any of the absent witnesses or, for that matter, on Comer's testimony. A wealth of additional evidence, including many documents from Supreme's own files, confirm the Claimants' position. This documentation evidences Supreme's clear understanding of what the contract meant and how the payment terms were to be applied. The fact that neither Switzer nor Lubrano appeared will not vitiate that wealth of documentary material, all pointing to the fact that the Monthly Service Fee was knowingly based upon total government receipts and not just the distribution fees.

In so finding, the Tribunal has also considered the testimony of the financial experts called by the parties. The definition of "Net Revenue" that is set forth at page 2 of the Services Agreement and that is quoted above at page 4, provides that the net revenue upon which the Monthly Service Fee will be calculated is to be "determined from the management accounts of the Company prepared in accordance with IAS [International Accounting Standards]." Supreme's expert, Lee M. Dewey, opined that a correct application of the applicable IAS standards lead to the conclusion that the Monthly Service Fees should have been equal to 3.5% of the distribution fees that Supreme received and not 3.5% of Supreme's receipts for the food plus the distribution fees. Mr. Dewey reached that conclusion by citing the criteria established by IAS 18 and its related Appendix. According to Paragraphs 7 and 8 of that accounting standard, pass-through receipts (for the food in this case) do not constitute part of an entity's net revenue if the entity acts in the capacity of an agent and not a principal. (Dewey Expert Report, page 10). Mr. Dewey then cited the factors that should be considered in determining whether an entity is in fact acting as a principal. *Id.,* page 11, and analyzed them one-by-one. *Id.,* pages 12 et seq. He then concluded that, while Supreme may have had some characteristics of a principal, it was, on balance, acting as an agent for the DSCP and, therefore, should properly report revenue as its net receipts equal only to the distribution fees that it receives. While not directly relevant in view of the definition of "Net Revenue" in the Services Agreement, Mr. Dewey also opined that the conclusion under IAS Standards is consistent with the conclusion that would be reached under U.S. GAAP (which was replaced by the FASB [Financial Accounting Standards Board] Accounting Standards Clarification.) Dewey Report, pages 19 et seq.

In response, Claimants presented their own financial expert, Richard E. Walck. Mr. Walck disagreed with Mr. Dewey's

conclusions and opined that the application of the standards set forth in IAS 18 does not lead to the conclusion that Supreme was acting as an agent. Mr. Walck also took issue with Mr. Dewey's citation of GAAP (and successor standards) and opined that the appropriate accounting guidance relating to accounting for government contracts confirmed that Supreme correctly paid PWC/PCA on the basis of 3.5% of its total receipts from the government including the cost of the food itself.

After due consideration, the panel concludes that the expert reports do not change the conclusion reached above that the Monthly Service Fees should have been calculated as they were in fact calculated, i.e. on the basis of Supreme's total receipts. First, it appears from a review of the standards listed in IAS 18, that Supreme was, in fact, acting as a principal and not an agent, at least as that term is defined as an accounting matter. Supreme's payment to the Claimants was also consistent with the accounting standards applicable to government contracts. In addition, Supreme's own internal accounts, which were prepared by internationally recognized accountants, apparently reported its revenue as inclusive of the receipts for the food that it sold - not simply its receipts for the distribution fees and sheltered income that it received.

In conclusion, PWC/PCA is entitled to Monthly Service Fees based on Supreme's total receipts.

The Claimants Breached the Services Agreement

PWC and PCA claim that Supreme's termination of the Services Agreement was a contrived exercise motivated solely by Supreme's desire to cut off the Service Fees payable and not by any material breach committed by the Claimants. According to Claimants, Supreme saw press reports of the investigation into PWC's conduct with reference to the Iraq prime vendor contract and decided to terminate. Claimants contend that Supreme did not send its letter of January 28,2008 in good faith and that it had no need or desire for the price information sought, other than to compete with PWC for the next prime vendor contract for Zone 1. Because Supreme's motivation was to gain information for competitive reasons, PWC was well within its rights to refuse to supply the pricing information. Claimants also argue that, in any event, this pricing information was the subject of confidentiality agreements with PWC's suppliers and could not be disclosed.

In response, Supreme claims that it demanded the pricing information in good faith. It also points to a number of instances in which PWC, in violation of the terms of the Services Agreement, gave Supreme prices that were demonstrably higher than those being paid by PWC. Supreme also points to the absence of Messrs. Lubrano and Switzer whose testimony would be crucial in this area of inquiry.

After consideration, the Tribunal agrees that Supreme has carried its burden of demonstrating that PWC did not give Supreme its best prices and vendor information. Nor does PWC have a defense that its failure to supply the information was motivated by improper competitive reasons (or by its purported belief that giving the price information would open it to a charge of collusive bidding). The Services Agreement does not give PWC a reason to withhold pricing information for any of the reasons given.

Moreover, this is one area in which the testimony of the missing witnesses can be deemed crucial. The documentary evidence on this issue was either sparse or ambiguous (for example, prices of items differed at different times thereby preventing an "apples to apples" price comparison). Oral testimony from witnesses with knowledge of the pricing would have been critical. PWC's failure to appear with knowledgeable witnesses warrants an adverse inference.

As PWC and PCA breached the Services Agreement by failing to give Supreme the pricing and other information demanded, and the provisions of Section 7.02 were otherwise met, Supreme properly terminated the Services Agreement for material breach as of March 26, 2008. Because Section 2.01(a) of the Services Agreement provides that such a termination will reduce the Monthly Service Fee by half, the rate applicable to Supreme's receipts after March 26, 2008 is 1.75%.

The Side Agreement

Supreme's PVC called for "the supply and distribution of prime vendor subsistence to U.S. forces and troops stationed in the territories identified in the [S]olicitation." Those territories included the four bases in Afghanistan: Kabul, Bagram, Salerno

and Kandahar. As the war in Afghanistan expanded, however, the DSCP requested Supreme to expand its services to include the supply and distribution of food to numerous additional locations, known as Forward Operating Bases, or "FOBs". These additional services requested by DSCP included inbound airfreight, outbound airfreight, and transport to and from Kabul and along the Afghanistan supply chain, which included, among other things, overland or other transportation from Karachi, Pakistan.

In response to this request for additional services, Supreme's Stephen Orenstein and PWC's Toby Switzer exchanged emails on May 15, 2006 regarding whether and, if so, how much, PWC/PCA should receive if Supreme agreed to this expansion of its work. After discussions, Orenstein wrote to Switzer to "confirm" what became known as the Side Agreement. Specifically, Orenstein wrote that the parties had agreed:

... on fees of 2% payable by Supreme to PCA/PWC for all services not requested in the solicitation of US SPV Afghanistan. These services include outbound airlift and road transport (deliveries from Kabul to customers not specified in the original solicitation) as well possible future work under this contract (i.e. road transport from Karachi to Kabul). For clarification purposes, inbound airlift (airlift into Afghanistan), while not part of the solicitation, will still attract 3.5%.

SX-115. Orenstein also requested that PWC prepare a formal contract amendment.

In response, Switzer responded that he had discussed the matter with Comer and that they have agreed "in helping you out with this issue in order to facilitate the negotiations you are having with DSCP, specifically on the additional internal Afghanistan transportation requirements that you currently have." *Id.* Switzer then went on to say:

However, I'm not ready to concede all of the future work associated with this contract as future work is a normal outcome of our basic contract and has been the principle I've worked under with PCA myself.

No formal contract amendment was ever drafted and, according to the Claimants, Supreme thereafter paid PWC/PCA based on the deal as reflected in Switzer's responsive email, i.e. Supreme paid PWC/PCA 2% on all revenue that it earned for providing internal Afghanistan transportation services for the military.

Two issues arise in connection with the Side Agreement. First is the issue of coverage. Supreme contends that the deal, as reflected in oral conversations that Orenstein thereafter had with Switzer, was that PWC/PCA would receive the lower 2% on "the additional non-subsistence services, including outbound airlift and road transport [from Kabul to the FOBs]", and the additional revenue earned providing road transport from Karachi to Kabul. See, Supreme's *Post-Hearing Br.* at page 42. Supreme further contends that the lower 2% is also applicable to the distribution fees applicable to the food delivered to the FOBs, as well as to the transportation costs. Supreme's Post-Hearing Br., p. 43; Orenstein Tr. 2858-2859. This, argues Supreme, was confirmed in conversations that Orenstein had with Switzer and is also consistent with the fact that the DSCP viewed the deliveries to the FOBs - including both the food and the transportation charges-- as additional services not covered by the original Solicitation. Claimants on the other hand contend that they agreed only to accept 2% rather than 3.5% on the revenue that Supreme received for the transportation services that it provided within Afghanistan, i.e. internal transportation costs to the FOBs and that the higher 3.5% still applied to the food.

Second, and more significantly, is the issue of whether the Side Agreement is a separate contract or effectively an amendment to the Services Agreement. If it is a separate agreement, then it presumably terminated upon the termination of the parties' relationship and no further fees are payable to PWC/PCA after March 26, 2008. If the latter, then the Claimants contend that the 2% fee should continue through the life of the contract, or alternatively, and to be consistent with the halving of the Monthly Service Fee under Section 2.01(a) of the Services Agreement, the 2% rate applied to these additional services should drop at most to half of that (1%) after termination.

As to the matter of coverage, Claimants point out that Supreme paid the Claimants under the Side Agreement at a rate of 2% applied only to in-country transportation services and 3.5% on all other revenues under the PVC. Supreme argues that it made a mistake in doing so, and that the 2% should have been applied to *both* the revenues received for transporting the food to the FOBs and to the distribution fees on the food delivered to the FOBs (or, alternatively - assuming Supreme loses on its argument that (whatever the percentage) Claimants were not entitled to be paid based on the cost of the food itself, to the cost of the food plus the distribution fees).

With respect to the issue of coverage, the Tribunal is of the view that - like in the billing and payment of PWC's invoices through November 2007 - the parties' course of performance is the most reliable indicator of what they intended the Side Agreement to cover. The email exchange of May 15, 2006 is indeed consistent with that payment, namely that the 2% was to apply only to transportation services and not to the food itself (whether that includes the cost plus the distribution fees or only the distribution fees).

The 2% should not be applied to the cost of the food (plus the distribution fees), which continues to garner a Monthly Service Fee of 3.5% (or 1.75% after termination). If, hypothetically, the DSCP has not asked Supreme to take on the additional responsibility to transport the food to the FOBs, then Supreme would have presumably delivered the same quantity of food to one of the four main bases as specified in the Solicitation. The troops still have to eat whether at the main base or at a forward operating base. Thus, the percentage to be applied to the food deliveries remains as provided for in the Services Agreement.

The Tribunal next turns to the issue of whether the Side Agreement constitutes a separate agreement or a modification of the Services Agreement such that payment under the Side Agreement continues post-termination. As to that issue, the Tribunal determines that the Side Agreement was intended to be a separate contract. First, it was separately discussed and negotiated. Moreover, Switzer himself characterized the services that the Side Agreement pays for as "future work associated with the contract" (SX-115) and not as "work under the contract" of some similar characterization.

In sum, the Side Agreement reflects a separate deal for Supreme's rendering of services outside of the Services Agreement. Its term implicitly coincided with the term of the Services Agreement, and when that agreement ended, Supreme's obligation under the Side Agreement also ended. In that regard, Switzer's absence does lead to the inference that his testimony would not have been helpful to PWC/PCA on this issue.[19]

Damages

For the reasons set forth above, the Tribunal determines that Claimants are entitled to 3.5% of the total net receipts from the government (*i.e.* the total cost of food that the government actually pays for plus the distribution fees) through March 26, 2008 and 1.75% thereafter through the initially anticipated ending date of Supreme's PVC. Claimants are also entitled to 2% of the inbound transportation costs calculated through March 26, 2008 in the same manner as calculated in the prior invoices paid by Supreme.

No adjustments are to be made to account for the controversy that may exist between the government and Supreme described in Supreme's letter to the Tribunal of May 10, 2010. That communication related to charges that Supreme billed for supplemental transportation and delivery services. It appears that this situation has not resulted in any adverse governmental action at least as of the date of this Award. It can also be inferred from the contract extension granted Supreme that the government is at least generally satisfied with Supreme's performance under its prime vendor contract and any adjustments that might be made will not be major.

The contract extension which Supreme was awarded in mid-December 2010 is another matter. Supreme argues that Claimants could have anticipated this extension and that their failure to raise this issue at the hearings effectively waived any claim that they might have otherwise had. Claimants on the other hand argue that they are entitled to their 1.75% on the net receipts that Supreme collects during the contract extension period.

More evidence is required in order to determine whether or not the contract extension granted Supreme is simply an extension of Supreme's existing prime vendor contract or the equivalent of a new contract for Zone 3. Evidence is also required to determine whether Claimants should have raised this issue prior to the close of the hearings. Accordingly, the Tribunal will not decide these issues but leave them for another proceeding if the parties cannot resolve the matter with the benefit of this Award.

Because of the complexity of the calculations and the amounts involved, this Award will be a Partial Final Award. Within 15 days from their receipt of this Award, each side will submit a proposed damage calculation based upon the findings in this Award. The Tribunal will thereafter issue a Final Award based on the calculations provided.

Counsel Fees and Costs

Article 12 of the Services Agreement, which contains the dispute resolution clause, provides simply for the application of the Rules of the American Arbitration Association. By decision dated May 21, 2009, the Tribunal clarified that those Rules as "may be supplemented by the ICDR Arbitration Rules will apply to this arbitration proceeding." *See,* Clarification Regarding Procedural Rules Applicable to the Arbitration dated May 21, 2009. Article 31 of the AAA's International Dispute Resolution Procedures permits the Tribunal to apportion fees and costs if it determines that such apportionment is reasonable, taking into account the circumstances of the case. After due consideration, the Tribunal declines to apportion fees and costs to either party. First, only the AAA Rules are referenced in the Services Agreement. Further, the substantive law chosen by the parties is New York law, which was also the place of arbitration. New York law would not provide for the awarding of costs or fees in the ordinary course.

Accordingly, each side will bear its own costs and counsel fees.

Interest

Section 2.03 of the Services Agreement provides that "Any amount payable under this Agreement that is not paid when due shall accrue interest for each day after such due date until the outstanding balance is paid in full at the lesser of (a) a rate equal to two and a half per cent (2.5%) over LIBOR) London Interbank Offering Rate) for United States Dollars (US$) as published in the Financial Times (London) ... and (b) the maximum rate permitted by applicable law. The rate in (b) would be the 9% judgment rate applicable under New York law.

In its proposed damages calculations, the parties will use the rate specified in Section 2.03 above.

For the sake of completeness, the Tribunal has not dealt with every argument made by the parties in every particular (such as, for example, Supreme's argument that, under one scenario, Claimants were unable to perform their obligations because of antitrust concerns). However, all such arguments have nonetheless been considered and found to be either without merit or insufficient to alter the conclusions reached.

Relief Awarded

For the reasons set forth above, Respondent Supreme Foodservice AG will pay to Claimants an amount to be determined with reference to the findings in this Partial Final Award. Within fifteen days from their receipt of this Partial Final Award, each side shall submit to the Tribunal its calculation of the damages payable. The Tribunal will promptly thereafter issue a Final Award incorporating the damage calculations that it deems appropriate.

Each side will bear its own costs and counsel fees. The interest rate described in Section 2.01 of the Services Agreement will be utilized in the calculation of damages due Claimants.

No decision is being made with respect to the contract extension granted Supreme. The matter of the damages payable to Claimants by reason of that extension, if any, may be the subject of a further arbitration if the parties are unable to resolve the matter amicably.

Dated: April *21,* 2011

<<Signature>>

Robert B. Davidson, Chair

??

Hon. Milton Mollen (Ret.)

(dissenting)

<<Signature>>

James M. Rhodes

We, Robert B. Davidson, Hon. Milton Mollen and James M. Rhodes hereby certify that, for purposes of Article I of the Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Award, this Partial Final Award was made in New York, NY, USA.

Date 9-21-11

<<Signature>>

Robert B. Davidson

<<Signature>>

Hon. Milton Mollen (Ret.)

<<Signature>>

James M. Rhodes

Footnotes

1 PWC is also known as Agility Global Integrated Logistics, a/k/a Agility.

2 The DSCP is the troop support center agency of the Defense Logistics Agency ("the DLA"). The DLA is the logistics combat support agency within the DOD.

3 This area of the Middle East is referred to as "Zone 1" in the Solicitation discussed below issued by DSCP.

4 As of the date of this Award, the functions of the DSCP have been assumed by the Defense Logistics Agency ("the DLA").

5 Paragraph 40 of the Indictment described below defines the distribution fee as follows: "The Distribution Fee was to consist of the prime vendor's projected general and administrative expenses, overhead, profit, packaging costs, such as palletizing and labeling, transportation cost from the prime vendor's OCONUS [outside the continental United States] distribution facility(s) to the final delivery point, high risk insurance, and any other projected expenses associated with the distribution function. The Distribution Fee was to include all expenses that defendant PWC incurred in performing the prime vendor contracts, as well as a profit for doing so.,'

6 A final arrangement applicable to these so-called ancillary services was separately negotiated between the parties in an email exchange that took place in March 2006. This arrangement ("the Side Agreement") called for the Claimants to earn 2% of the invoices paid, rather than 3.5%.

7 Often, the quantity of food ordered from a U.S. vendor is insufficient to fill an entire shipping container or other shipping unit. A PV contractor will, therefore, place food orders with a consolidator who will buy the food from the manufacturers, pack it and then load it into shipping containers for carriage overseas. A consolidator may be paid 8% or more for this service.

8 The Indictment was preceded by the filing of a False Claims Act action against PWC brought by private parties in the United States District Court for the District of Georgia. That action was filed on November 18,2005.

9 Generally, see pages 6-7 of Supreme's Post-Hearing Brief.

10 At pages 8-9 of its Post-Hearing Brief, Supreme alleges that "PWC/PCA, unbeknownst to Supreme, withheld plainly responsive documents... These documents were first produced on the eve of the hearing, pursuant to the Tribunal's order, and only because their existence became know through [the Indictment]." Thus, Supreme ultimately received these documents but nonetheless seeks sanctions including, among other things, a dismissal of the Claimants' case.

11 The Steinbrecher court refused to affirm a default judgment against a defendant who refused to testify on Fifth Amendment grounds at an EBT holding that, to do so, "would amount to nothing more than the imposition of a civil forfeiture for the good faith exercise of a constitutional right." *Id.* at pages 365-366.

12 These include, for example, allegations of improper kickback arrangements with T.S.C. and others with whom Supreme did not do any regular business.

13 *See,* Fed. Rule of Evidence, Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...")

14 This might have occurred by reason of a witness testifying about the prime vendor contract for Zone 3 and that testimony being deemed by the panel to constitute a waiver of the privilege thereby opening up such testimony to all similar transactions, including those relating to the acquisition and performance of the prime vendor contract for Zone 1. The waiver argument might also have had consequences in the criminal proceeding.

15 Moreover, Supreme has not proven that PWC/PCA gave Supreme a number of false market basket prices to put into its bid. In any event, it appears that only two (out of approximately 70) market basket items might have been understated (Tr. 3155). Comer, the PCA executive who largely assisted in obtaining the market basket prices that Supreme used, testified that the invoices reflected bona fide transactions, and the prices used in PWC's market basket for the Iraq contract related to a different time period in any event. Supreme has made no disclosure to the government that it believed that its market basket prices were not correct, and the government has made no allegation to that effect. Indeed, the government's recent decision to renew Supreme's PVC for Zone 3 without competitive bidding carries the inescapable inference that the government has no reason to question the manner in which Supreme acquired its prime vendor contract.

16 The Indictment also accuses PWC of illegally overcharging the government by receiving improper kickbacks and entering into other payback arrangements with suppliers. These latter charges, however, relate to PWC's performance under its own prime vendor contract.

17 Section 2.01(a) justifies a continuing 1.75% Monthly Service Fee to the Claimants in "consideration for Contractor's services as set forth in Appendix A." This is of little interpretive assistance, however, as Appendix A lists every task that PWC and PCA are expected to perform.

18 Article 7 includes a termination under Section 7.03 for an uncured material breach. After Supreme, with PWC's and PCA's help, obtains the prime vendor contract and commences its performance, the most likely "material breach" justifying a termination with cause would be a failure by the Claimants to provide requested pricing or vendor information. It is thus the fact that the parties foresaw the possibility that Supreme would become dissatisfied with PWC's performance and use that as a reason (good or bad) to terminate the Services Agreement.

19 By contrast, on the issue of the amount due under the Side Agreement (like the issue of the manner of calculation of the Monthly Service Fee under the Services Agreement), the parties' course of performance speaks louder than an adverse inference that might be drawn from a missing witness.

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LEGAL AUTHORITY AA-67

26 Cal.App.3d 26
Court of Appeal, Second District, Division 5, California.

AMERICAN CENTER FOR EDUCATION, a non-profit corporation and Hurst B. Amyx, Plaintiffs and Appellants,
v.
Samuel M. CAVNAR et al., Defendants and Respondents.

Civ. 38356.
|
June 13, 1972.
|
As Modified June 26, 1972.

Synopsis
Action, by corporate officer against two other officers and against person who was allegedly elected a corporate director by such other defendants after purported ouster of plaintiff from his offices, seeking to invalidate such purported ouster and election, in which defendants in cross complaint sought ouster of plaintiff from any corporate office. The Superior Court, Los Angeles County, Raymond R. Roberts, J., entered judgment denying relief to plaintiff and declaring that he cease to occupy any corporate office, and plaintiff appealed. The Court of Appeal, Kaus, P.J., held that where articles of incorporation provided that any director could be removed by majority vote of board of directors, one bylaw provided that the board could create executive committee and another bylaw provided that power to fill vacancies in the board could be delegated to the executive committee and that action by the committee in filling a vacancy would be as effective as if taken by the board, latter bylaw concerning power to delegate the election of board members to existing vacancies implied denial of power to create such vacancies by the removal of board members, and thus plaintiff could not have been removed from his offices by the executive committee.

Judgment reversed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] Judgment Particular Cases

In action, by corporate officer against two other officers and against person who was allegedly elected a corporate director by such other defendants after purported ouster of plaintiff, seeking to invalidate such purported ouster and election, questions of fact existed as to whether corporation's executive committee validly met at first purported meeting and as to whether plaintiff was ousted at such time, precluding summary judgment.

1 Cases that cite this headnote

[2] Corporations and Business Organizations
Construction, operation, and effect

Corporate bylaws are to be construed according to general rules governing construction of statute and contracts.

6 Cases that cite this headnote

[3] Corporations and Business Organizations
Removal

In case of any inconsistency between corporate bylaw relating to potential powers of corporation's executive committee and bylaw relating to power to remove directors and to fill vacancies on board of directors, provisions of latter bylaw which were more specific than provisions of former bylaw controlled question whether power of the board to remove directors was delegable to the executive committee.

1 Cases that cite this headnote

[4] Contracts Construction as a whole

Contract must be interpreted so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. West's Ann.Civ.Code, § 1641.

[5] **Corporations and Business Organizations** Removal
Corporations and Business Organizations Removal

Where articles of incorporation provided that any director could be removed by majority vote of board of directors, one bylaw provided that the board could create executive committee and another bylaw provided that power to fill vacancies in the board could be delegated to the executive committee and that action by the committee in filling a vacancy would be as effective as if taken by the board, latter bylaw concerning power to delegate the election of board members to existing vacancies implied denial of power to create such vacancies by the removal of board members, and thus person who was president, director and member of executive committee could not have been removed from his offices by the executive committee.

1 Cases that cite this headnote

[6] **Corporations and Business Organizations** Calling

Where president of corporation was not ousted from his corporate offices at May 15 meeting of corporation's executive committee and had no intention of calling special board meeting, and where bylaw provided that annual board meeting would be held on January 21, that other meetings could be held in accordance with written notice as determined by the board and that president in addition could call board meeting upon 24 hours' notice, May 25 board meeting which was not called by the president was not called in accordance with corporate bylaws, and thus the purported May 15 ouster of the president could not have been ratified at such May 25 meeting. West's Ann.Corp.Code, § 820.

[7] **Corporations and Business Organizations** Removal
Corporations and Business Organizations Removal

Statute, providing for determination of validity of election or appointment of director of corporation, was inappropriate vehicle for raising question of ouster of corporate officer from his positions as president, director and member of corporation's executive committee. West's Ann.Corp.Code, § 2236.

[8] **Pretrial Procedure** Misjoinder of claims or defenses

Dismissal of cause of action, sounding in fraud and claiming that plaintiff-corporate officer was ousted from his corporate offices as result of conspiracy between defendant-officers, on theory that such cause could not be joined with cause of action for summary relief under statute providing for determination of validity of election or appointment of corporate director was error, where trial court held there was no triable issue to hear with respect to such statutory cause of action for summary relief. West's Ann.Corp.Code, § 2236 et seq.

1 Cases that cite this headnote

[9] **Appeal and Error** Proper or necessary parties in general

Where issue in action by corporate officer against other officers was whether first officer or the other officers rightfully controlled corporation, such corporation was not a

necessary party to appeal.

Attorneys and Law Firms

****577** Hurst B. Amyx, in pro. per.

Simon, Sheridan, Murphy, Thornton & Medvene, Robert E. Hinerfeld, Richard C. Leonard, Los Angeles, for defendants and respondents.

Opinion

***27** KAUS, Presiding Justice.

The American Center for Education Inc., ('ACE') is a nonprofit corporation incorporated under the laws of the District of Columbia. ***28** Its principal office has always been in the County of Los Angeles. Its purpose is to 'conduct research, educational, and implementation programs and projects to safeguard and preserve this Nation's moral, spiritual, economic, political and social concepts.' It enlists the support of all American citizens 'who are bound to each other as brothers in the broad spectrum of American patriotism.'

ACE was incorporated in January 1969. Its first operating board of directors consisted of the plaintiff Amyx, who was also ACE's president, Harry Cartlidge (executive vice president), defendant Cavnar (vice president and treasurer) and defendant Todt (vice president and secretary).

The corporation was financed by a donation in the amount of $500,000.00 from an unidentified 'benefactor.' At the time of the troubles which resulted in this litigation—May, 1970—about $150,000.00 of the initial operating funds were left in ACE's treasury.

ACE's bylaws provide for the election, by its board, of an executive committee which is to exercise the powers of the board between board meetings. Three members of the board constitute a quorum for the transaction of board business. The same number makes a quorum of the executive committee.

At the first board meeting after incorporation Amyx, Cartlidge, Cavnar and Todt were elected members of the executive committee.

In April 1970, Cartlidge resigned all of his offices, which left Amyx, Cavnar and Todt as the only directors and members of the executive committee. The bylaws provide for a maximum of seven directors; however Amyx, Cavnar and Todt were not even able to agree on a replacement for Cartlidge. The question of bringing the board up to its authorized strength of seven apparently never even arose.

Differences between Amyx on one side and Cavnar and Todt on the other, which had been festering for some time, came to a head on May 15, 1970 in Amyx' office.[1] Todt and Cavnar claim that they convened a meeting of the executive committee for the purpose of removing Amyx from all of his offices, but that Amyx left the room. Cavnar and Todt then voted to remove Amyx as president, director and member of the executive committee and elected the defendant Bob Davies to fill the unexpired term of Amyx as director. Cavnar was elected to replace Amyx as president. ***29** Later during the afternoon of May 15, there was a donnybrook at the offices of ACE's bank, where the parties attempted to persuade the manager to recognize their respective claims to the right to dispose of ACE's funds. In connection with this summit meeting the executive committee may or may not have met again to fire Amyx and elect Davies once more. In any event Cavnar, Todt and Davies, as the purported new board, met again at 6:00 p.m. that evening. Cavnar resigned as president and Todt as Secretary. Todt was then elected president, Cavnar treasurer and Davies secretary. Justifiably uncertain about the legality of what had taken ****578** place, Todt, Cavnar and Davies then noticed a board meeting for May 25, 1970, 'for the purpose of ratifying certain action by the Executive Committee, including, without limitation, the removal of Hurst B. Amyx as President, Director, and member of the Executive Committee of the Corporation, the action of the Board of Directors at its special meeting, upon waiver of notice, on 15 May 1970, for the election of new officers and directors . . .' Though served with a copy of the notice of the May 25 meeting, Amyx did not attend. The meeting took place and the actions taken on May 15 were duly ratified by Cavnar and Todt, with Davies abstaining.

On June 24, 1970, Amyx sued.[2] The complaint is in two causes of action. The first purports to be based on section 2236 et seq. of the Corporations Code. By challenging the election of Davies, it seeks to have the court invalidate the purported ouster of Amyx. The second cause of action sounds in fraud and claims, essentially, that Amyx was ousted as a result of a conspiracy between Cavnar and Todt. The conspirators, by various fraudulent representations, first caused Amyx to procure the

resignation of Cartlidge, then staged the allegedly illegal intra-corporate proceedings of May 15 and May 25 in order to get control of the corporation and its assets. The relief demanded by the complaint is a declaration to the effect that Amyx' ouster and Davies' election were illegal, the removal of Cavnar and Todt from all their corporate offices, an accounting to the corporation and ancillary injunctions. A preliminary injunction was sought and supported by various declarations. The defendants demurred, filed motions to strike and for a summary judgment and cross-complained against Amyx.[3] The cross-complaint prays alternatively for an order directing another meeting of ACE's board or the ouster of Amyx from any office with ACE.
After Amyx answered the cross-complaint the pending law and motion matters came on for hearing. Eventually an order was made as follows: ***30** 1. The preliminary injunction was denied. 2. The demurrer to the first cause of action was overruled. 3. Defendants' motion for summary judgment was granted as to the first cause of action. 4. Defendants' motion to strike was denied. 5. Defendants' demurrers to the second cause of action were sustained, without prejudice to refiling under a new case number.[4]

A judgment was then entered. It denied any relief to Amyx, dismissed the second cause of action without prejudice, declared that there was no triable issue with respect to Amyx' first cause of action asserted under section 2236 et seq. of the Corporations Code, that he ceased to occupy any corporate office with ACE on May 25, 1970, and that since his removal Cavnar and Todt continued as officers, Todt as president, Cavnar as treasurer.

It will be noted that the judgment makes no specific provision with respect to the contested election of Davies.

DISCUSSION

[1] There are several reasons why the summary judgment on the first cause of action must be reversed.

Turning first to the validity of the election of Davies, it is apparent that if he was elected, it happened either on May 15, at the first purported meeting of the executive committee in Amyx' office, or on May 25, at the purported board meeting of that day. Defendants do not contend that if the election at the first executive committee meeting of May 15 was invalid, its ***579** repetitions at the second executive committee meeting of that day, or at the board meeting that evening were any better.

As far as the May 15 meeting is concerned, it seems clear to us that there is a triable issue of fact on whether or not the executive committee validly met. Amyx' declaration concerning the corporate infighting of that day is to the effect that at about 3:40 p.m. Cavnar and Todt entered his office with two policemen, sat down and that Cavnar said something about a meeting. As soon as Cavnar started speaking, Amyz rose from his chair, said 'just a minute' as he rounded his desk and was out of the room within two seconds. Declarations filed by and on behalf of Cavnar and Todt do not deny this detailed description of what happened, but state generally that there was a meeting.

***31** While we have found no cases with respect to executive committee meetings which started, as it were, out of the blue, such law as there is on the subject concerning directors' meetings is summarized in 2 Fletcher, Cyclopedia of the Law of Private Corporations (perm. ed.) section 422, page 277 as follows:

'A director cannot be trapped into attendance at a directors' meeting, against his will, by the directors going to his office, which was the office of the company, where he left the office in order to break up a quorum as soon as he realized that corporate action was to be taken and a meeting held. (Footnote omitted.) So, to hold that certain directors could form a quorum by coming upon another in a room, or in the street, and, despite the protests of that other, could, by merely declaring the body of persons gathered together to be a meeting, actually give it that complexion, would be illegal. (Footnote omitted.) But this rule does apply where the director not only attends but remains and participates in the proceedings during the entire meeting. (Footnote omitted.)'

Having these principles and the authorities cited in Fletcher in mind, the trial court could not have decided on motion for summary judgment that there was a meeting of the executive committee on May 15. Indeed the declaration in the judgment to the effect that Amyx was ousted as of May 25 supports the conclusion that no such determination was made.

The same reasons which militate against a holding that there is no triable issue on whether or not there was a May 15 meeting of the executive committee that elected Davies, compel a similar holding with respect to the alleged ouster or Amyx on that day.
Moreover, with respect to that issue, there is a more important reason why Amyx could not have been ousted

by the executive committee on May 15.[5]

As we interpret the bylaws of ACE, the one board power which was not delegated to the executive committee was the power to remove duly elected directors.

As far as the articles of incorporation of ACE are concerned, they say nothing about an executive committee. They merely provide that 'any director may be removed with or without cause by a majority vote of a properly constituted quorum of the board of directors.' Section 1 of ***32** article VIII of the bylaws then provides that the board may create an executive committee which 'shall exercise the powers of the board of directors in the interim between meetings of the directors, with general power to discharge the duties of the board of directors, except as such power from time to time may be limited by the Board.'

At its first meeting on January 21, 1969, the board did, after voting salaries to Amyx, Cavnar and Todt and a handsome retainer to their Washington, D.C., attorney, create an executive committee and provide that it should 'exercise full powers of the Board of Directors in the interim between meetings of the Directors, with ****580** general power to discharge the duties of the Board of Directors and that the Executive Committee shall execute all powers delegated to it by the By-Laws of this corporation . . .' Of course the board had no power to delegate any board function which the bylaws prohibited it from delegating; nor do we interpret the January 21, 1969, resolution as attempting to do any such thing.

The question whether the board's power to remove directors was delegable to the executive committee cannot, however, be answered by reference to section 1, article VIII alone. Article IV, section 2 of the bylaws provides as follows:

'Any member of the board of directors may resign by delivering his written resignation to the Secretary of the Corporation, and any member of the board may be removed at any time with or without cause by action of the board. In case of any vacancy in the board of directors through death, disability, resignation, removal, or other cause, the remaining directors may elect his successor, who shall take office immediately and hold office for the unexpired portion of the term of the director to whose place he is elected. The board of directors serving at any time shall have the right in its own discretion to elect other persons to the board of directors, subject to the foregoing limitation as to maximum and minimum. The power to fill vacancies in the board may be delegated to the Executive Committee, and the action by the Executive Committee in filling a vacancy shall be as effective as if taken by the board of directors.' (Italics added.)

[2] It is generally accepted that corporate bylaws are to be construed according to the general rules governing the construction of statute and contracts. (18 C.J.S. Corporations s 183; 18 Am.Jur.2d 'Corporations' s 168; cf. Casady v. Modern Metal Etc., Mfg. Co., 188 Cal.App.2d 728, 732—733, 10 Cal.Rptr. 790; Bornstein v. District Grand Lodge, No. 4, 2 Cal.App. 624, 627—628, 84 P. 271.)

[3] Comparing the general provisions of the bylaws relating to the ***33** potential powers of the executive committee (Art. VIII, s 1), with those relating to the power to remove directors and to fill vacancies on the board (Art. IV, s 2) particularly with respect to the extent to which the executive committee may be designated to share those powers, it is evident that the article IV, section 2 provisions are more specific than the former. Therefore, in case of any inconsistency, they control. (Continental Casualty Co. v. Zurich Insurance Co., 57 Cal.2d 27, 35, 17 Cal.Rptr. 12, 366 P.2d 455.)

[4] Turning to article IV, section 2 we find that it specifically permits the board to delegate to the executive committee the power to fill vacancies. As far as any delegation of the power to remove board members is concerned, nothing is said. If it had really been the intention of the framers of the bylaws that the board could validly delegate all of its powers—including but not limited to the removal and election of directors—to the executive committee, the last sentence of article IV, section 2 would have been quite unnecessary. It is, however, established by abundant authority that a contract must be interpreted 'so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (Civ.Code, s 1641; Mickle v. Sanchez, 1 Cal. 200, 202; Colonial Savings & Loan Ass'n v. Redwood Empire Title Co., 236 Cal.App.2d 186, 192, 46 Cal.Rptr. 16; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 310, 266 P.2d 856; Cole v. Low, 81 Cal.App. 633, 637, 254 P. 676.) Obviously no purpose would have been served by giving the board specific authority to delegate the power to fill board vacancies to the executive committee, if it had not been assumed that but for that specific authority to delegate, none existed with respect to the removal or election of board members.

[5] This interpretation of the bylaws is further aided by the application of the familiar ****581** maxim 'expressio unius est eclusio alterius.' (Cf. Jones v. Robertson, 79 Cal.App.2d 813, 816, 180 P.2d 929.) Thus the provision concerning the power to delegate the election of board members to existing vacancies, implies the denial of the power to create such vacancies by the removal of board

members.

It is therefore our conclusions that Amyx could not have been removed by the exective committee on May 15, even if there were no triable issue whether it ever met that day. [6] This brings us to the question whether the judgment may be upheld ***34** on the basis of the undisputed events concerning the May 25 meeting.[6] The bylaw provisions with respect to board meetings read as follows:

'The board of directors shall hold an annual meeting on the 21st day of January at an hour and place to be determined by the board.

'The board of directors shall hold such other meetings at times and places and in accordance with written notice as from time to time may be determined by the board, and, in addition thereto, the President of the corporation may call a meeting of the board upon 24 hours' notice delivered either by mail, personally, or by telephone. Any director may waive any notice required to be given to him by law or under these By-Laws, and by attendance at any meeting he shall be deemed to have waived notice thereof.'

It is, of course, the basic position of defendants that in view of the valid removal of Amyx and the equally valid election of Davies on May 15, the May 25 board meeting is so much gilding of the lily. Since we cannot agree with their premise, we must inquire further.

We have already held that based on the record before us Amyx was not ousted on May 15. In the absence of any special meeting of the board before January 21, 1971, the question of his removal would not arise until the annual meeting of that day. The record discloses Amyx' stipulation that he had no intention of calling a board meeting at which he was bound to be removed. The superior court's judgment was clearly based on its view that the May 25 board meeting was valid regardless of what happened on May 15. Its reasoning—expressed in its minute order—was that its validity derived from the fact that Amyx, being disqualified on the subject of his own ouster, was a non-person as far as his power to call a meeting was concerned; nor could his presence be counted to make up the necessary quorum of three.[7] In its holding the court relied on Hotaling v. Hotaling, 193 Cal. 368, 377, 224 P. 455 and Pennington v. George W. Pennington Sons, 27 Cal.App. 57, 59—60, 148 P. 947.

Disregarding the question whether the cause of disqualification involved in Hotaling—personal, financial interest in a corporate transaction—even applies to Amyx' position vis-a-vis the agenda of a board meeting convened ***35** to oust him, the fact is that California corporation law is not the same today as it was when Hotaling and Pennington were decided. The law is now embodied in section 820 of the Corporations Code, which is generally to the effect that directors are not disqualified from voting or having their votes counted if certain conditions are met. (2 Fletcher, Cyc. Corp. (perm.ed.) s 426.1.)

It therefore does not follow from the facts disclosed by the record that the May 25 board meeting was called in accordance with ACE's bylaws. Absent the unlikely event that Amyx, as president, would call a meeting in the meanwhile, the situation was simply that Todt and Cavnar had to curb their impatience to get rid of him until the January 1971 meeting. In the ****582** meanwhile, of course, such remedies as the law provides—for example, proceedings under section 811 of the Corporations Code—were open to them. Indeed one of the items of relief requested by them in their cross-complaint was, as noted, a court-convened meeting of the board.

Finally we must mention the question which may eventually present itself, whether the first cause of action was in fact based on section 2236 of the Corporations Code, to the extent that it challenged the ouster of Amyx as distinguished from the election of Davies. The section reads as follows:
'Upon the filing of an action therefor by any shareholder, the superior court shall try and determine the validity of any election or appointment of any director of any domestic corporation, or of any foreign corporation if the election was held or the appointment was made in this State. In the case of a domestic corporation the action shall be brought in the county in which the principal office of the corporation is located. In the case of a foreign corporation the action shall be brought in the county in which the corporation has its principal office in this State or in which the election was held or the appointment was made.' (Emphasis added.) Section 2237 then provides for certain accelerated proceedings to try cases brought under section 2236.[8]
[7] It will be noted that section 2236 speaks of actions involving 'the validity of any election or appointment of any director.' Clearly the validity, as such, of the attempted ouster of Amyx does not come within the purview of the section. To be sure if the validity of the election of Davies depended solely on the efficacy of the ouster of Amyx, that ouster would have to be scrutinized (Columbia Engineering Co. v. Joiner, 231 Cal.App.2d 837, 842—849, 42 Cal.Rptr. 241), but that is not the case. ***36** Whether Davies was elected on May 15, or on May 25, there were plenty of vacancies on the board to accomodate his presence, without the necessity of

removing Amyx. Section 2236 was, therefore, an inappropriate vehicle for raising the question of Amyx' ouster.

[8] Be that as it may, the parties submitted the issue of Amyx' expulsion on the motion for summary judgment. Under the circumstances it can make no difference that, had the motion been denied, the summary proceedings provided for by section 2237 would not have been available. Our only reason for making the point at all is that the dismissal of the second cause of action was apparently based on the theory that a statutory cause of action for summary relief under sections 2236 et seq. could not be joined with the plenary second cause of action. Whatever may be the merits of that proposition when the summary cause of action is to be disposed of by a full, though speedy, hearing, it clearly did not apply here after the court held—erroneously, to be sure—that as far as the first cause of action was concerned, there was no triable issue to hear, speedily or more sedately. The court should have ruled on the demurrer to the second cause of action. The dismissal thereof was error. The judgment must, therefore, be reversed. Obviously a lot of water has flowed under the corporate bridge while this case was on appeal. Needless to say, on remand, justice demands the utmost liberality in permitting amendments or supplements to the pleadings.

This brings us to the last point, namely the position of ACE as a litigant. Our attention has been particularly focused on that issue because Amyx, while originally represented by counsel, has acted as his own attorney in connection with a motion for a new trial and this appeal. He also purported to sign the notice of appeal on behalf of the corporation. (Cf. City of Downey v. Johnson, 263 Cal.App.2d 775, 780—782, 69 Cal.Rptr. 830.) Obviously, **583 while he can represent himself, he cannot, as a layman, represent the corporation. (Roddis v. All-Coverage Ins. Exchange, 250 Cal.App.2d 304, 311, 58 Cal.Rptr. 530.)

[9] The question—on which we received no help from anyone—then arose whether the corporation was a necessary party to this appeal. We have concluded that it is not.

The cases which shed the most light on this issue are Colburn Biological Institute v. DeBolt, 6 Cal.2d 631, 59 P.2d 108, and Boericke v. Weise, 68 Cal.App.2d 407, 156 P.2d 781. Both involve actions under former section 315 of the Civil Code. In Colburn the court held that it was not improper for the plaintiff to sue in behalf of himself and the corporation, because the corporation was a 'proper party to the action if not a necessary *37 one and, since the action is one to determine who is in control of the corporation, it cannot be material whether it is joined as a party plaintiff or defendant. . . .' (Id., 6 Cal.2d at p. 642, 59 P.2d at p. 113.) In Boericke, the issue was the validity of a corporate election, and the court, reciting the procedural facts of that case, noted that 'the corporation put in but a pro forma appearance.' It then listed individuals as the 'real and only' defendants, omitting the corporation. (Id., 68 Cal.App.2d at p. 409, 156 P.2d at p. 783.)

Here, as in Colburn, the issue is whether plaintiff or defendants rightfully control the corporation. Under these circumstances the corporation is not in a position to represent its position in court, for the very purpose of the action is to determine who speaks for the corporation. Thus any appearance by the corporation is indeed, as found in Boericke, pro forma, and we conclude that the issues raised by the individual parties on appeal may be disposed of without the appearance of the corporation in this court.

The judgment is reversed.

STEPHENS and AISO, JJ., concur.

All Citations

26 Cal.App.3d 26, 102 Cal.Rptr. 575

Footnotes

1 No particular purpose would be served by detailing the charges and counter-charges leveled by the parties against each other or the various bizarre tactics employed in the prosecution of their intra-corporate war.

2 ACE was named as a plaintiff. It also appeared as a cross-complainant later on. For the time being we shall ignore ACE's status as a litigant.

3 Defendants also filed an answer. (See Code Civ.Proc. s 472a.) The motion for summary judgment was supported and opposed by lengthy affidavits.

4 This ruling by the court refers to section 430 subsection 5 of the Code of Civil Procedure—several causes of action improperly

united.

5 As already noted, no contention is made that if Amyx was not validly ousted at the first of the May 15 meetings, there was an effective ouster at any time before the May 25 board meeting.

6 It is again noted that, perhaps through oversight, the judgment makes no express disposition of the disputed issue whether Davies was elected on May 15, on May 25, or at all.

7 Whether or not there was a quorum of three at the May 25 meeting, if that meeting was properly called, depends, of course, on the validity of Davies' election of May 15.

8 The proceedings allowed by section 2237 of the Corporations Code must be distinguished from the motion for a summary judgment granted here. Section 2237 merely provides for a very early trial, not for a trial on affidavits or declarations.

LEGAL AUTHORITY AA-68

214 Cal.App.3d 1
Court of Appeal, Fourth District, Division 1, California.

APPALACHIAN INSURANCE CO. et al., Plaintiffs and Appellants,
v.
McDONNELL DOUGLAS CORPORATION et al., Defendants and Appellants.

No. D009875.
|
Aug. 29, 1989.

Synopsis
Insurers of owner of communications satellite who was buyer of an upper stage rocket used to boost satellite into orbit sued seller of rocket and certain of seller's subcontractors seeking recovery of payments made to buyer when rocket malfunctioned and satellite did not go into proper orbit. The Superior Court, Orange County, Tully H. Seymour, J., entered summary judgment for seller and its subcontractors, and insurers appealed. The Court of Appeal, Kremer, P.J., held that: (1) insurers were precluded from recovery by mutual waiver of liability, on behalf of parties and their subcontractors, contained in agreement under which seller provided buyer with rocket; (2) no basis existed for reformation of contract; (3) contract was not unconscionable; (4) contract was not invalid as contrary to public interest; (5) waivers of liability were enforceable as to strict liability claims; (6) insurers were not entitled to new trial based on warranty on behalf of buyer issued by one of seller's subcontractors; and (7) suit was not barred by statute of limitations.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (9)

[1] Contracts Exculpatory contracts

Insurers of communications satellite were precluded from recovering payments made with respect to satellite from subcontractors of seller of upper stage rocket which had malfunctioned causing loss of satellite; seller and buyer had executed mutual waiver of liability under which buyer had waived its rights to proceed against subcontractors, and insurers were bound by buyer's waiver.

1 Cases that cite this headnote

[2] Reformation of Instruments By scrivener or draftsman

Evidence that seller and buyer of upper stage rocket to be used to boost communications satellite into orbit intended to incorporate into their contract interparty waiver provision required in contract between buyer and the National Aeronautics and Space Administration did not require reformation of the seller-buyer contract, on the grounds that the contract with NASA provided only for waiver on behalf of immediate parties and seller-buyer contract called for waiver also on behalf of subcontractors; intention to incorporate waivers as to immediate parties was carried out and there was no evidence that extension of waivers to also include subcontractors was a mistake. West's Ann.Cal.Civ.Code § 3399.

19 Cases that cite this headnote

[3] Contracts Exemption from liability

Contract provision urged by seller of upper stage rocket used for boosting communications satellite into orbit, that buyer and seller execute mutual waivers of rights for recovery for damages on behalf of themselves and their subcontractors, was not unconscionable; if buyer was dissatisfied it could have obtained rocket from another source and liability allocation arising from mutual waiver provision was not commercially unreasonable. West's

Ann.Cal.Civ.Code § 1670.5.

5 Cases that cite this headnote

[4] **Contracts** Exemption from liability

Provision in contract between buyer and seller of upper stage rocket used to boost communications satellite into orbit, under which each party waived its rights to recovery from the other for damages on behalf of itself and its subcontractors, was not unenforceable as contrary to public policy; contract involved large organizations pursuing private interests and public was not really involved.

14 Cases that cite this headnote

[5] **Contracts** Exculpatory contracts

Provision in contract between buyer and seller of upper stage rocket used to boost communications satellite into orbit, under which each party waived its damage rights against the other on behalf of itself and its subcontractors, was effective to waive rights of buyer's insurers to recover from seller's subcontractors on strict liability theory; restrictions on contractual disclaimer of strict liability applied only to cases where consumers were involved.

6 Cases that cite this headnote

[6] **New Trial** Nature of evidence discovered

Insurers of space satellite who had been unsuccessful in suit to recover payments made when upper stage rocket failed causing satellite to go into improper orbit and become worthless were not entitled to new trial after discovering warranty from one of seller's subcontractors which applied to insured buyer; there was no evidence that buyer had relied on warranty in entering into rocket purchase agreement with seller, so as to establish that warranty from seller's subcontractor formed any part of bargain.

11 Cases that cite this headnote

[7] **Limitation of Actions** New action in different forum

Insurers of buyer of defective upper stage rocket were not precluded from bringing suit against seller and its subcontractors by expiration of statute of limitations period when insurers brought suit within period in state court, defendants removed to federal court, and after limitations period had expired insurers terminated original state court case and brought a second one. West's Ann.Cal.C.C.P. § 339, subd. 1.

21 Cases that cite this headnote

[8] **Costs** Bad faith or meritless litigation

Insurers of communication satellite did not bring frivolous action, for purpose of Civil Procedure Code provision authorizing imposition of attorney fees in frivolous lawsuit cases; action against seller of booster rocket which failed causing satellite to go into defective orbit was not brought to harass seller or its subcontractors or cause unnecessary delay and insurers' negligence and strict liability claims were contentions with some, if minimal, merit given clear failure of rocket's motor, seller's position as sole supplier of upper stage rockets and generally strict judicial review of exculpatory clauses. West's Ann.Cal.C.C.P. § 128.5(b)(2).

8 Cases that cite this headnote

[9] **Indemnity** Attorney fees

Seller of upper stage rocket used to boost

communication satellite into orbit was not entitled to attorney's fees following unsuccessful suit against it by insurers of buyer of rocket, based on claim that contract required indemnification of costs and expenses and statute interpreted such term to mean costs of defense against lawsuits; contract provided that indemnification did not extend to loss of the type incurred in present case. West's Ann.Cal.Civ.Code §§ 1717, 2778.

12 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

KREMER, Presiding Justice.

This case involves the failure of a telecommunications satellite owned by Western Union Telegraph Company to reach the desired orbit. Western Union sought to launch its satellite, Westar VI, into orbit from the Space Shuttle. To reach the desired orbit from the Space Shuttle, Western Union used an upper stage rocket it purchased from McDonnell Douglas Corporation. McDonnell Douglas subcontracted with Morton Thiokol and Hitco to manufacture elements of the upper stage rocket. Due to a failure of this rocket, the Westar VI satellite was left in an orbit unsuitable for telecommunication purposes.

****718** Western Union's insurers paid Western Union $105,000,000 for the satellite, treating it as a total loss. Five of the insurers—Appalachian Insurance Company, Commonwealth Insurance Company, Industrial Indemnity, Mutual Marine Office, Inc. and Northbrook Excess & Surplus Insurance Company (hereafter collectively referred to as Appalachian)—sued McDonnell Douglas, Morton Thiokol and Hitco for negligence and strict products liability.[1] The trial court initially granted summary adjudication against Appalachian on its strict liability cause of action and thereafter granted summary judgment in favor of the defendants on the basis the McDonnell Douglas/Western Union contract contained exculpatory clauses barring the causes of action.

On appeal, Appalachian contends summary judgment should not have been granted because the contract provisions are ambiguous, unconscionable, against public interest, do not reflect the parties' true agreement and unlawfully disclaimed strict products liability. Appalachian also contends it should have been granted leave to amend to plead an express warranty from Morton Thiokol. We disagree and therefore affirm.

The defendants also appeal, contending the trial court should have granted summary judgment based on the statute of limitations and on the negligence cause of action because the loss suffered was only "economic." We conclude the statute of limitations did not bar the suit and therefore affirm that ruling. As to the negligence cause of action, since the contract protected ***8** the defendants from liability based on negligence, we need not reach this issue. Finally, McDonnell Douglas appeals the trial court's denial of an award of attorney's fees. We conclude the court did not err in denying attorney's fees and therefore affirm that ruling.

FACTS

In order for a telecommunications satellite to function effectively, it must be placed into a "geosynchronous orbit." A geosynchronous orbit is an orbit in which a satellite remains stationary vis-a-vis a particular location on the earth. This orbit is approximately 22,000 miles above the equator.

Prior to 1981, NASA launched commercial satellites by NASA's "Delta" rocket, a three-stage, expendable launch vehicle which could lift a satellite into a geosynchronous orbit. Each Delta carried only one satellite. In the 1970s,

NASA decided to phase out expendable rockets and to launch all satellites from the Space Shuttle. The Space Shuttle could carry up to four satellites at a time but was not designed to reach the geosynchronous orbit. Instead, the Space Shuttle orbited at an altitude of 150–160 nautical miles (a "parking orbit"). To launch satellites from the Space Shuttle's parking orbit into higher orbits, each satellite needed its own upper stage rocket.

In 1976, McDonnell Douglas proposed to develop such an upper stage rocket for satellites, at its own expense, if NASA agreed not to fund development of a competing system. NASA agreed but did not obligate itself to purchase any hardware from McDonnell Douglas nor promise not to purchase similar hardware or services from other companies. NASA also retained the right to set a ceiling on the price McDonnell Douglas could charge for the upper stage rocket and related launch services.

McDonnell Douglas's upper stage rocket, a power assist module (PAM), had two key components: (1) airborne support equipment, consisting principally of a spin table, cradle, sun shield and related control electronics and hardware designed to hold the satellite in the Space Shuttle's cargo bay from liftoff to the parking orbit; and (2) a Star 48 motor manufactured by Morton Thiokol which is attached to a satellite prior to liftoff. The nozzle or exit cone of the Star 48 motor was manufactured by Hitco under a subcontract with Morton Thiokol.

Western Union initially contacted both NASA and Arianespace, a French based ****719** company of the European Space Agency to launch its Westar VI satellite. The Ariane rocket was an expendable launch vehicle capable of ***9** placing a satellite into a geosynchronous orbit without the use of a PAM.[2] In 1981, Western Union entered a contract with Arianespace for a December 1983 launch on their Ariane rocket. Subsequently Western Union relinquished its launch reservation with NASA.

Later in 1982, Arianespace had a failure (its second in six launches). It rescheduled Western Union's launch date which caused Western Union to reconsider its decision to launch via Arianespace. At this point, Western Union felt more confidence in the Space Shuttle than Ariane, believing the Space Shuttle was better priced[3] and more reliable. By April 1983, Western Union had decided to use the Space Shuttle "because of economic reasons, and the advantages of the new program and the new vehicle [i.e., the Space Shuttle]."

In December 1982, Western Union began negotiations with McDonnell Douglas for a PAM for its Westar VI satellite. Western Union had previously purchased PAMs from McDonnell Douglas for its Westar IV and Westar V satellites which were launched in 1982. In March 1983, Western Union signed a contract with McDonnell Douglas. The execution of the contract was conditioned on later incorporating an inter-party waiver clause NASA would require of Western Union in a Launch Services Agreement. As part of the contract between Western Union and McDonnell Douglas, McDonnell Douglas disclaimed any warranties and Western Union agreed to hold McDonnell Douglas harmless for any loss or damage and to obtain insurance to cover any potential loss.

In January 1984, after having terminated its agreement with Arianespace, Western Union signed a Launch Services Agreement with NASA for a launch on the Space Shuttle. Western Union drafted an inter-party waiver of liability for the McDonnell Douglas contract to comply with a condition in the NASA Launch Services Agreement and submitted the draft to McDonnell Douglas for its approval. McDonnell Douglas approved the draft and the waiver was incorporated, by amendment, into the parties' agreement as article 14.

On February 3, 1984, the Space Shuttle Challenger lifted off carrying Westar VI. About eight hours after liftoff, Westar VI was deployed from the ***10** Space Shuttle's cargo bay. The upper stage rocket, scheduled to burn for 85 seconds to boost Westar VI into an orbit which would intersect with the geosynchronous orbit, failed when the Star 48 motor's exit cone, or nozzle, disintegrated about four seconds after ignition. Thereafter, the motor nozzle assembly was expelled and the motor extinguished itself. The short burn of the upper stage rocket caused Westar VI to go into a low elliptical orbit around the earth with a maximum altitude of only 655 nautical miles. In this orbit, Westar VI was useless for telecommunication purposes.

Western Union made a claim against its insurance companies for a total loss of the satellite. The insurers paid Western Union about $105,000,000 million on the claim.

About three weeks after the Space Shuttle mission, Hughes Aircraft Corporation (which had manufactured Westar VI) briefed NASA about the possibility of retrieving the satellite. On September 7, 1984, an agreement was reached by Hughes and the majority insurers of Westar VI to retrieve the satellite. In November 1984, Westar VI was retrieved from its improper orbit and brought to Hughes Aircraft Company.

On January 17, 1986, Appalachian filed suit in the Orange County Superior Court ****720** against McDonnell

Douglas, Morton Thiokol and Hitco, alleging causes of action for negligence and strict liability. On February 14, McDonnell Douglas filed for a petition to remove the case to federal court. Thereafter, on February 18, Appalachian voluntarily dismissed the federal court action and filed a new complaint, containing minor modifications, in the Orange County Superior Court. In federal court, McDonnell Douglas filed a motion to strike or vacate Appalachian's dismissal. The federal court denied the motion, noting that removal had been improper.

DISCUSSION

APPALACHIAN'S APPEAL

I

Summary Judgment Review

The aim of the summary judgment procedure is to discover whether the parties possess evidence requiring the fact-weighing procedures of a trial. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 873, 127 Cal.Rptr. 110, 544 P.2d 1310; *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 851, 94 Cal.Rptr. 785, 484 P.2d 953.) "[T]he trial court in ruling on a motion for summary judgment is merely to determine ***11** whether such issues of fact exist, and not to decide the merits of the issues themselves." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, 252 Cal.Rptr. 122, 762 P.2d 46.) In reviewing the propriety of a summary judgment, the appellate court must resolve all doubts in favor of the party opposing the judgment. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 183, 203 Cal.Rptr. 626, 681 P.2d 893.) The reviewing court conducts a de novo examination to see whether there are any genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law. (*Lichty v. Sickels* (1983) 149 Cal.App.3d 696, 699, 197 Cal.Rptr. 137.) While "[s]ummary judgment is a drastic procedure, should be used with caution [citation] and should be granted only if there is no issue of triable fact" (*Brose v. Union–Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081, 228 Cal.Rptr. 620), it is also true "[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one." (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 507, 86 Cal.Rptr. 744.) "A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn., supra,* 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46.)

II

The Contractual Provisions

[1] The trial court here ruled provisions in the contract between Western Union and McDonnell Douglas unambiguously precluded Western Union from suing McDonnell Douglas, Morton Thiokol or Hitco.

The fundamental canon of contract interpretation is the ascertainment of the parties' intent. (*Universal Sales Corp. v. Cal., etc., Mfg. Co.* (1942) 20 Cal.2d 751, 761, 128 P.2d 665; *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730, 223 Cal.Rptr. 175.) The language of the instrument must govern its interpretation if it is clear and explicit. (Civ.Code, § 1638.) Generally, the words of a contract are to be understood in their ordinary and popular sense (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 931, 218 Cal.Rptr. 839; Civ.Code, § 1644; Code Civ.Proc., § 1861) unless a contrary intent is shown, such as a specialized meaning due to trade custom and practice or a prior course of dealing (see *LaCount v. Hensel Phelps Constr. Co.* (1978) 79 Cal.App.3d 754, 145 Cal.Rptr. 244; Code Civ.Proc., § 1856, subd. (c)).

The interpretation of a written contract is solely a judicial function unless the interpretation turns on the credibility of extrinsic evidence. ***12** (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839; *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891, 222 Cal.Rptr. 455.) Extrinsic evidence may be introduced when the terms of the contract are ambiguous. ****721** (*Vega v. Western Employers Ins. Co.* (1985) 170 Cal.App.3d 922, 927, 216

Cal.Rptr. 592, disapproved on other grounds in *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58; Code Civ.Proc., § 1856.)

A court must view the language in light of the instrument as a whole and not use a "disjointed, single-paragraph, strict construction approach." (*Ezer v. Fuchsloch* (1979) 99 Cal.App.3d 849, 861, 160 Cal.Rptr. 486.) If possible, the court should give effect to every provision. (Civ.Code, § 1641; *White v. Dorfman* (1981) 116 Cal.App.3d 892, 897, 172 Cal.Rptr. 326.) An interpretation which renders part of the instrument to be surplusage should be avoided. (See *Estate of Newmark* (1977) 67 Cal.App.3d 350, 356, 136 Cal.Rptr. 628; *Thackaberry v. Pennington* (1955) 131 Cal.App.2d 286, 297, 280 P.2d 165.)

The contract between Western Union and McDonnell Douglas, contains two provisions addressing liability and allocation of loss. Appalachian concedes the first of these provisions, article 7, if enforceable, protects McDonnell Douglas from liability but argues it does not similarly protect McDonnell Douglas's subcontractors, i.e., Morton Thiokol and Hitco.

Article 7 provides:

> "*7. Warranties and Indemnities. [McDonnell Douglas] extends no warranty of any kind, express or implied, including any implied warranty of merchantability or suitability for purpose with respect to the PAM or with respect to services provided by [McDonnell Douglas] hereunder.* Except as provided in Articles 13, 15, 16, and 17 of this Agreement, under no circumstances will [McDonnell Douglas] be liable to Purchaser under or in connection with this Agreement, under any tort, negligence, strict liability, contract or other legal or equitable theory, for incidental or consequential damages or for Purchaser's cost of effecting cover. Purchaser shall indemnify and hold harmless [McDonnell Douglas], its officers, agents and employees from and against any and all liabilities, damages and losses, including costs and expenses in connection therewith, for death of or injury to any persons whomsoever and for the loss of, damage to or destruction of any property whatsoever, caused by, arising out of or in ***13** any way connected with the launch or operation of the PAM, Spacecraft, or Launch Vehicle unless resulting from the sole negligence or willful misconduct of [McDonnell Douglas], its officers, agents and employees. Purchaser hereby expressly waives and releases any cause of action or right of recovery which Purchaser may have hereafter against [McDonnell Douglas] for any loss or damage to the PAM, Spacecraft or Launch Vehicle, caused by, arising out of or in any way connected with the launch or operation of the PAM, Spacecraft or launch vehicle. Purchaser shall obtain a waiver from any insurance carrier with which the Purchaser carries property insurance covering the PAM, Spacecraft and/or launch vehicle releasing its subrogation rights against [McDonnell Douglas]. Purchaser shall furnish [McDonnell Douglas] with certificates, satisfactory to [McDonnell Douglas], evidencing its compliance with its insurance obligations under this Article 7. The indemnification provisions of this Article 7 shall not apply to liabilities, damages or losses suffered under the conditions set forth in Article 14."

As Appalachian points out, article 7 does not expressly extend protection to subcontractors. Morton Thiokol acknowledges article 7 does not provide an explicit waiver applicable to subcontractors, but argues it was intended to benefit component suppliers: "Article 7 applies to the entire product, i.e., the PAM and its component parts. [Western Union] could have bargained for a warranty from [McDonnell Douglas] for the PAM and its component parts. Instead of paying an increased price, [Western Union] accepted a complete disclaimer." Morton Thiokol relies on the Ninth Circuit cases of *Aeronaves de Mexico, S.A. v. McDonnell Douglas* (9th Cir.1982) 677 F.2d 771 and *Airlift Intern., Inc. v. McDonnell Douglas Corp.* (9th Cir.1982) 685 F.2d 267. These cases are factually distinguishable and rest on the particular facts of the cases as the Ninth Circuit subsequently explained ****722** in *Continental Airlines v. Goodyear Tire & Rubber Co.* (9th Cir.1987) 819 F.2d 1519.

As the Ninth Circuit explained in *Continental Airlines v. Goodyear Tire & Rubber Co., supra,* at page 1528:

> "The reasoning in *Aeronaves* proceeded in this fashion. The court pointed out that the airline already had received from [McDonnell Douglas] over $400,000 worth of free servicing under its warranty provisions. To permit recovery by the airline from the parts suppliers for consequential damages would enable the parts suppliers thereafter to sue [McDonnell Douglas] for indemnity. The consequence would be that the airline would in effect circumvent the exculpatory clause and reap a 'windfall' of free repairs plus consequential damages. The crux of the matter, as *Aeronaves* saw it, was that the airline (by way of the exculpatory clause) had waived its consequential damage remedies in return for [McDonnell Douglas's] promise to provide valuable servicing of the component parts that allegedly caused the accident. The airline should not be permitted 'to have its cake and eat it too.' The situation in *Airlift* appears to have been the same.

"As Continental points out, however, the contractual provisions in this case differ in a significant respect. In *Aeronaves,* 'the warranty provisions ... explicitly extend[ed] to components of the aircraft manufactured by ***14** entities other than [McDonnell Douglas], regardless of who supplied the design specifications.' " (Citations omitted.)

Thus, the holdings of the *Aeronaves* and *Airlift* cases derived from (1) express language in an exculpatory clause which extended exculpation to component manufacturers and (2) on the existence of a servicing agreement for the seller's benefit. In the case here, there is no such express language in article 7 nor is there a similar servicing agreement extended to Western Union.

Article 7, however, is not the only exculpatory clause in the contract. The contract also contains article 14 which provides, in pertinent part:

"14.2 Purchaser and [McDonnell Douglas] (the Parties) will respectively utilize their property and employees in STS Operations in close proximity to one another and to others. Furthermore, the parties recognize that all participants in STS Operations are engaged in the common goal of meaningful exploration, exploitation and uses of outer space. In furtherance of this goal, the parties hereto agree to a no-fault, no-subrogation, inter-party waiver of liability pursuant to which each party agrees not to bring a claim against or sue the other party, NASA, or other NASA customers and agrees to absorb the financial and any other consequences for Damage it incurs to its own property and employees as a result of participation in STS Operations during Protected STS Operations, irrespective of whether such Damage is caused by NASA, Purchaser, [McDonnell Douglas], or other NASA customers participating in the STS Operations, and regardless of whether such Damage arises through negligence or otherwise. Thus, the Parties, by absorbing the consequences of damage to their property and employees without recourse against each other, NASA, or other NASA Customers participating in STS Operations during Protected STS Operations, jointly contribute to the common goal of meaningful exploration of outer space.

"14.3 The parties agree that this common goal will also be advanced through extension of the inter-party waiver of liability to other participants in STS Operations. Accordingly, the parties agree to extend the waiver as set forth in Paragraph 14.2 above to their respective contractors and subcontractors at every tier, as third party beneficiaries, whether or not such contractors or subcontractors causing damage bring property or employees to a United States Government Installation or retain title to or other interest in property provided by them to be used, or otherwise involved, in STS Operations. Specifically, the parties intend to protect these contractors and subcontractors from claims, including 'products liability' claims, which might otherwise [be] pursued by the Parties, or ****723** the respective contractors or subcontractors of the Parties, or other NASA customers or the contractors ***15** or subcontractors of other customers. Moreover, it is the intent of the parties that each will take all necessary and reasonable steps in accordance with Paragraph 14.5 below to foreclose claims for Damage by any participant in STS Operations during protected STS Operations, under the same conditions and to the same extent as set forth in Paragraph 14.2 above, except for claims between Purchaser and its other contractors or subcontractors and claims between [McDonnell Douglas] and its contractors and subcontractors.

"14.4 The parties intend that the inter-party waiver of liability set forth in Paragraph 14.2 and 14.3 above be broadly construed to achieve the intended objectives.

"14.5 Purchaser and [McDonnell Douglas] will each require the following to agree to the waiver of liability set forth in Paragraph 14.3 above: (i) all persons and entities to whom it assigns all or part of its right to Launch and Associated Services; (ii) any person or entity to whom it has sold or leased or otherwise agreed, prior to the completion of NASA's launch services for a particular Payload, to provide all or any portion of its Payload or Payload services; (iii) all its prime contractors; and (iv) all its subcontractors who will have persons or property involved in STS Operations during Protected STS Operations.

"14.6 Words or phrases capitalized but not defined in this Article 14, shall have the meaning attributed to such words or phrases in the NASA/Purchaser Launch Services Agreement for WESTAR VI.

"14.7 In the event NASA and Purchaser should modify any of the provisions entitled 'Damages to Persons or Property involved in STS Operation,' [the inter-party waiver] [McDonnell Douglas] and Purchaser agree to modify this Article 14, to conform to such modification."

Appalachian argues its suit is permitted by the "except" clause in paragraph 14.3. We disagree. That clause excepts "claims between [Western Union] and its *other* contractors and subcontractors...." (Emphasis added.) Morton Thiokol and Hitco were not "other" contractors or

subcontractors of Western Union; they were a contractor and subcontractor of McDonnell Douglas. As such, they were specifically extended protection by paragraph 14.3's language stating: (1) the inter-party waiver of liability was extended to each parties' "*respective* contractors and subcontractors" and (2) the parties's intent was to protect "*these* contractors and subcontractors from claims, *including 'products liability' claims, which might otherwise [be] pursued by the Parties*...." (Emphasis added.) To adopt Appalachian's argument would render this language, which lies at the heart of paragraph 14.3, ***16** mere surplusage, a result to be avoided. (See *Estate of Newmark, supra,* 67 Cal.App.3d 350, 356, 136 Cal.Rptr. 628.)

Appalachian contends article 14, and the "except" clause of paragraph 14.3 in particular, must be construed in light of the inter-party waiver contained in the Launch Services Agreement between NASA and Western Union.[4] Appalachian explains ****724** Western Union drafted article 14 for the sole purpose of complying with NASA's condition that Space Shuttle customers "flow down" the inter-party waiver of liability contained in the Launch Services Agreement to their prime contractors and subcontractors.[5] The inter-party waiver of liability contained in the Launch Services Agreement required Space Shuttle customers to agree not to sue NASA or other customers or the contractors or subcontractors of NASA or other customers for any loss occurring during Space Shuttle operations. The "flow down" provision of the Launch Services Agreement's inter-party waiver required Space Shuttle customers to obtain similar waivers of liability (i.e., agreements not to sue other customers, NASA or the contractors and subcontractors of ***17** other customers and NASA for losses incurred during Space Shuttle operations) from the customers' prime contractors and subcontractors.[6]

Appalachian cites evidence indicating the inter-party waiver of liability in the Launch Services Agreement was not intended to preclude lawsuits like the one here, i.e., between a Space Shuttle customer and its own contractors and subcontractors. For example, Robert Wojtal, NASA's general counsel, in his deposition explained:

> "Well, essentially we drafted a clause that applied to the user, that is the customer who came in and purchased launch services, and it applied to anyone who continued to own property, for example the component on board the Shuttle, that is no—NASA would not sue him nor would another user sue that person who had that defective component, who manufactured the defective component and retained title to that defective component while on board the Shuttle."

When asked if the inter-party waiver in the Launch Services Agreement was intended to prohibit Western Union from suing Morton Thiokol "for the loss of its satellite caused by the exploding motor," Wojtal answered: "... The answer is yes. The user, the customer, could bring suit against his own contractor. There's nothing in the agreement which is intended to preclude that. In fact there's language in the agreement that was intended to permit the suit."

Appalachian also points to language in the NASA Launch Services Agreement specifically allowing this suit against Western Union's contractor (McDonnell Douglas) and subcontractors (Morton Thiokol and Hitco). The "except" clause in the Launch Services Agreement excepts from the general inter-party waiver of liability "claims ****725** between the Customer and its contractors or subcontractors." Appalachian argues that since article 14.3 was modeled on the Launch Services Agreement and because it contains nearly identical language as the Launch Services Agreement, article 14 and the "except" clause of paragraph 14.3 should be construed as reflecting the same intent as the NASA/Western Union Launch Services Agreement, i.e., permitting suits by Western Union against Morton Thiokol and Hitco.

The problem with this argument is that the language of the Launch Services Agreement and the McDonnell Douglas/Western Union contract, ***18** while similar, are not identical. There are significant differences in the wording of the two instruments. The McDonnell Douglas/Western Union contract specifically prohibits suits by the parties against each other's respective contractors and subcontractors, excepting only claims between Western Union and its "other" contractors and claims between McDonnell Douglas and its contractors and subcontractors. In contrast, the Launch Services Agreement, an agreement between Western Union and NASA prohibits claims between NASA and the Space Shuttle's customers (and their contractors and subcontractors) and between Space Shuttle customers (and their contractors and subcontractors) but specifically excepts claims between a customer and its own contractors or subcontractors and between the United States Government and its contractors and subcontractors.

To ignore the differences in the language used in the two agreements, would violate a fundamental rule of contract interpretation, that is, the words of a contract, if clear, must govern its interpretation. The words of the McDonnell Douglas/Western Union contract are clear; they unambiguously preclude a suit by Western Union against McDonnell Douglas's respective contractors and

subcontractors, i.e., against Morton Thiokol and Hitco. The fact that the Launch Services Agreement reflects a different intent does not render the McDonnell Douglas/Western Union contract ambiguous; the Launch Services Agreement involves different parties, a different subject matter and different language. Appalachian's argument, based on importing language from a different agreement, is unpersuasive.[7]

III

Reformation

[2] Appalachian contends article 14, as written, does not reflect the true intent of the parties which was to adopt only the inter-party waiver as required by the Launch Services Agreement between Western Union and NASA. Appalachian argues article 14 should be reformed to reflect this "true agreement" of the parties.[8]

***19** As a general rule, a written contract, having been deliberately executed, is presumed to correctly express the parties' intentions. (*California Trust Co. v. Cohn* (1935) 9 Cal.App.2d 33, 40, 48 P.2d 744.) "The presumption is not conclusive and may be overcome by satisfactory evidence which shows that the written instrument is not in conformity with the true agreement of the parties." (*Ibid.*) Civil Code section 3399 allows reformation of a contract when, through mistake, it fails to express the true agreement of the parties. "[The] mistake may be the mutual error of both parties to the contract, or the oversight of one party which the other knew or suspected at the time of entering the agreement." (*American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 961, 175 Cal.Rptr. 826.)

When reformation is sought, "the Court may inquire what the instrument was intended ****726** to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." (Civ.Code, § 3401; *First American Title Ins. & Trust Co. v. Cook* (1970) 12 Cal.App.3d 592, 598, 90 Cal.Rptr. 645.) Thus, "[t]he fact that the parties used the very words which they intended to use is not always sufficient cause for refusing relief of this character. There may be no mistake as to the words used or to be used, and at the same time there may have been a mutual mistake as to some other matter of fact affecting the meaning or application of the words, and by reason thereof the contract may not truly express the real intention of both parties, and in that case it may be revised and reformed at the instance of the aggrieved party and enforced accordingly, although the words were carefully chosen. [Citations.]" (*F.P. Cutting Co. v. Peterson* (1912) 164 Cal. 44, 47–48, 127 P. 163; see also *Holmes v. Anderson* (1928) 90 Cal.App. 276, 265 P. 1010.)

Since reformation is an equitable remedy, it may be denied if the mistake was the result of " ' "the want of that degree of care and diligence which would be exercised by persons of reasonable prudence under the same circumstances." ' " (*Fraters G. & P. Co. v. Southwestern C. Co.* (1930) 107 Cal.App. 1, 6, 290 P. 45; see also *Miller v. Lantz* (1937) 9 Cal.2d 544, 548, 71 P.2d 585 [reformation denied to defendant who failed to explain long delay in discovering the alleged defect in the writing, why he was precluded from reading or fully comprehending the meaning of the contract and language used and his cross-complaint showed only a unilateral mistake]; *Roller v. California Pacific Title Ins. Co.* (1949) 92 Cal.App.2d 149, 154, 206 P.2d 694 ["We are inclined to the view, therefore, that where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, reformation as a rule should be denied." (emphasis omitted)]; *Taff v. Atlas Assur. Co.* (1943) 58 Cal.App.2d 696, 702, 137 P.2d 483 ["The reformation of (an insurance policy) on the ground of mistake without the exercise of reasonable ***20** care on the part of the insured is not to be encouraged."]; *Nelson v. Meadville* (1937) 19 Cal.App.2d 68, 64 P.2d 1116 [one seeking reformation must offer a satisfactory explanation for the failure to read or familiarize one's self with the terms of a contract].)

"If the written instrument accurately reflects the agreement of the parties, albeit an agreement based upon a mistaken assumption of fact, an action for reformation does not lie. [Citations.]" (*Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1178, 232 Cal.Rptr. 603.) Finally, "[a]lthough a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties, whether the mistake be mutual or unilateral [citation]." (*Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 700, 62 Cal.Rptr. 352; *Stare v. Tate* (1971) 21 Cal.App.3d 432, 438, 98 Cal.Rptr. 264.)

Here, the evidence offered by Appalachian in support of reformation consists of (1) statements by the parties prior to the incorporation of article 14 into the contract of their

intent to comply with the inter-party waiver NASA would require in the Launch Services Agreement,[9] and (2) the variance in the scope of the inter-party waiver required by NASA in the Launch ****727** Services agreement (i.e., waivers of liability between NASA and the Space Shuttle customers and their respective contractors and subcontractors and among the Space Shuttle customers and their contractors and subcontractors) and the scope of the waiver contained in article 14 (i.e., waivers not only among Western Union and its contractors and subcontractors, NASA and other Space Shuttle customers but also waivers between Western Union and McDonnell Douglas and McDonnell Douglas's contractors and subcontractors).

This evidence is insufficient to support reformation. This evidence shows only that the parties intended to comply with NASA's requirement that Space Shuttle customers obtain an inter-party waiver of liability relating to other customers, NASA and the respective contractors and subcontractors ***21** so as to be able to launch the Westar VI satellite on the Space Shuttle. Article 14 certainly accomplishes this purpose. The fact that it acts to do more than the bare minimum required by NASA does not in and of itself establish the existence of a mistake so as to support a reformation. The parties may well have decided to extend the scope of the waiver exactly as reflected by the language used in article 14. The record here is silent as to the intended scope of the article 14 waiver. In the absence of any evidence showing a contrary intent, we must presume article 14, as written, reflects the intent of the parties.

Basic to a cause of action for reformation is a showing of a " 'definite intention or agreement on which the minds of the parties had met [which] pre-existed [and conflicted with] the instrument in question.' " (*Bailard v. Marden* (1951) 36 Cal.2d 703, 708, 227 P.2d 10; see also *Treadaway v. Camellia Convalescent Hospitals, Inc.* (1974) 43 Cal.App.3d 189, 197, 118 Cal.Rptr. 341 ["Reformation, on the ground of mutual mistake, presupposes actual agreement (i.e., no mistake) between the contracting parties as to what they intend, ..."].) The evidence offered by Appalachian does not establish the existence of a definite preexisting intention or agreement to which the written contract should be reformed.

Nor has Appalachian presented evidence explaining how the mistake occurred, i.e., to explain the alleged negligence in drafting article 14 or Western Union's failure to uncover the error. Western Union itself drafted the article and submitted it to McDonnell Douglas for approval. While it is true a written contract may be reformed even though the party seeking reformation drafted it, the party seeking reformation must offer some excuse. (See *Roller v. California Pacific Title Ins. Co., supra,* 92 Cal.App.2d 149, 154, 206 P.2d 694.)[10] Here, Appalachian offered no excuse. For example, there is no claim (nor evidence showing) the "mistake" was caused by misrepresentations by McDonnell Douglas as to the language which should be used (*ibid.*), or was due to an oversight or due to an error of a scrivener (see *McClure v. Cerati* (1948) 86 Cal.App.2d 74, 194 P.2d 46). Rather, the record reflects Western Union formally submitted article 14 as well as other amendments to the contract to McDonnell Douglas for approval and that McDonnell Douglas reviewed and accepted the inter-party waiver as written by Western Union. There is no evidence in the record that during this review process that either party did not conduct a careful review of the language or expressed any doubts as to the language chosen in article 14 and its possible failure to reflect the parties' "true" agreement. Indeed, even after ***22** the failed launch here, when Western Union again reviewed the language of its contract and had an incentive to inform McDonnell Douglas of any error in article 14 as written, Western Union did not assert ****728** article 14 failed to reflect the agreement of the parties.[11]

In sum, what Appalachian seeks is not reformation of article 14 to reflect an agreement the parties had for a more limited waiver of liability which was not accurately reflected in article 14 as written. Rather, Appalachian seeks to create a new agreement for the parties, an agreement that Western Union might have made, but did not. This we cannot do. The trial court properly ruled against Appalachian on the reformation issue.

IV

Unconscionability

[3] Appalachian contends articles 7 and 14 are not enforceable because both are unconscionable.

The doctrine of unconscionability is codified in Civil Code section 1670.5. Section 1670.5, in pertinent part, provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may ... enforce the remainder of the contract without the

unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." The doctrine of unconscionability applies to all provisions of all contracts and has both a "procedural" and a "substantive" element. (*H.S. Perlin Co. v. Morse Signal Devices* (1989) 209 Cal.App.3d 1289, 1300–1301, 258 Cal.Rptr. 1.) As we explained in *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 186 Cal.Rptr. 114:

> "The procedural element focuses on two factors: 'oppression' and 'surprise.' 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. Characteristically, the form contract is drafted by the party with the superior bargaining position.
>
> "Of course the mere fact that a contract term is not read or understood by the nondrafting party or that the drafting party occupies a superior bargaining position will not authorize a court to refuse to enforce the contract. Although an argument can be made that contract terms not actively negotiated between the parties fall outside the 'circle of assent' which constitutes ***23** the actual agreement, commercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also *substantively* unreasonable. No precise definition of substantive unconscionability can be proffered. Cases have talked in terms of 'overly harsh' or 'one-sided' results. One commentator has pointed out, however, that '... unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for it[,]' which is only to say that substantive unconscionability must be evaluated as of the time the contract was made. The most detailed and specific commentaries observe that a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. But not all unreasonable risk reallocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated." (*Id.* at pp. 486–487, 186 Cal.Rptr. 114, citations and fn. omitted.)

Appalachian contends the "procedural element" of unconscionability exists here because, Appalachian asserts, McDonnell Douglas "had an absolute monopoly on the sale of the PAM–D, which was essential for the launch of any commercial satellite in the United States," used that monopoly power to require all customers to accept the exculpatory clause which insulated McDonnell Douglas from liability and left Western with "no 'meaningful choice' other ****729** than to accept [McDonnell Douglas's] contractual terms." The record does not support these conclusions.

It is true, that at the time Western Union sought to launch its Westar VI satellite, McDonnell Douglas was the only company supplying upper stage rockets for the Space Shuttle. To that extent, McDonnell Douglas had a monopoly. But, McDonnell Douglas did not have "an absolute monopoly" on the means of launching a telecommunications satellite into a geosynchronous orbit; owners of telecommunications satellites had the option of launching their satellites into geosynchronous orbit via the Ariane rocket of the European Space Agency. An Ariane launch did not require the purchase of an upper stage rocket from McDonnell Douglas. Here, Western Union, in fact, initially contracted with Arianespace to launch the Westar VI into geosynchronous orbit. Western Union terminated that contract, not because Arianespace was not unavailable, but because Western Union decided the Space Shuttle presented a more reliable and cheaper option. Thus, contrary to Appalachian's contention, McDonnell Douglas had no monopoly vis-a-vis the means of launching satellites into geosynchronous orbits.

Appalachian contends McDonnell Douglas used oppressive negotiating practices and cites evidence of NASA's concerns about McDonnell Douglas's contracting practices.

***24** Appalachian, in particular, cites a July 1983 letter from James Abrahamson, NASA's Association Administrator for Space Flight, responding to McDonnell Douglas's request for an increase in the ceiling price. In the letter, Abrahamson noted NASA had "received a series of major customer complaints about [McDonnell Douglas's] contractual approach" and stated "it has become increasingly clear that there are significant incompatibilities between the NASA Launch Services Agreement and the [McDonnell Douglas] contract." Abrahamson explained:

> "To insure there is no misunderstanding, I would like to emphasize that customer complaints are not directed at [McDonnell Douglas's] performance, the PAM–D as a system, or [McDonnell Douglas's] dedication and commitment to customer satisfaction. Both our customers and NASA are delighted with each of those important areas of performance. We are gratified that our partnership has worked so well for the Space

> Transportation System and our customers to this point.
>
> "However, our new customers are gravely concerned with your contracting approach. They complain that there is no apparent willingness, on the part of [McDonnell Douglas], to undertake responsibilities normally agreed to in the aerospace payload industry; e.g., responsibility for hardware performance, for late delivery of the hardware, for acknowledging equity to the customer in the case of termination, and for granting access to technical information...."

Abrahamson disapproved McDonnell Douglas's requested increase in the ceiling price at that time, but added he "would be pleased to continue the discussion within the broader content of both price and an acceptable customer contractual approach...."

This letter, however, does not tell the whole story. After the letter, as a result of pressure from NASA and Western Union, McDonnell Douglas gave additional concessions to Western Union. Thus, Western Union was not the victim of allegedly oppressive contracting practices by McDonnell Douglas; McDonnell Douglas responded to the complaints and yielded to the bargaining power of Western Union and NASA. Moreover, as to article 14, the record is clear this provision was neither drafted nor insisted upon by McDonnell Douglas, but was drafted by Western Union and agreed to by both parties.

As to the second factor of procedural element of unconscionability—"unfair surprise"—Appalachian does not assert any unfair surprise occurred here nor would the record support such an assertion. The record shows Western Union was well aware of article 7. It had dealt with similar provisions in earlier contracts with McDonnell Douglas and in this contract ***25** negotiated changes in the article. As to ****730** article 14, surprise cannot be claimed since Western Union itself drafted the provision.

Appalachian argues there is "substantive" unconscionability present here. Appalachian asserts the disclaimers are not "consistent with aerospace industry practice," explaining "[n]ormally, [Western Union] obtains warranties from its vendors." The evidence in the record fails to support Appalachian's assertion.

The citations are to testimony by Western Union contracting officer Anthony Cammarato addressing a different matter, i.e., Western Union's general policy when purchasing existing goods and services and, in particular, Western Union's use of printed purchase order forms containing a standard warranty for most procurements. Appalachian ignores Cammarato's later deposition testimony addressing the specific contract and warranty disclaimer here at issue. Cammarato stated it was "a standard way of doing business in the industry." Cammarato explained McDonnell Douglas did not agree to the warranty "because it's a high risk business," Western Union did not make any complaints about McDonnell Douglas's "take it or leave it" contracting attitude, and that Western Union's rationale for not seeking a warranty was "there's no such thing as a free lunch, and even if [McDonnell Douglas] would agree [to a warranty], there would be a charge."[12] Appalachian also ignores evidence showing article 14 was drafted to comply with the inter-party waiver in the Launch Services Agreement, a condition imposed by NASA, rather than McDonnell Douglas.

Appalachian asserts the disclaimers were not a "commercially reasonable allocation of risk." To support its position, Appalachian relies on language in *A & M Produce Co. v. FMC Corp., supra,* 135 Cal.App.3d 473, 186 Cal.Rptr. 114, where we stated "[f]rom a social perspective, risk of loss is most appropriately borne by the party best able to prevent its occurrence. [Citations.] Rarely would ***26** the buyer be in a better position than the manufacturer-seller to evaluate the performance characteristics of a machine." (*Id.* at pp. 491–492, 186 Cal.Rptr. 114.) Appalachian asserts this case fits within the guidelines of the *A & M Produce* case because "[i]t is beyond dispute that [McDONNELL DOUGLAS], MORTON THIOKOL and HITCO were in a better position than [WESTERN UNION] to prevent the exit cone failure that occurred in this case."

Appalachian's argument is overly simplistic. If unconscionability could be established merely by showing the manufacturer/seller's superior ability to detect defects, then the general rule would be that disclaimers were unconscionable and illegal. Warranty disclaimers, however, are specifically authorized by the California Uniform Commercial Code (see Cal.U.Com.Code, § 2316) and the Supreme Court has held "no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101, 32 Cal.Rptr. 33, 383 P.2d 441.)

****731** Further, Appalachian's reliance on our decision in *A & M Produce* is misplaced; Appalachian ignores the factual context of that case. *A & M Produce* involved the sale of a mass-produced product by "an enormous diversified corporation" to "a relatively small but experienced farming company" using a standardized preprinted form with a warranty disclaimer printed on the

reverse side which was never read by the buyer. (*A & M Produce Co. v. FMC Corp., supra,* 135 Cal.App.3d 473, 489–491, 186 Cal.Rptr. 114.) In this factual context, we stated "[I]t is patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards." (*Id.* at p. 491, 186 Cal.Rptr. 114.) We also observed:

> "Especially where an inexperienced buyer is concerned [the buyer here was venturing into a new area, was unfamiliar with the equipment and turned to the seller's agent for recommendations as to what equipment was necessary], the seller's performance representations are absolutely necessary to allow the buyer to make an intelligent choice among the competitive options available. A seller's attempt, through the use of a disclaimer, to prevent the buyer from reasonably relying on such representations calls into question the commercial reasonableness of the agreement and may well be substantively unconscionable." (*Id.* at p. 492, 186 Cal.Rptr. 114.)

Here, the contract was not a standardized printed form for the sale of a mass-produced product; here the contract was negotiated. It involved specialized services and new technology developed in a "high risk business." Western Union was not an inexperienced buyer who had to rely on McDonnell Douglas's representations; Western Union was a large, sophisticated corporation experienced in launching telecommunications satellites. Western ***27** Union was further given periodic progress reports, including reports of two test failures of the Star 48 motor.

In this context, of a highly specialized, risky new technology, it was not commercially unreasonable for the parties to agree Western Union would obtain insurance to protect it against the risk of loss rather than to have McDonnell Douglas warrant performance of the upper stage rocket. As a practical matter, it was a question of whether Western Union wanted to directly pay for insurance by obtaining insurance itself or indirectly pay for insurance by requiring McDonnell Douglas obtain the insurance and give a warranty.[13] It was reasonable for Western Union to agree to obtain its own insurance directly rather than to pay an increased contract price which would include McDonnell Douglas's costs in administering the insurance for Western Union's benefit. We do not find any unconscionability existing in articles 7 and 14 of the Western Union and McDonnell Douglas contract.

V

Public Interest

[4] Appalachian contends articles 7 and 14 are unenforceable because they affect the public interest.

In *Tunkl v. Regents of University of California, supra,* 60 Cal.2d 92, 96, 32 Cal.Rptr. 33, 383 P.2d 441, the Supreme Court held that exculpatory provisions which "involve 'the public interest' " are unenforceable. The *Tunkl* court identified six characteristics "which have been held to stamp a contract as one affected with a public interest." (*Id.* at p. 98, 32 Cal.Rptr. 33, 383 P.2d 441.) These characteristics are:

> "[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the ****732** public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person ***28** or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Id.* at pp. 98–101, 32 Cal.Rptr. 33, 383 P.2d 441, fns. omitted.)

Appalachian contends all six of the *Tunkl* factors are present in this case.

(1) *Public Regulations*

Appalachian argues this factor is satisfied "by the regulations that govern both domestic satellite owners'

use of communications satellites and the sale of upper stage boosters by domestic suppliers like [McDonnell Douglas].” Appalachian points to the regulations by the FCC and state authorities on satellite communications for the protection of the public and NASA’s regulation of customer procurements of McDonnell Douglas’s upper stage rocket (e.g., the ceiling price on the PAM and launch related services).

Appalachian’s reliance on these regulations to meet the *Tunkl* criteria is misplaced. First, the NASA “regulations” are not legislative enactments or agency regulations, they are terms in a contract between NASA and McDonnell Douglas. The terms are related to the price of the upper stage rocket and launch related services and were added, not for the protection of the general public, but to insure NASA’s Space Shuttle would remain competitively priced with the Ariane rocket of the European Space Agency.

As to the state and FCC regulations cited by Appalachian, these relate to satellite transmissions rather than the sale of hardware and services for launching satellites.

The “public regulations” factor is intended to focus the court’s attention on the question of whether the exculpatory clause will adversely affect a public interest demonstrated by the presence of regulations. As the court explained in *Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal.App.2d 95, 47 Cal.Rptr. 518, a case involving an exculpatory clause in a contract for sale of an aircraft:

> “The fact that Delta is a regulated enterprise and carries passengers has no relevance to the present decision. The upholding of the exculpatory clause will not adversely affect rights of future passengers [i.e., the general public affected by the regulations]. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against [McDonnell] Douglas for negligence. [Citation.] Also, their right to bring an action against [McDonnell] Douglas for breach of implied warranty would not be interfered with because the passengers were not a party to the contract containing the exculpatory clause.” (*Id.* at p. 104, 47 Cal.Rptr. 518, fn. omitted.)

Similarly, here, the rights of the public are not affected by the exculpatory clause in the Western Union/McDonnell Douglas contract. The rights of ***29** the public as protected in the regulations cited by Appalachian are unaffected by the parties’ agreement that Western Union should obtain insurance to protect against potential loss rather than to look to McDonnell Douglas for a warranty.

(2) *Practical Necessity*

Appalachian argues:

> “[This factor] is present here because PAM–Ds provide a critical link in the establishment of domestic and international telecommunication systems. Common carriers like [Western Union] that launch commercial satellites provide vital communication services to the public, including the transmission of telephone, data transmission, and video (television) ****733** signals. The PAM–D is, of course, necessary for the launch of commercial satellites.”

Appalachian misapprehends the nature of this factor. This factor looks to services such as medical, legal, housing, transportation or similar services “which must *necessarily* be used by the general public.” (*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 343, 214 Cal.Rptr. 194 [emphasis in original]; *Okura v. United States Cycling Federation* (1986) 186 Cal.App.3d 1462, 1467, 231 Cal.Rptr. 429; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 655, 191 Cal.Rptr. 209.)

The provision of hardware and service for space launches, obviously, is not similar to these basic, necessary services; it is not the type of service “which is often a matter of practical necessity for some members of the public.” (*Tunkl v. Regents of University of California, supra,* 60 Cal.2d 92, 99, 32 Cal.Rptr. 33, 383 P.2d 441.) Appalachian points out that it is not necessary that the service be of practical necessity to all members of the public; it is sufficient if it is of practical necessity to *some* members. Here, however, the provision of space hardware and launch services is of practical necessity to no individual member of the public; it is of “practical necessity” only to a few, very large commercial and governmental entities dealing in highly specialized fields such as telecommunications.

(3) *Service is Open to Any Member of the Public*

Appalachian argues: “The third *Tunkl* characteristic is present here because [McDonnell Douglas] was willing to

sell the PAM–D to any public or private entity, so long as the potential customer could afford the prices charged for the PAM–D."

Appalachian's attempt to minimize the exclusivity of the sales of the upper stage rocket by characterizing it only as a matter of being able to afford the sales price is hardly a persuasive argument. The high price of obtaining the service, in and of itself, precludes nearly all members of the ***30** public from obtaining the service. The record shows ten sales of the upper stage rocket. None of the sales were to an individual member of the general public; all were to large, sophisticated commercial and governmental entities. Further, the contract here involved not only the sale of space hardware, but also the provision of launch related services. We seriously doubt NASA was making Space Shuttle launches available to the general public.

(4) *Essential Nature of Service, Economic Setting and Bargaining Power*

To support the presence of this factor, Appalachian points to the "monopoly" McDonnell Douglas had on the supply of upper stage rockets for the Space Shuttle and stresses the "essential nature" of this product for launching telecommunication satellites.

As discussed in Section III above, Western Union, in seeking to launch its Westar VI satellite was not presented with a situation where it was compelled to purchase McDonnell Douglas's product or forgo launch of its satellite; Western Union had the option of launching its satellite via the Ariane rocket which did not require the purchase of a PAM from McDonnell Douglas. Second, while the service provided by McDonnell Douglas may have been "essential" to Western Union once Western Union decided to use the Space Shuttle, it was not the kind of "essential" service referred to by the Supreme Court in *Tunkl. Tunkl* 's focus was on whether the service was "essential" to individual members of the public. Here, the service is "essential" only to a small number of large corporations and governmental entities; it "is not a compelled, essential service" but "a voluntary relationship between the parties." (*Okura v. United States Cycling Federation, supra,* 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429.) Finally, this case does not involve a "decisive advantage of bargaining strength [used] against any member of the public who seeks [the] services." (*Tunkl v. Regents of University of California, supra,* 60 Cal.2d 92, 100, 32 Cal.Rptr. 33, 383 P.2d 441.) This case does not involve a large entity using its bargaining strength against an individual member of the public. This case involves two large, sophisticated ****734** corporations with relatively equal bargaining power who negotiated the terms of a voluntary agreement.[14]

(5) *Standardized Adhesion Contract*

The contract here was not a standardized adhesion contract. The contract here was the product of negotiations between the parties and the exculpatory clauses (providing the parties would obtain their own insurance ***31** to cover potential losses and would not make claims against each other) were the result of a voluntary agreement.

(6) *Property Subject to Seller's Control*

Appalachian argues this factor is present here because the "... Westar IV, in the critical period after deployment from the Space Shuttle, was solely and exclusively controlled by the PAM–D Star 48 motor."

This argument is without merit. Once the satellite was placed in the Space Shuttle, McDonnell Douglas no longer had control; the satellite and the PAM were under NASA's control. McDonnell Douglas did not suddenly regain control of Westar VI and the PAM by its deployment from the Space Shuttle.

Conclusion

We conclude, the exculpatory clauses here do not conflict with the public interest, but were the result of "private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (*Tunkl v. Regents of University of California, supra,* 60 Cal.2d 92, 101, 32 Cal.Rptr. 33, 383 P.2d 441.) We find pertinent here to both Appalachian's claim based on the

public interest as well as its claim based on unconscionability the reasoning of the court in *Philippine Airlines, Inc. v. McDonnell Douglas Corp.* (1987) 189 Cal.App.3d 234, 234 Cal.Rptr. 423, a case involving the sale of an allegedly defective aircraft by McDonnell Douglas. The court there stated:

> "Each of these theories might be asserted in *any* action involving an allocation of risk, yet, as discussed, contractual allocations of risk in nonconsumer commercial settings are routinely upheld. The reason, we think, lies with our laws of negligence and products liability, and with the economic realities of the marketplace. It may be true, as PAL argues, that the ultimate consumer—here the passenger—is provided with a streamlined remedy against the carrier. Given, however, the realities of litigation, and the possibility that a carrier might have insufficient resources to cover what might be extensive liability should an aircraft malfunction, it would make little economic sense for a manufacturer to place on the market a defective product on the belief that it somehow would be insulated from the personal injury claims of passengers. Moreover, and aside from its potential liability to passengers, a manufacturer whose defective products caused its customers to be sued would not long remain in business. And a manufacturer such as [McDonnell Douglas] is still answerable to the Federal Aviation Commission. We are thus of the opinion that the argued 'disincentive' to produce a safe aircraft resulting ***32** from a finding that the disclaimer of liability at issue is valid, is largely illusory." (*Id.* at p. 242, 234 Cal.Rptr. 423, emphasis in original, fn. omitted.)[15]

****735** We conclude the trial court correctly rejected Appalachian's argument the exculpatory clauses in the Western Union/McDonnell Douglas contract were affected with the public interest.

VI

Strict Liability

[5] Appalachian contends articles 7 and 14 are unenforceable to the extent they attempt to bar claims for strict liability. Appalachian contends strict liability may not be contractually disclaimed. While we agree with Appalachian that there are cases holding strict tort liability cannot be contractually disclaimed, we disagree with Appalachian's conclusion that the waivers here are unenforceable. Appalachian's argument rests on the faulty premise that strict liability theory applies in this commercial setting.

Under the strict liability doctrine, "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury...." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62, 27 Cal.Rptr. 697, 377 P.2d 897.) Strict liability theory was adopted because sales warranty theory, developed to meet the needs of commercial transactions and requiring a showing of privity, was inadequate to protect consumers. (*Kaiser Steel Corp. v. Westinghouse Elec. Corp.* (1976) 55 Cal.App.3d 737, 746–747, 127 Cal.Rptr. 838.) "The doctrine of manufacturers' and suppliers' strict liability in tort was developed primarily to protect *individual consumers,* users, and, to some extent, bystanders who are in no position to protect themselves from defective products" rather than to protect commercial entities. (*U.S. Financial v. Sullivan* (1974) 37 Cal.App.3d 5, 18, 112 Cal.Rptr. 18, emphasis added.) In accord with the underlying purpose of the strict liability doctrine (to provide a ***33** remedy for injuries to consumers injured by defective products when contractual theories were inadequate), it has been held strict liability cannot be contractually disclaimed in the consumer context. As the Supreme Court explained in *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 17, 45 Cal.Rptr. 17, 403 P.2d 145, "[strict] liability [cannot] be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products." (See also *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 37 Cal.Rptr. 896, 391 P.2d 168, ["Regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved to be defective and caused injury to human beings."].)

In contrast, when a lawsuit over a defective product arises in a commercial setting and involves only a business loss, the courts hold strict liability theory is not available; the parties are limited to normal commercial remedies (e.g., the Cal.U.Com.Code or their contracts). The cases reason strict liability theory should not apply to a commercial transaction because: commercial entities are not " 'in such a vulnerable position' " as are consumers, (see *Sumitomo Bank v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211, 227, 229 Cal.Rptr. 719; *U.S. Financial v. Sullivan, supra,* 37 Cal.App.3d 5, 18–19, 112 Cal.Rptr. 18); commercial entities can bargain for "a product designed

to negotiable specifications and not furnished off the shelf" (see *Kaiser Steel Corp. v. Westinghouse Elec. Corp., supra,* 55 Cal.App.3d 737, 748, 127 Cal.Rptr. 838); and because application of a strict liability theory "would improperly invade rules of law adopted by the Legislature in the California Uniform Commercial Code" when the California Uniform Commercial Code regulates "the various aspects of plaintiff's purchase of [the product] from defendant, including liability for defects based on express and implied warranties" (*Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 Cal.App.3d 289, 294–295, 204 Cal.Rptr. 736).

Since liability for defective products when commercial entities and a business loss are involved is governed by the California Uniform Commercial Code which allows disclaimers of warranties (see Cal.U.Com.Code, § 2316) and by the parties' ****736** agreement, liability for defects may be disclaimed; the tort theory of strict liability does not apply and thus does not bar the disclaimer. The trial court properly ruled the disclaimers of strict liability in the Western Union/McDonnell Douglas contract were effective.

VII

New Trial Motion

[6] Appalachian contends the trial court erred in denying its motion for a new trial based on newly-discovered evidence—a warranty from Morton ***34** Thiokol running in favor of Western Union. The trial court denied Appalachian's motion on the ground that nothing had been presented which would cause the court to change its ruling.

This warranty from Morton Thiokol provided:

> "Seller [Morton Thiokol] warrants the articles delivered hereunder to be free from defects in labor, material and manufacture and to be in compliance with any drawings or specifications incorporated or referenced herein and with any samples furnished by the Seller. *All warranties shall run to* [McDonnell Douglas], its successors, and assigns and to *its customers and the users of its products.*" (Emphasis added.)

Appalachian argues it may enforce this warranty despite the fact there is no evidence indicating Western Union was aware of it at the time Western Union negotiated the purchase of the PAM. Appalachian contends the disclaimers and waivers contained in the contract between Western Union and McDonnell Douglas are insufficient to negate the express warranty from Morton Thiokol.

To support its position, Appalachian relies on the general rule that express warranties take precedence over attempted disclaimers. This rule is codified in California Uniform Commercial Code section 2316 which provides attempts to negate or limit express warranties shall be "inoperative to the extent that such construction is unreasonable."[16] In the comment to section 2316, it is explained:

> "1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks *to protect a buyer from unexpected and unbargained language of disclaimer* by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which *protect the buyer from surprise.*" (Emphasis added.)

Here, because there was no evidence indicating Western Union was aware of or relied on the warranty from Morton Thiokol when Western Union purchased the PAM, it cannot be said the disclaimer language in the written contract with McDonnell Douglas was "unexpected," "unbargained for" or a "surprise" since Western Union negotiated the language contained in article 7 and itself drafted article 14 which waived claims against McDonnell Douglas's contractors and subcontractors, including claims against Morton Thiokol.

***35** Appalachian's reliance on *A & M Produce Co. v. FMC Corp., supra,* 135 Cal.App.3d 473, 186 Cal.Rptr. 114 and *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 199 Cal.Rptr. 789, is similarly misplaced. Both cases involve situations where the seller attempted to disclaim warranties in a written contract after having made *express* warranties to the buyer (by the seller's representative in *A & M Produce;* by a brochure in *Fundin*). In both cases, the buyers *relied* on the seller's representations in purchasing the product. In both cases the express warranties directly contradicted disclaimers in the written contract which were *unbargained for.* As the court explained in *Pisano v. American* ****737** *Leasing* (1983) 146 Cal.App.3d 194, 197–198, 194 Cal.Rptr. 77:

> "In the absence of any affirmations of fact or promises

> made by defendants to plaintiff, plaintiff cannot recover damages under his theory of breach of express warranty. [Citations.] In order to establish an express warranty, plaintiff must demonstrate that defendants' statements of fact or opinion were *the basis of the agreement*.... [Citations.] Plaintiff concedes that no such representations were made. Therefore, the summary judgment on his claim of breach of express warranty of fitness was properly granted." (Emphasis added.)

The critical flaw in Appalachian's argument is its failure to show the warranty from Morton Thiokol ever formed a " 'part of the basis of the bargain.' " (See *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, 120 Cal.Rptr. 681, 534 P.2d 377 ["The key (to the existence of an express warranty) is that the seller's statements—whether fact or opinion—must become 'part of the basis of the bargain.' "].) Since Appalachian has failed to show any warranties, including the warranty from Morton Thiokol, formed a basis of Western Union's bargain for the PAM purchase; there is no basis for limiting or negating the exculpatory clauses and disclaimers in Western Union's written agreement with McDonnell Douglas. Limitations or negations of warranties are construed as inoperative only "to the extent that such construction is unreasonable." (Cal.U.Com.Code, § 2316, subd. (1).) Here there is nothing unreasonable in enforcing the limitations and disclaimers Western Union negotiated and agreed to in its contract with McDonnell Douglas because those limitations and disclaimers formed the sole basis of the parties' agreement.

The trial court correctly denied Appalachian's motion for a new trial.[17]

***36** CROSS APPEAL

I

Negligence Cause of Action

The Respondents contend the trial court erred in failing to additionally grant summary judgment as to Appalachian's cause of action for negligence. The Respondents advance various theories why a negligence cause of action does not lie here, including assertions that a manufacturer in a commercial relationship has no duty under a negligence theory to prevent a product from injuring itself; that there is no recovery in tort for purely "economic losses;" that recovery under a negligence theory requires damage caused by "a violent or calamitous occurrence"; and that applying California tort law to allow recovery here would violate various federal laws and international treaties relating to outer space. Regardless of the merit or lack of merit to these arguments, we need not address them since we have held Western Union specifically waived this claim in the contract it signed with McDonnell Douglas.

II

Statute of Limitations

[7] The Respondents contend the trial court erred in determining Appalachian's action was not barred by the two-year statute of limitations of section 339, subdivision (1) of the Code of Civil Procedure.

Here, all parties agree the limitation period began to run on February 3, 1984 when the upper stage rocket failed to launch the Westar VI satellite into a geosynchronous orbit. On January 17, 1986, Appalachian filed a complaint against McDonnell Douglas, Morton Thiokol and Hitco seeking recovery based on negligence and strict liability in Orange County Superior Court. On February 14, 1986, McDonnell Douglas petitioned to remove the case to federal court on the ground, inter alia, that Appalachian's complaint raised a federal question ****738** and Appalachian's claims were preempted by federal law. On February 18, Appalachian, rather than petitioning for remand to the superior court, dismissed its action. McDonnell Douglas opposed the dismissal and filed a motion to strike or vacate Appalachian's dismissal. The following day, February 19, 1986, Appalachian filed an action containing essentially the same allegations against McDonnell Douglas, Morton Thiokol and Hitco in Orange County Superior Court.

On March 24, 1986, the Federal Court ruled on McDonnell Douglas's motion to strike or vacate Appalachian's dismissal. In ruling against McDonnellDouglas, ***37** the federal court judge stated:

> "Whether a dismissal under [Federal Rule of Civil Procedure] 41(a)(1)(i) may be set aside is an open question which the Court need not reach, since the Court has satisfied [itself] that the actions were not removable in the first place.
>
> "...
>
> "On the basis that the causes of action asserted by the plaintiff do not depend upon a federal law element, the Court determines that the case does not 'arise under' federal law and was thus not removable. Had plaintiff not already dismissed the cases, they would have been remanded to the Superior Court.
>
> "The plaintiffs having dismissed the actions, nothing remains to be done but deny the motion to strike the dismissal."

The respondents, in Superior Court, brought motions for summary judgment on the ground Appalachian's complaint was filed after the statute of limitations period had expired. The trial court denied the motions, ruling the complaint was timely filed within the two-year limitation period of Code of Civil Procedure section 339, subdivision (1) pursuant to the equitable tolling doctrine.

Appalachian first contends the applicable statute of limitations is not the two-year limitation period provided for in Code of Civil Procedure section 339, subdivision (1) but the three-year period of Code of Civil Procedure section 338, subdivision (3).[18]

Section 339, subdivision (1) imposes a two-year limitation on all action on "obligation or liability not founded upon an instrument of writing." It has been construed to cover actions based on negligent wrongs not involving damage to real or tangible personal property and all actions seeking recovery for economic loss. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 440, p. 470; *Richardson v. Allstate Ins. Co.* (1981) 117 Cal.App.3d 8, 172 Cal.Rptr. 423; *People v. Wilson* (1966) 240 Cal.App.2d 574, 49 Cal.Rptr. 792.)

Section 338, subdivision (3) imposes a three-year limitation on "[a]n action for ... injuring any goods...." This section has been construed to cover negligent damage to tangible personal property. (See *Jones v. Russ Davis Ford* (1967) 247 Cal.App.2d 725, 56 Cal.Rptr. 18 [damage to automobile].)

The parties disagree here as to whether Appalachian is seeking recovery for any physical damage to the satellite caused by failure of the Star 48 ***38** motor. The Respondents contend: "What is involved in the instant case is not conversion of or damage to the satellite, but the intangible right to have the satellite in a particular orbit." The Respondents, therefore, assert the two-year limitation period of Code of Civil Procedure section 339, subdivision (1) applies. We need not resolve their dispute since, even assuming the shorter two-year statute applies, the trial court correctly found the action not barred. The trial court agreed with the Respondents but applied the equitable tolling doctrine to the period when Appalachian's case was pending in federal court. The Respondents contend the court erred in applying the doctrine.

The "equitable tolling" doctrine is a judicially created doctrine designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has ****739** been satisfied. (See *Elkins v. Derby* (1974) 12 Cal.3d 410, 417–420, 115 Cal.Rptr. 641, 525 P.2d 81.) The doctrine was first applied by the California Supreme Court in *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 154 P.2d 399. In *Bollinger,* the plaintiff filed a complaint against an insurance company but, after the limitations period contained in the plaintiff's insurance policy had expired, the trial court erroneously granted a nonsuit on the ground the plaintiff's action had been prematurely filed. Thereafter, when the plaintiff attempted to file a new complaint, the insurance company filed a demurrer, contending the complaint had been filed after the limitations period had expired. The trial court agreed, sustained the insurance company's demurrer without leave to amend and dismissed the complaint. The Supreme Court reversed.

The starting point of the Supreme Court's analysis was Code of Civil Procedure section 355 which provided: "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal." The Supreme Court traced the derivation of this statute through the New York Code of Civil Procedure back to the English Limitation Act of 1623. The Court noted:

> "The wording of section 355 is reminiscent of the old English statutes that specified situations instead of formulating general rules. As presently worded it protects a plaintiff who has mistaken his remedy if he was awarded a judgment in the first instance and defeated on appeal. There is all the more reason to protect a plaintiff, as in the present case, who has not mistaken his remedy but through error of the trial court was not allowed to proceed to trial. The basic policy

that underlies section 355 calls for relief in such a case." (*Bollinger v. National Fire Ins. Co., supra,* 25 Cal.2d at pp. 409–410, 154 P.2d 399.)

***39** The *Bollinger* court stated it was "not powerless to formulate rules of procedure where justice demands it" and "has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits. [Citations.]" (*Id.* at p. 410, 154 P.2d 399.) The court cited as an example *Wennerholm v. Stanford Univ. Sch. of Med.* (1942) 20 Cal.2d 713, 128 P.2d 522, where the court had applied a new rule before it had been enacted by the Legislature to eliminate a technicality requiring a plaintiff to request leave to amend before seeking appellate review, even though the trial court had already sustained a demurrer without leave to amend. (*Bollinger v. National Fire Ins. Co., supra,* 25 Cal.2d at p. 410, 154 P.2d 399.) The court also cited the relation back doctrine where an amendment, sought after the limitations period has expired, "will be deemed filed as of the date of the original complaint so long as recovery is sought upon the same general set of facts [citation], recognizing that despite the new filing, the action is still the same." (*Ibid.*)

The Supreme Court held the statute of limitations should not bar a trial on the merits in the *Bollinger* case because the plaintiff's "action is in reality a continuance of the earlier action involving the same parties, facts, and cause of action," the plaintiff had timely filed his action and diligently pursued it, the nonsuit was erroneous and unrelated to the merits and the defendant's delay in bringing the motion contributed to the filing of the complaint beyond the limitations period. (*Id.* at pp. 410–411, 154 P.2d 399.) The *Bollinger* court concluded:

> "Statutes of limitations are not so rigid as they are sometimes regarded. Under certain circumstances property rights or immunities may be acquired as a result of the running of the statutory period, but the period will be extended or tolled by the occurrence of certain events, which may be the subject of conflicting evidence, such as absence from the state or disability. [Citation.] It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. [Citations.] It is settled in this state that fraudulent concealment by the defendant ****740** of the facts upon which a cause of action is based [citation] or mistake as to the facts constituting the cause of action [citations] will prevent the running of the period until discovery. Principles of equity and justice ... are ... controlling here.... It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture." (*Id.* at p. 411, 154 P.2d 399.)

The Supreme Court in *Addison v. State of California* (1978) 21 Cal.3d 313, 318–319, 146 Cal.Rptr. 224, 578 P.2d 941, later explained: "The rule announced in *Bollinger* is a general equitable one which operates independently of the literal wording of the Code of Civil Procedure.... [¶] ***40** [A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff."

The equitable tolling doctrine has been applied to a plaintiff who first pursued a workers compensation remedy which was denied after the limitations period because the plaintiff had not been an "employee" and the plaintiff then filed an action in superior court (*Elkins v. Derby* (1974) 12 Cal.3d 410, 115 Cal.Rptr. 641, 525 P.2d 81; see also *Barth v. Board of Pension Commissioners* (1983) 145 Cal.App.3d 826, 193 Cal.Rptr. 755) as well as to a plaintiff who first filed in federal court, then filed in state court after the defendant moved to dismiss the federal action for lack of federal jurisdiction, a motion which was granted after the plaintiff filed the state court action (*Addison v. State of California, supra,* 21 Cal.3d 313, 146 Cal.Rptr. 224, 578 P.2d 941). Additionally, *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049, while the Supreme Court did not expressly apply the equitable tolling doctrine, it held a plaintiff's action was not barred by the statute of limitations when the plaintiff had timely filed a petition for a writ in the Court of Appeal which was denied without prejudice and thereafter, after the limitations period had expired, refiled the petition in superior court.

The Respondents assert the equitable tolling doctrine does not apply when the plaintiff voluntarily dismisses an action; they assert it applies only to involuntary dismissals. To support this assertion, the Respondents cite *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 142 Cal.Rptr. 696, 572 P.2d 755; *Neff v. York Life Ins. Co.* (1947) 30 Cal.2d 165, 180 P.2d 900; *Dowell v. County of Contra Costa* (1985) 173 Cal.App.3d 896, 219 Cal.Rptr. 341; *Permanente Medical Group v. Workers' Comp. Appeals Bd.* (1985) 171 Cal.App.3d 1171, 217 Cal.Rptr. 873; *Hill v. Allan* (1968) 259 Cal.App.2d 470, 66 Cal.Rptr. 676; and *Cook v. Stewart McKee & Co.* (1945) 68 Cal.App.2d 758, 157 P.2d 868.)[19]

Initially, we note none of the cases applying the equitable tolling doctrine have depended on whether there was an voluntary or involuntary dismissal. Second, the cases cited by the Respondents do not, either when read singly or together, establish a general rule that a voluntary dismissal precludes application of the equitable tolling doctrine. Rather, these cases turn on the failure to meet the *Bollinger* criteria relating to timely notice, lack of prejudice ***41** to the defendant and reasonable and good faith conduct on the part of the plaintiff.[20]

****741** In contrast, here, all of the *Bollinger* criteria are present. Appalachian notified the Respondents of its claim by filing a complaint involving the same parties, causes of action and facts within the limitations period. The Respondents have shown no prejudice resulting from application of the equitable tolling doctrine. Appalachian's conduct was reasonable and in good faith. The filing of the second complaint after the limitations period had expired was not due to any dilatory conduct on Appalachian's part but was due to McDonnell Douglas's improper removal of the action to federal court after the limitations period had expired. Appalachian's second complaint was filed immediately following its voluntary dismissal, less than a week after the removal and a little more than two weeks after the limitations period had expired.

Moreover, we note that had Appalachian, instead of voluntarily dismissing the first action in federal court and filing a second action in Superior Court, pursued the alternative legal remedy of petitioning in federal court for a remand to the Superior Court, a petition which would have been granted, there would have been no question that Appalachian's action was timely filed within the limitations period. In such a situation there would have been no doubt the case pursued after remand from federal court was the same case as was filed in January.[21] To preclude Appalachian's action here based on Appalachian's decision to dismiss and file a new complaint in superior court rather than to pursue a petition for remand, under the circumstances ***42** of this case where the federal court stated removal was improper and said it would have remanded the case to the superior court had Appalachian not already dismissed the action, would result in the kind of technical and unjust forfeiture of a trial on the merits that the equitable tolling doctrine was designed to avoid. (See *Bollinger v. National Fire Ins. Co., supra,* 25 Cal.2d 399, 410, 154 P.2d 399.)

We conclude the action here before us "is in reality a continuance of the earlier action." (*Id.* at p. 410, 154 P.2d 399.) Appalachian's complaint, whether governed by Code of Civil Procedure section 338, subdivision (3) or section 339, subdivision (1), was timely filed.

III

Attorney's Fees

[8] McDonnell Douglas contends the court erred in failing to award it attorney's fees. McDonnell Douglas first argues it is entitled to attorney's fees because Appalachian's action was frivolous.

Code of Civil Procedure section 128.5, subdivision (a), authorizes a court to order a party to pay reasonable attorney's fees "incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." The statute defines "frivolous" as meaning "totally and completely without merit" or "for the sole purpose of harassing an opposing party." (Code Civ.Proc., § 128.5, subd. (b)(2).)

****742** Nothing in the record indicates Appalachian's action was brought solely for the purpose of harassing McDonnell Douglas, Morton Thiokol or Hitco or to cause unnecessary delay. Nor was Appalachian's action "totally and completely without merit." Appalachian's contentions the defendants were negligent, the Star 48 motor was defective and that the exculpatory clauses were unenforceable because they were ambiguous, did not reflect the parties' true intent and were unconscionable were contentions with some, if minimal, merit given the clear failure of the Star 48 motor, McDonnell Douglas's position as the sole supplier of the upper stage rocket for the Space Shuttle and the generally strict judicial review of exculpatory clauses.

[9] Alternatively, McDonnell Douglas argues it is entitled to attorney's fees pursuant to Civil Code section 1717. This section provides for an award of attorney's fees to the prevailing party "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract" shall be awarded. McDonnell Douglas, while acknowledging the contract does not contain an ***43** express attorney's fee provision, argues indemnification language in article 7, referring to "costs and expenses" is sufficient to create an obligation to indemnify for attorney's fees as provided in Civil Code section 2778,

subdivision 3.

Civil Code section 2778, subdivision 3 states:

> "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:
>
> "...
>
> "3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion...."

McDonnell Douglas contends the following language from article 7 is sufficient to entitle it to attorney's fees pursuant to Civil Code sections 1717 and 2778:

> "*Purchaser shall indemnify and hold harmless [McDonnell Douglas],* its officers, agents and employees *from and against any and all liabilities, damages and losses, including costs and expenses in connection therewith,* for death of or injury to any persons whomsoever and for the loss of, damage to or destruction of any property whatsoever, caused by, arising out of or in any way connected with the launch or operation of the PAM, Spacecraft, Delta or STS." (Emphasis added.)

This language might be sufficient to support an award of attorney's fees to McDonnell Douglas (see, e.g., *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666, 683, 53 Cal.Rptr. 551), if it were the only language in article 7. Article 7, however, contains other language limiting the indemnification. The final sentence of article 7 states: "The indemnification provisions of this Article 7 *shall not apply* to liabilities, damages or losses suffered under the conditions set forth in Article 14." (Emphasis added.) The loss here occurred under the conditions set forth in article 14.[22] ***44** Therefore, the indemnification provision of article 7, referring to "costs and expenses" does not apply; the contract itself reflects an intent not to award attorney's fees under the conditions occurring here. Civil Code section 1717 does not authorize an award of attorney's fees to McDonnell Douglas here.

DISPOSITION

The judgment is affirmed.

HUFFMAN and NARES, JJ., concur.

All Citations

214 Cal.App.3d 1, 262 Cal.Rptr. 716, Prod.Liab.Rep. (CCH) P 12,297

Footnotes

1 These five insurance companies paid approximately $5,000,000 of the $105,000,000 claim. They named the remaining insurance companies as involuntary plaintiffs.

2 Arianespace promoted itself as having more reliable launch dates and better financial arrangements than NASA's Space Shuttle. It's manual stated the following advantages of the Ariane rocket over the Space Shuttle: (1) five- to six-week payload integration time versus three to four months for the Space Shuttle; (2) higher accuracy of in-orbit injection due to the use of an inertial guidance system as opposed to a "spinned, non-guided motor as PAM stage;" (3) better payload environment which allowed the use of lighter satellite structures; and (4) was automatic and therefore did not require the safety checks of a manned vehicle.

3 At that time a Space Shuttle launch cost about $15 million ($9–10 million for the launch and $6–7 million for the PAM) while an Ariane launch cost about $21 million.

4 The basic inter-party waiver of liability in the Launch Services Agreement provides: "NASA and the Customer (the parties) will respectively utilize their property and employees in STS Operations in close proximity to one another and to others. Furthermore, the parties recognize that all participants in STS Operations are engaged in the common goal of meaningful exploration, exploitation and uses of outer space. In furtherance of this goal, the parties hereto agree to a no-fault, no subrogation, inter-party waiver of liability pursuant to which each party agrees not to bring a claim against or sue the other party or other customers and agrees to absorb the financial and any other consequences for Damage it incurs to its own property and employees as a result of participation in STS Operations during Protected STS Operations, irrespective of whether such Damage is caused by NASA, the Customer, or other customers participating in STS Operations, and regardless of whether such Damage arises through negligence

or otherwise. Thus, the parties, by absorbing the consequences of damage to their property and employees without recourse against each other or other customers participating in STS Operations during Protected STS Operations, jointly contribute to the common goal of meaningful exploration of outer space."

5 The section in the Launch Services Agreement which is equivalent to paragraph 14.3 in the McDonnell Douglas/Western Union contract provides: "The parties agree that this common goal [of meaningful exploration of outer space] will also be advanced through extension of the inter-party waiver of liability to other participants in STS Operations. Accordingly, the parties agree to extend the waiver as set forth in Subparagraph 3.b. above to contractors and subcontractors at every tier of the parties and other customers, as third party beneficiaries, whether or not such contractors or subcontractors causing damage bring property or employees to a United States Government Installation or retain title to or other interest in property provided by them to be used, or otherwise involved, in STS Operations. Specifically, the parties intend to protect these contractors and subcontractors from claims, including 'products liability' claims, which might otherwise be pursued by the parties, or the contractors or subcontractors of the parties, or other customers or the contractors or subcontractors of other customers. Moreover, it is the intent of the parties that each will take all necessary and reasonable steps in accordance with Subparagraph 3.e. below to foreclose claims for Damage by any participant in STS Operations during Protected STS Operations, under the same conditions and to the same extent as set forth in Subparagraph 3.b. above, except for claims between the Customer and its contractors or subcontractors and claims between the United States Government and its contractors and subcontractors."

6 The inter-party waiver of liability in the Launch Services Agreement was prompted by a concern that customers would be wary of using the Space Shuttle which could carry up to four satellites (as opposed to an expendable launch vehicle which carried only one satellite at a time) because of the potential liability problems, e.g., the possibility that one customer's payload, due to either NASA's fault or the fault of the customer or its contractors, could damage another customer's payload or the Space Shuttle. To eliminate this concern, NASA incorporated an inter-party waiver of liability into all its Launch Services Agreements and required all customers to waive claims against NASA, other customers and their respective contractors and subcontractors.

7 Appalachian also argues the ambiguous nature of the McDonnell Douglas/Western Union contract is established by the trial court's finding the inter-party waiver of liability in the Launch Services Agreement was ambiguous. The ambiguity found by the trial court in the Launch Services Agreement, however, related to a different issue—the question of McDonnell Douglas's status as a contractor relative to the federal government.

8 Hitco contends Appalachian cannot raise the reformation issue because it failed to plead reformation or recision in its complaint. This contention is without merit. Reformation may be raised as a defense to the enforcement of a contract. (See *California Packing Corp. v. Larsen* (1921) 187 Cal. 610, 612, 203 P. 102.) Here, Appalachian raised the reformation issue as a defense to the Respondents' summary judgment motions seeking to enforce the written contract.

9 The original contract between Western Union and McDonnell Douglas in March 1983 did not contain article 14; the parties signed the contract on the condition that "any provisions included in the Launch Services Agreement between Western Union and NASA related to damages to persons or property involved in the STS operations will be incorporated in the contract between [McDonnell Douglas] and Western Union." At the time Western Union proposed inclusion of article 14, it noted "This is the current NASA Launch Services Agreement flow-down clause." In a deposition, Western Union's contracting officer, Cammarato, explained article 14 was intended "to comply with whatever requirements NASA had with regard to [the] inter-party waiver requirement." Cammarato's counterpart at McDonnell Douglas testified in a deposition that article 14 "was going to be whatever Western Union negotiated with NASA with respect to the interparty waiver in [the] launch services agreement." He further explained article 14 was added "Because it was our understanding that NASA wouldn't let us on the launch site without having agreed to an interparty waiver of liability. We had to get on the launch site to process the hardware."

10 In *Roller v. California Pacific Title Ins. Co., supra,* 92 Cal.App.2d 149, 154, 206 P.2d 694, the court stated: "Appellant's burden of explanation was much heavier since, as the court has found, he drew and prepared the contract. The language therein, attributable to himself, is now claimed by him to have caused his mistake. It was appellant's own proposal, already signed by him, which was presented to respondent for acceptance or rejection."

11 In an internal memorandum, Western Union concluded: "[Western Union] has no rights or obligations under this agreement in view of the failed launch."

12 In support of its position the exculpatory provisions were unconscionable, Appalachian also submitted hearsay statements made by Cammarato and another contracting officer, F. William Ziegler, to Appalachian's attorney. Appalachian's attorney, in a declaration, stated these individuals had told him McDonnell Douglas was clear it "was not about to deviate" from the standard contract and that "there was very little to negotiate because the contract basically was offered on a take-it-or-leave-it basis."
Appalachian states the Western Union contracting officials changed their position after McDonnell Douglas threatened to sue Western Union unless Western Union stopped Appalachian's lawsuit. Appalachian explains: "[McDonnell Douglas] did file a cross-complaint against [Western Union] in this action seeking indemnification from [Western Union] for all of [McDonnell

Douglas's] defense costs. As a result of [McDonnell Douglas's] actions, [Western Union] ceased its cooperation with plaintiffs in the prosecution of this case despite its obligation to do so under its insurance agreement with plaintiffs.... As Commissioner Bauer put it during an earlier hearing in this case, [McDonnell Douglas] 'terrorized' [Western Union] into a posture of noncooperation with plaintiffs.... It is not surprising, therefore, that the [Western Union] witnesses were less than forthcoming at their depositions." (Citations omitted.)

13 A contracting official at McDonnell Douglas stated during a deposition: "I remember having discussions with Mr. Herbert of RCA with regards to that. And discussion was of the nature as to providing—them providing insurance as opposed to us providing insurance and having to charge them for the same insurance and having to put an overlay on top of it."

14 It has also been noted: "The relative bargaining strengths of the parties does not come into play absent a compelling public interest in the transaction." (*Okura v. United States Cycling Federation, supra,* 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429.)

15 See also *Delta Air Lines, Inc. v. Douglas Aircraft Corp., supra,* 238 Cal.App.2d 95, 47 Cal.Rptr. 518, also involving the sale of an allegedly defective aircraft and an attempt to avoid the effect of an exculpatory clause. The *Delta* court, in upholding the exculpatory clause, stated: "In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on [McDonnell] Douglas (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to [McDonnell] Douglas, which had neither agreed to assume it nor been compensated for such assumption." (*Id.* at pp. 104–105, 47 Cal.Rptr. 518, fn. omitted.)

16 California Uniform Commercial Code section 2316 provides: "(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable."

17 Morton Thiokol also argues Appalachian's motion for a new trial was properly denied because Appalachian failed to excuse its failure to earlier discover the warranty. Because we have held the warranty did not form a basis of Western Union's bargain and therefore is not enforceable by Appalachian we need not address Morton Thiokol's argument Appalachian failed to establish its diligence in discovering the warranty. We note, however, that in light of Morton Thiokol's and McDonnell Douglas's earlier denials of the existence any express warranties from Morton Thiokol, the voluminous documentation involved in this case, Morton Thiokol's late disclosure of some documents and the difficulty of tracing the contract reference numbers, Morton Thiokol's argument seems somewhat disingenuous.

18 In 1988, the Legislature changed the subdivision designations from numerical to alphabetical in section 338 of the Code of Civil Procedure. Thus, subdivision (3) of section 338 is now subdivision (c).

19 Respondents also cite *Fleishbein v. Western Auto S. Agency* (1937) 19 Cal.App.2d 424, 65 P.2d 928. This case is not applicable. Not only does it predate the *Bollinger* decision, but also it deals with different issues, the application of equitable estoppel and the question whether any fraud or misrepresentation was involved in defendant's stipulation to plaintiff's dismissal of an action in federal court so as to lead the plaintiff to believe the defendant would not oppose plaintiff's filing the same claim in state court after the limitations period had expired.

20 In *Wood v. Elling Corp., supra,* 20 Cal.3d 353, 142 Cal.Rptr. 696, 572 P.2d 755, the plaintiff's first action was dismissed for lack of prosecution i.e., he failed "to diligently pursue the sole avenue of legal recourse available to him." (*Id.* at p. 360, fn. 4, 142 Cal.Rptr. 696, 572 P.2d 755.) In *Neff v. New York Life Ins. Co., supra,* 30 Cal.2d 165, 180 P.2d 900, the plaintiff failed to show any excuse for the delay. In *Dowell v. County of Contra Costa, supra,* 173 Cal.App.3d 896, 219 Cal.Rptr. 341, not only had the plaintiff failed to raise the issue below but also there had been no timely notice to the defendant and the second suit involved different facts and parties. In *Permanente Medical Group v. Workers' Comp. Appeals Bd., supra,* 171 Cal.App.3d 1171, 217 Cal.Rptr. 873, there was no showing the plaintiff had been pursuing another legal remedy during the limitations period. In *Hill v. Allan, supra,* 259 Cal.App.2d 470, 66 Cal.Rptr. 676, five years separated the filing of the first action, which was voluntarily dismissed pursuant to a settlement, and the filing of the second action. In *Cook v. Stewart McKee & Co., supra,* 68 Cal.App.2d 758, 157 P.2d 868, the second action involved an entirely separate matter.

21 For example, McDonnell Douglas argues: "Plaintiffs' discussion of the statute of limitations is egregiously misleading. They begin by stating bluntly: 'The original complaint in this case was filed ... on January 17, 1986.' That is simply not true. This case is Orange County Civil Action No. 481712, and it is undisputed that the complaint herein was filed *not* on January 17, 1986, but on February 19, 1986, more than two years after the unsuccessful deployment of Westar VI. The other case—the one plaintiffs are referring to—is a different lawsuit, No. 479106, which involved some different parties and which, in any event, was voluntarily

dismissed." This argument, focusing so strongly on the docket numbers, would, of course, not apply had Appalachian pursued the remedy of remand from the federal court, since the case number would have remained the same throughout.

22 Article 14 covers losses occurring during "Protected STS Operations" which is defined as: "(1) Beginning with the signature of an Agreement or Arrangement with NASA for Space Transportation System services and (i) when any employee, Payload or property arrives at a United States Government Installation, or (ii) during transportation of such to the installation by a United States Government conveyance, or (iii) at ingress of such into an Orbiter, for the purpose of fulfilling such Agreement or Arrangement, whichever occurs first. [¶] (2) Ending with regard to any employee when (i) the employee departs a United States Government Installation or (ii) the Orbiter if it lands at other than such Installation, or (iii) a United States Government conveyance which transports the employee from such Installation or Orbiter, whichever occurs last. [¶] (3) Ending with regard to a Payload or property, not Jettisoned or Deployed, under the same conditions as set forth in Paragraph 14.1.B.(2) above. [¶] (4) Ending with whichever occurs last with regard to a Deployed or Jettisoned payload or property (i) after such impacts the Earth; or (ii) if retrieved by the Orbiter, under the same conditions set forth in Paragraph 14.1.B(2) above."

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LEGAL AUTHORITY AA-69

2020 WL 2085003
United States District Court, N.D. Illinois, Eastern Division.

ASSOCIATION OF FLIGHT ATTENDANTS—CWA, Plaintiff,
v.
UNITED AIRLINES, INC., Defendant.

Case No. 19-cv-2867
|
Signed 04/30/2020

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

HON. JORGE ALONSO, United States District Judge

***1** After receiving an unfavorable arbitration decision from the System Board of Adjustment, which concluded the submitted grievance was untimely, plaintiff Association of Flight Attendants—CWA ("Union") filed this suit seeking to set aside the decision under the Railway Labor Act. Plaintiff and defendant United Airlines, Inc. ("United" or "Employer") have filed cross motions for summary judgment. For the reasons set forth below, the Court grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment.

I. BACKGROUND

The following facts are undisputed unless otherwise noted.[1]

Plaintiff and defendant are parties to a collective bargaining agreement (the "CBA"). Because United is a carrier covered by the Railway Labor Act, the CBA establishes a System Board of Adjustment (the "Board") to decide the parties' disputes regarding the CBA.

Section 26.C of the CBA states:

> A group of Flight Attendants or a Flight Attendant who has a grievance concerning any action of the Company which affects her/him, except as may arise out of disciplinary action, shall discuss such matter with her/his Supervisor within one hundred twenty (120) days after she/he reasonably would have knowledge of such grievance. The supervisor shall have ten (10) days in which to announce a decision.

(Award at 21). Section 26.D of the CBA states:

> The Master Executive Council President may by written request ask for a review by the Director Labor Relations—Inflight of any alleged misapplication or misinterpretation of this Agreement which is not at the time the subject of a grievance. The relief sought shall be limited to a change of future application or interpretation of the Agreement. The Director Labor Relations—Inflight/designee shall have twenty (20) days after receipt of the request for review in which to investigate and issue a decision. If the decision is not satisfactory, further appeal may be made in writing by the MEC President or the Union to the "United Air Lines Flight Attendant System Board of Adjustment" provided this is done within thirty (30) days after receipt of the decision. It shall be understood such right under the Paragraph shall not apply to hypothetical cases or situations.

***2** (Award at 21).

On June 12, 2012, the Union's President submitted a grievance over profit-sharing payments from United. (The merits of the grievance are not relevant to this case. In a nutshell, plaintiff complained that United had included flight attendants formerly employed by Continental Airlines when it made profit-sharing payments, which meant the flight attendants who had worked for United since before the merger were paid less than if the Continental flight attendants had been excluded.) The grievance stated, among other things:

> Pursuant to Section 26.C of the 2012-16 Agreement ... the undersigned hereby requests a review of the Company's violation of Section 5.J.2 ... when on February 14, 2012 profit sharing payments were made to United Flight Attendants ...
>
> In relief the Union requests ... the Company will determine profit sharing entitlements to be paid to United Flight Attendants for 2011 and subsequent years based upon ...
>
> Pursuant to Section 26.C. this is being filed as a System Group Grievance.
>
> Pursuant to Section 26.D. a decision is requested within twenty (20) days.

(Award at 15-16). On August 2, 2012, defendant denied the grievance, noting, among other things, that the grievance was untimely. On August 30, 2012, plaintiff submitted the grievance to the Board for arbitration.

The Board, chaired by neutral arbitrator Dana Eischen, held a five-day hearing on the grievance before accepting post-hearing briefs. On January 29, 2019, the Board issued an award in favor of United, on the grounds that the grievance was untimely. The Award states, in relevant part:

> **POSITIONS OF THE PARTIES ARBITRABILITY**
> **Company**
>
> AFA's grievance is barred by Section 26(C) of the UAL CBA, which required AFA to file its grievance within 120 days of when it 'reasonably would have knowledge' of the grievance. The evidence demonstrates beyond doubt that AFA reasonably had full knowledge well before February 14, 2012 that United was including the Continental employees in the 2011 profit share distribution scheduled for February 14, 2012.
>
> * * *
>
> **Union**
>
> ... Under the 1976 Settlement ... the MEC Chair is permitted to file systemwide pay liability grievances pursuant to this paragraph, without any prior notice to the Company, and subject to a 120-day limitation on liability, so long as the grievance involves identical questions of fact and contract interpretation and is specified as a group grievance. ... [The grievance] was specifically filed under Section 26.D., meets all contractual requirements for such a filing, and thus constitutes a viable grievance under that provision. ...
>
> * * *
>
> **OPINION OF THE NEUTRAL ARBITRATOR**
>
> * * *
>
> **Course of Conduct/Custom/Practice**
>
> Absent clear and explicit contract language limiting or barring such parole evidence, proof of custom, practice and tradition, *i.e.,* 'course of conduct' is admissible and may be relied upon as an aide in determining the mutual intent of the parties under a written contract. ...
>
> Arbitrators and courts recognize that '[c]ourse of performance when employed to interpret a contract is an indicator of what parties intended at the time they formed their agreement. It is an expression of the parties of the meaning that they give to the terms of the contract that they made.' *See* Margaret N. Kniffen, Corbin on Contracts (5th ed. 2015) § 24.16. The Supreme Court of the United States has endorsed the admissibility and utility of such evidence for such purposes. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82, 80 S.Ct. 1347, 46 L.R.R.M. 2416 [(]1960)[.] ...
> ***3**
> * * *
>
> **ANALYSIS**
>
> **Timeliness**
>
> * * *
>
> At every step in th[e] transparent process, over a multi-month period starting in March 2011, AFA at both the International and MEC level was informed by United that the Company was going to distribute **combined** ... profits to ... Flight Attendants ...
>
> * * *
>
> In short, AFA knew or should have known on January 25, 2012, of the 'Company Action' that was described [in the grievance]. However, AFA did not file [the grievance] until June 12, 2012, which is clearly outside the 120-day mandatory grievance filing time limit of § 26.C....
>
> * * *
>
> **Section 26.D**
>
> Alternatively, according to AFA, the proven violation of CBA § 26.C time limits is not jurisdictionally fatal

> to a decision on the merits of [the grievance] but merely bars this Board from granting 'retrospective' relief for Plan Year 2011. On that premise, AFA urges the Board to consider [the grievance] on the merits, sustain the grievance and 'prospectively correct the distribution formula for profit sharing distributions in subsequent years', *i.e.,* for Plan years 2012, 2013 and 2014.
>
> The opening and penultimate sentences of [the grievance] both plainly state that it was filed '[P]ursuant to Section 26.C as a System Group Grievance.' The only mention of § 26.D in [the grievance] is a truncated last sentence request for an expedited decision: 'Pursuant to Section 26.D. a decision is requested within twenty (20) days'. According to AFA, irrespective of manifestly untimely filing under § 26.C, [the grievance] is still 'separately and independently' arbitrable on its merits under [26.D] because a decision was requested within twenty (20) days 'pursuant to § 26.D'.
>
> In the facts and circumstances of this particular case, AFA did not establish by persuasive evidence of record that this single oblique reference to Section 26.D time limits in the last sentence of [the grievance] 'automatically encompasses the four additional profit sharing payments the Company made according to the flawed formula despite AFA's pending grievance, namely: the 2013 distribution of 2012 profits; the 2014 distribution of 2013 profits and the 2015 distribution of 2014 profits'. The record shows a pattern of AFA citing both Sections 26.C and 26.D in grievances for many years 'to protect the damages'. But the record before this Board is far from clear concerning the mutually intended consequences in this particular case. The only thing that is clear is these Parties have long held sharply differing positions on that point.
>
> * * *
>
> In the unique facts and circumstances of this case record, the Board is unable to make an informed determination that mere citation of 26.D time limits is mutually intended to revitalize an untimely filed nonarbitrable claim of contract violation to which the Continuing Violation Doctrine is inapplicable.

(Award at 25-26, 29, 35-37, 39, 42, 44, 47-48).

II. STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). When considering a motion for summary judgment, the Court must construe the evidence and make all reasonable inferences in favor of the non-moving party. *Hutchison v. Fitzgerald Equip. Co., Inc.*, 910 F.3d 1016, 1021 (7th Cir. 2018). Summary judgment is appropriate when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005). "As the 'put up or shut up' moment in a lawsuit, summary judgment requires a non-moving party to respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." *Grant v. Trustees of Ind. Univ.*, 870 F.3d 562, 568 (7th Cir. 2017).

III. DISCUSSION

***4** Pursuant to the Railway Labor Act, a district court has jurisdiction to set aside an order of a Board. 45 U.S.C. § 153 First (q). That section, though, limits a court's power to set aside a Board's order to the following reasons:

> for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U.S.C. § 153 First (q). In this case, the Union argues the Board exceeded its jurisdiction.

"Arbitrators exceed their jurisdiction if they fail to interpret the collective bargaining agreements between the parties" but not if they merely "make a mistake in interpreting a collective bargaining agreement." *Brotherhood of Locomotive Engineers and Trainmen, Gen'l Comm. of Adjustment v. Union Pacific RR Co.*, 719 F.3d 801, 803 (7th Cir. 2013). There, the Seventh Circuit explained:

> Lawyers and judges who believe they see an error of reasoning or interpretation by an arbitrator are often tempted to try to correct such errors. Such error

> correction is not the function of judicial review of arbitration awards under the Railway Labor Act. That is why we have said many times that the question 'is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.'

Brotherhood of Locomotive Engineers, 719 F.3d at 803 (*quoting Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987)). The Supreme Court has said:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards. ...
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. ...
>
> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

***5** *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-98 (1960). Still, if an arbitrator issues an award contrary to an express term of the CBA such that "[t]here is no basis for any other interpretation and thus 'no possible interpretive route to the award,' " then an arbitrator has exceeded his authority. *United States Soccer Federation, Inc. v. United States Nat'l Soccer Team Players Assoc.*, 838 F.3d 826, 833 (7th Cir. 2016); *see also Wilson v. Chicago and North Western Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984) ("The agreement between [the parties] requires the dismissal of disciplinary charges if the railroad fails to hold required investigative hearings within the specified time limits; under the Act this provision can only be altered through the collective bargaining process. We hold that [the Board] exceeded its authority in attempting to alter this provision and fashion their own remedy.").

Here, plaintiff does not challenge the Board's conclusion that the grievance was time-barred as to the year 2011. (Award at 44) ("AFA knew or should have known on January 25, 2012 of the 'Company Action' that was described as the alleged CBA violation in [the grievance.] ... However, AFA did not file [the grievance] until June 12, 2012, which is clearly outside the 120-day mandatory grievance filing time limit of § 26.C.").

Instead, plaintiff takes issue with the Board's refusal to consider the grievance as to subsequent years. Plaintiff's theory seems to be that, by mentioning § 26.D in the grievance, the Union was expanding the grievance to years beyond 2011. The Board rejected the theory. Plaintiff argues that the Board exceeded its authority by writing in a requirement that the parties must have " 'mutually intended' the availability of prospective relief" and by applying a 120-day limitations period to Section 26.D. The Court disagrees and concludes that the Board interpreted the CBA. The Court sees an interpretive route to the Board's conclusion.

First, the Board appears to have been unconvinced by plaintiff's attempt to add subsequent years to the grievance, because plaintiff did not clearly indicate in the grievance that it was intended to cover subsequent years. The Board noted: (1) that the grievance seemed to be, by its terms, merely a § 26.C grievance; and (2) that the only reference to 26.D was an attempt to obtain an *expedited* decision (as opposed to a decision about subsequent years). (Award at 47) ("The opening and penultimate sentences of [the grievance] both plainly state that it was filed '[P]ursuant to Section 26.C as a System Group Grievance.' The only mention of § 26.D in [the grievance] is a truncated last sentence request for an expedited decision: 'Pursuant to Section 26.D. a decision is requested within twenty (20) days'.").

Second, the Board appears to have considered the language of § 26.D, which, by its terms, seems to allow requests for review only in the *absence* of a grievance on the same issue. Specifically, § 26.D allows the President to "ask for a review ... of any alleged misapplication or misinterpretation of this Agreement *which is not at the time the subject of a grievance.*" (Award at 21) (emphasis

added). That language would seem to suggest that plaintiff could not merely tack a § 26.D request for review onto a § 26.C grievance. The Board mentioned the problem of an already-pending grievance. (Award at 48) ("AFA did not establish by persuasive evidence of record that this single oblique reference to Section 26.D time limits in the last sentence of [the grievance] 'automatically encompasses the four additional profit sharing payments the Company made according to the flawed formula *despite AFA's pending grievance*") (emphasis added).

***6** Although the terms of 26.D did not appear to allow a request for review on the same subject as a pending grievance, the Board still went on to consider whether, under the parties' usual custom or practice, mere mention of 26.D could expand a grievance into a request for review as to future years. There is nothing inherently wrong with considering custom or practice when interpreting a contract. *See Transportation-Communication Employees Union v. Union Pacific RR Co.*, 385 U.S. 157, 160-61 (1966) ("A collective bargaining agreement is not an ordinary contract. ... [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. ... *In order to interpret such an agreement* it is necessary to consider ... the practice, usage and custom pertaining to ... such agreements.") (emphasis added); *Dennison v. MONY Life Retirement Income Security Plan for Employees*, 710 F.3d 741, 745 (7th Cir. 2013) ("When the consistent performance of parties to a contract accords with one of two alternative interpretations of the contract, that's strong evidence for that interpretation. This is a general principle of contract interpretation[.]"); *Restatement (Second) of Contracts,* § 202, comment (g) (1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."). The Board explicitly stated it could consider evidence of custom or practice in interpreting the CBA. (Award at 36) ("proof of custom, practice and tradition, *i.e.,* 'course of conduct' is admissible and may be relied upon as an aide in determining the mutual intent of the parties under a written contract.").

When the Board considered custom and practice, it found insufficient evidence of past practice to support plaintiff's proposed interpretation (that mere mention of 26.D expanded the grievance to a request for review of future years). Specifically, the Board said:

> AFA did not establish by persuasive evidence of record that this single oblique reference to Section 26.D time limits in the last sentence of [the grievance] 'automatically encompasses the four additional profit sharing payments the Company made according to the flawed formula despite AFA's pending grievance[.] ... The record shows a pattern of AFA citing both Sections 26.C and 26.D in grievances for many years 'to protect the damages'. But the record before this Board is far from clear concerning the mutually intended consequences in this particular case. The only thing that is clear is these Parties have long held sharply differing positions on that point.
>
> * * *
>
> [T]he Board is unable to make an informed determination that mere citation of 26.D time limits is mutually intended to revitalize an untimely filed nonarbitrable claim of contract violation to which the Continuing Violation Doctrine is inapplicable.

(Award at 47-48). In other words, nothing in the parties' practice suggested to the Board that plaintiff's interpretation of the CBA was correct.

Thus, it appears to this Court that the Board considered the language of the CBA and, in absence of CBA language supporting plaintiff's argument, considered past practice. It found a lack of evidence of past practice to support plaintiff's argument. The Court does not read the Board's decision as adding a requirement of mutual intent before the Board can consider a grievance but rather as looking toward the CBA's language and past practice to determine whether plaintiff's proposed interpretation (that mere mention of 26.D adds a request for review to a grievance) of the CBA was correct. Nor does it appear to this Court that the Board applied the 26.C limitations period to a 26.D request for review. Rather, the Board seems to be saying that the grievance did not, on its face, include a request for review, which makes sense given the CBA's language limiting requests for review to issues on which no grievance is pending. It appears the Board was saying the grievance was a time-barred 26.C grievance and that the mere mention of 26.D did not convert the grievance to a 26.D request for review. In so concluding, the Board looked at the CBA's language and past practice and concluded that mere mention of 26.D did not expand the 26.C grievance in a way that got around the limitations period applicable to a 26.C grievance.

In short, the Board interpreted the CBA, which is enough for this Court. *See Union Pacific*, 719 F.3d at 807 ("The only question for this Court is whether the arbitrator interpreted the [CBA]. Our task is limited to determining whether the arbitrator's award could possibly have been based on the contract."); *Tice v. American Airlines, Inc.*, 373 F.3d 851, 854 (7th Cir. 2004) ("The plaintiffs challenge the correctness of the ruling, but we have no power to review an arbitral ruling for error. As long as what the arbitrators did can fairly be described as

interpretation, our hands are tied."); *Lyons v. Norfolk & Western Ry. Co.*, 163 F.3d 466, 470 (7th Cir. 1999) ("It is not for us to decide if this conclusion was correct; it is sufficient for us to say that in arriving at this conclusion, the [Board] was interpreting the contractual term ... Because we find that the [Board] interpreted the contract, its interpretation is conclusive."). That plaintiff disagrees with the Board's interpretation of the CBA does not mean the Board exceeded its authority.

***7** Plaintiff has not presented this Court with grounds on which to set aside the Board's decision. Accordingly, defendant is entitled to judgment as a matter of law. The Court grants defendant summary judgment as to Count I.

IV. CONCLUSION

For all of these reasons, defendant's motion [21] for summary judgment is granted, and plaintiff's motion [27] for summary judgment is denied. Civil case terminated.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 2085003, 2020 L.R.R.M. (BNA) 162,307

Footnotes

1 Local Rule 56.1 outlines the requirements for the introduction of facts parties would like considered in connection with a motion for summary judgment. The Court enforces Local Rule 56.1 strictly. *See McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783, 790 (7th Cir. 2019) ("We take this opportunity to reiterate that district judges may require strict compliance with local summary-judgment rules."). When one party supports a fact with admissible evidence and the other party fails to controvert the fact with admissible evidence, the Court deems the fact admitted. *See Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015); *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817-18 (7th Cir. 2004). This does not, however, absolve the party putting forth the fact of the duty to support the fact with admissible evidence. *See Keeton v. Morningstar, Inc.*, 667 F.3d 877, 880 (7th Cir. 2012). The Court does not consider any facts that parties fail to include in their statements of fact, because to do so would rob the other party of the opportunity to show that the fact is disputed.

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also alleges that he asked for, and was denied, medical attention upon being returned to prison, defendants named in this action were not responsible for ensuring that plaintiff received medical treatment while he was outside of their control. *See McAllister v. New York City Police Dep't.*, 49 F.Supp.2d 688, 701 (S.D.N.Y.1999)(granting summary judgment where there was no indication that named defendants were aware of plaintiff's request for medical attention). Indeed, it is undisputed that defendants provided plaintiff with prompt medical attention as indicated by the Injury to Inmate Report. As plaintiff has neither demonstrated that he had serious medical needs nor that defendants were deliberately indifferent towards them, his claim that defendants withheld medical treatment must be dismissed.

Conclusion

Defendants' motion for summary judgment is granted in its entirety. The Clerk of Court is directed to enter judgment for defendants.

SO ORDERED.

Salvatore BENIGNO, Petitioner,

v.

UNITED STATES of America, Respondent.

No. 03–CV–1603 (ADS).

United States District Court, E.D. New York.

Sept. 16, 2003.

Defendant filed motion to withdraw his plea of guilty and vacate his conviction under Sherman Act. The District Court, Spatt, J., held that: (1) alleged deficiencies in plea allocution did not warrant relief; (2) alleged misrepresentations of the government and defendant's attorney concerning defendant's possible sentence did not vitiate defendant's ability to knowingly and voluntarily plead guilty; and (3) defendant's attorney did not provide ineffective assistance.

Motion denied.

1. Criminal Law ⚿273.1(2)

There is no general bar to a waiver of collateral attack rights in a plea agreement.

2. Criminal Law ⚿1026.10(1)

A waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been produced.

3. Criminal Law ⚿1026.10(1), 1430

Where a petitioner claims a violation of Rule 11 or the ineffectiveness of trial counsel, she is not barred under the terms of the plea agreement from bringing a petition to vacate the conviction based on the legal shortcomings of the process in which the waiver was obtained. Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

4. Criminal Law ⚿273.1(4)

Requirements for a plea allocution do not require district court to anticipate and warn the defendant of every conceivable collateral effect the conviction entered on the plea may have. Fed.Rules Cr.Proc. Rule 11, 18 U.S.C.A.

5. Criminal Law ⚿273.1(4)

Purpose of Rule 11 is to insure that an accused is apprised of the significant ef-

fects of his plea so that his decision to plead guilty and waive his right to trial is an informed one. Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

6. Criminal Law ⇐274(1)

A guilty plea should not be vacated when there has been only a minor and technical violation of Rule 11 which amounts to harmless error. Fed.Rules Cr. Proc.Rule 11, 18 U.S.C.A.

7. Criminal Law ⇐274(3.1)

A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea. Fed.Rules Cr. Proc.Rule 11(h), 18 U.S.C.A.

8. Criminal Law ⇐273.1(4)

Defendant's guilty plea was voluntary despite his claim that he never contemplated a sentence of custodial incarceration prior to its imposition because he believed the word "imprisonment" to mean "home detention," and therefore Rule 11 plea allocution was not inadequate; presentence report's language clearly distinguished imprisonment from home detention. Fed. Rules Cr.Proc.Rule 11, 18 U.S.C.A.

9. Criminal Law ⇐1167(5)

Judge's technical violation of Rule 11 based on failure to specifically ask whether the defendant's willingness to plead guilty resulted from prior discussions between the attorney for the government and the defendant or the defendant's attorney was harmless error where defendant indicated his awareness that only court could determine his sentence and that promises by the prosecutor were not binding on the court. Fed.Rules Cr.Proc.Rule 11(d), 18 U.S.C.A.

10. Constitutional Law ⇐265.5

If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void. U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐273.1(4)

Alleged misrepresentations of the government and defendant's attorney concerning defendant's possible sentence did not vitiate defendant's ability to knowingly and voluntarily plead guilty. U.S.C.A. Const. Amend. 5.

12. Criminal Law ⇐641.13(5)

Defendant's attorney was not ineffective because he advised defendant to plead guilty even though he informed counsel that he was not guilty where defendant failed to show that, had he proceeded to trial, there would have been a reasonable probability that he would have been acquitted. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(5)

Defendant's attorney did not provide ineffective assistance because he assured defendant that no custodial sentence would be imposed where defendant made no showing that, but for his counsel's alleged faulty advice, there existed a reasonable probability that he would have succeeded at trial; furthermore, any faulty advice on potential sentence exposure was cured by the court's detailed questioning of defendant at the plea allocution, which alerted defendant of the actual sentencing possibilities. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(5)

Defendant's attorney did not provide ineffective assistance because he failed to advise defendant that the Sentencing Commission recommended a term of custodial punishment for his offense; during his plea allocution, defendant was informed by judge of the maximum and minimum sentences that court could impose, and defendant could not show that, but for his counsel's lack of advice, there was a reasonable probability that an alternative course of

action from the guilty plea, i.e. a trial, would have provided a different result. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⚿641.13(7)

Defendant's attorney's failure to object to holding the sentencing proceeding within 35 days of receipt of presentence report (PSR), the time limit set forth in applicable rule, did not constitute ineffective assistance of counsel; there was no showing that if the defendant had the extra 20 days, there would have been a different result. U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rule 32(b)(6), 18 U.S.C.A.

16. Criminal Law ⚿641.13(7)

Defendant's attorney was not ineffective because he failed to make an "outside the heartland" downward departure motion; defendant provided no support for his argument that his case warranted a motion for a downward departure on the ground that it was "outside the heartland" nor was there any indication that such a motion, if made, would have been granted. U.S.C.A. Const.Amend. 6.

Sarita Kedia, Esq., New York, NY, for Petitioner.

Ralph T. Giordano, Chief, New York Office, United States DEpartment of Justice, Antitrust Division, New York, NY, By Debra C. Brookes and John W. McReynolds, Attorneys for the United States.

Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, Central Islip, NY, By Tanya Y. Hill, Assistant United States Attorney.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

This case involves charges that the petitioner Salvatore Benigno (the "petitioner") took part in a bid-rigging conspiracy in violation of 15 U.S.C. § 1 (the "Sherman Act"). Presently before the Court is a motion by the petitioner to withdraw his plea of guilty and vacate his conviction pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure ("Rule 32(e)") and 28 U.S.C. § 2255 ("Section 2255"), or alternatively to set aside his sentence pursuant to Section 2255.

I. BACKGROUND

In late February 2001, the petitioner received a "target" letter from the government notifying him that he was the subject of an investigation involving bid-rigging, conspiracy, mail fraud, tax violations and other crimes allegedly committed by individuals who attended Sheriff's auctions in Nassau and Suffolk Counties. After receiving the letter, petitioner retained an attorney and met with the government twice. Thereafter, he pleaded guilty to conspiracy to commit bid-rigging in violation of the Sherman Act.

A. The Nature of the Conspiracy

The government's investigation revealed that between August 1996 and January 2001, the petitioner, along with several other individuals, regularly attended public auctions run by the Nassau and Suffolk County Sheriffs' Offices. At these auctions, various debtors' property was sold in order to satisfy their debts to judgment creditors. According to the government, while in attendance at these auctions, the petitioner and his co-conspirators engaged in a bid-rigging scheme in which they designated one individual from the group to bid on the auctioned property on the group's behalf, as opposed to each member of the group bidding competitively against each other. This scheme allowed the

group to obtain auctioned property at a lower price than it would have had they bid competitively against each other.

The investigation further revealed that after the official auction ended, the co-conspirators would then hold a second, private auction known as a "knock-out" auction. These "knock-out" auctions were held outside the presence of the Sheriffs and were open only to the co-conspirators. During the "knock-out" auctions, the co-conspirators would bid competitively against each other to acquire the property at a price higher than the price paid at the official auction. The winner of the "knock-out" auction would then reimburse the winner of the official auction as well as pay off the other co-conspirators based on the bid price of the property at the time they dropped out of the "knock-out" auction.

In addition to this scheme, the investigation revealed that the co-conspirators on several occasions discouraged third-party bidders from bidding at the Sheriffs' auctions by aggressively approaching them prior to the commencement of the bidding. As a result of this conspiracy, the government asserts that the prices of the properties sold at the Sheriffs' auctions were artificially low, thereby depriving debtors of the satisfaction of their debts and depriving them of obtainment of the full value of the auctioned property.

B. The Plea Negotiations

After receiving notification of the investigation, the petitioner and coconspirator Joseph Benigno, the petitioner's cousin, retained Steven Heller, Esq., to represent them in this matter. Despite a lack of any federal criminal defense experience, Heller agreed to represent the cousins based on his twenty-year relationship with them and their inability to afford an attorney familiar with federal criminal law.

The petitioner and Heller met with the government twice to discuss the investigation. After hearing the evidence against him, the petitioner indicated that he did not believe that he had committed any antitrust violation and informed Heller that he did not wish to plead guilty to any crimes. Heller advised the petitioner that the government believed that it was in his best interest to plead guilty. In addition, according to the petitioner, the government represented to both Heller and himself that a guilty plea would ensure a sentence without any term of imprisonment. The government contends that no such assurances were given, but instead it simply discussed with the petitioner and Heller previous experiences with similarly situated defendants.

Based on the advise of his counsel and the alleged representations by the government, the petitioner signed a plea agreement which Heller mailed to the government on January 4, 2002. Included in the agreement was a signed signature line affirming that the petitioner entered the agreement knowingly and voluntary.

On March 21, 2002, the government informed Heller that it would request a *Curcio* hearing based on his dual representation of the petitioner and Joseph Benigno. During the *Curcio* hearing, which commenced on April 30, 2002, United States Magistrate Judge Arlene R. Lindsay explained the seriousness of the charges against the petitioner, commenting that a conviction could result in a term of imprisonment. The hearing concluded with a request by the petitioner and Joseph Benigno for advice from an independent counsel on the hazards of dual representation. After receiving such advice, the hearing reconvened on June 28, 2002, at which time the petitioner informed Judge Lindsay that he desired to continue with Heller as his attorney.

After a brief adjournment, the petitioner appeared for his plea allocution. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure ("Rule 11"), Judge Lindsay reviewed with the petitioner his rights, including a detailed account of the potential punishment he faced. During this account, the petitioner affirmed that he understood that he faced a potential range of four to ten months' imprisonment and that the ultimate decision concerning his sentence was up to this Court, which was not bound by the government's estimate. Later in the proceeding, the petitioner affirmed that he was satisfied with his legal representation and that he entered the plea voluntarily and of his own free will. Finally, the petitioner affirmed that no one had made any promises to cause him to plead guilty or as to what his sentence would be.

C. The Presentence Report and the Sentencing Proceeding

On October 3, 2002, a Presentence Report ("PSR") was issued. The PSR noted the petitioner's acceptance of responsibility and his eligibility for a sentence of probation, but also noted that Application Note 5 of the Commentary to Guideline 2R1.1 stated, "[i]t is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders." The petitioner claims that although he received a copy of the PSR, neither he nor Heller noticed or discussed this statement prior to sentencing.

On October 18, 2003, the petitioner appeared for sentencing at which time he indicated that he had reviewed the PSR. During this proceeding, Heller requested leniency based on the petitioner's lack of criminal history and his dedication to his family. This request supplemented a letter submitted by Heller two days earlier with annexed letters from the petitioner's family and friends. The Court then sentenced the petitioner to a term of four months' incarceration with a surrender date of January 15, 2003.

D. The Post–Sentencing Proceedings

A day prior to his scheduled surrender, the petitioner, appearing *pro se,* moved by order to show cause pursuant to Section 2255 seeking to vacate his guilty plea and stay his surrender date on the ground that his guilty plea flowed from a jurisdictionally defective Information. At that time, the Court denied the petition. Later that day, the petitioner requested reconsideration of his application. The court granted the application in part, staying the petitioner's surrender date, and appointed a new attorney to represent the petitioner.

On March 24, 2003, the petitioner, then represented by his third counsel, filed the instant motion seeking to withdraw his guilty plea and vacate his sentence on the ground that his plea was not voluntary and intelligent as required by Rule 11. Alternatively, the petitioner moved for his sentence to be set aside because of the alleged ineffectiveness of his original counsel.

II. DISCUSSION

A. The Waiver of the Right to Collaterally Attack the Conviction

The government contends that the petitioner is barred from collaterally attacking his conviction based on an express waiver term in the plea agreement. Paragraph 4 of the plea agreement reads in part,

> The defendant will not file an appeal or otherwise challenge the conviction or sentence in the event that the court imposes a term of imprisonment of 10 months or below. This waiver is binding on the defendant even if the Court

employs a Guidelines analysis different from that set forth in Paragraph 2.

[1, 2] "There is no general bar to a waiver of collateral attack rights in a plea agreement." *Frederick v. Warden, Lewisburg Correctional Facility,* 308 F.3d 192, 195 (2d Cir.2002) (citing *Garcia–Santos v. United States,* 273 F.3d 506, 509 (2d Cir. 2001) (per curiam)). "However, a waiver of appellate or collateral attack rights does not foreclose an attack on the validity of the process by which the waiver has been produced, here, the plea agreement." *Id.* (citations omitted).

[3] Where, as here, a petitioner claims a violation of Rule 11 or the ineffectiveness of trial counsel, the Second Circuit has stated that she is not barred under the terms of the plea agreement from bringing a petition to vacate the conviction based on the legal shortcomings of the process in which the waiver was obtained. *See id.* at 196. Accordingly, the Court will address "the merits of [the] petition notwithstanding [the petitioner's] general waiver of the right to collaterally attack his conviction." *Id.* at 193; *see also Lebron v. United States,* 267 F.Supp.2d 325, 328 (E.D.N.Y. 2003).

B. The Alleged Rule 11 Violation

Where, as here, a petitioner moves to withdraw his plea of guilty after sentence has been imposed, "a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255." Fed.R.Crim.P. 32(e). Under Section 2255, "[a] prisoner in custody under sentence of a court established by [an] Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C.A. § 2255. "If the court finds ... that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall ... resentence [the prisoner] or grant a new trial ... as may appear appropriate." *Id.*

The petitioner's primary argument calls for a *withdrawal* of his guilty plea and the setting aside of his sentence. As Rule 32(e) and Section 2255 do not provide for a *withdrawal* of a guilt plea after sentence has been imposed, the Court has construed the petitioner's request as a motion for his conviction to be vacated and set aside and the relief of a new trial to be granted.

[4, 5] The petitioner argues that his motion should be granted because the Court allegedly violated Rule 11 during his plea allocution. "Rule 11 sets forth requirements for a plea allocution and 'is designed to ensure that a defendant's plea of guilty is a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " *United States v. Andrades,* 169 F.3d 131, 133 (2d Cir.1999) (quoting *United States v. Renaud,* 999 F.2d 622, 624 (2d Cir.1993) (internal quotation marks omitted)). "This does not mean, however, that the district court must anticipate and warn the defendant of 'every conceivable collateral effect the conviction entered on the plea may have.' " *United States v. Couto,* 311 F.3d 179, 188–89 (2d Cir.2002) (citing *Bye v. United States,* 435 F.2d 177, 179 (2d Cir. 1970)). "Rather, 'the purpose of Rule 11[is] to insure that an accused is apprised of the *significant* effects of his plea so that his decision to plead guilty and waive his right to trial is an informed one.' " *Id.* at 189 (quoting *Bye,* 435 F.2d at 180) (emphasis in original).

[6] To that end, "[the Second] Circuit has 'adopted a standard of strict adherence

to Rule 11.'" *United States v. Livorsi*, 180 F.3d 76, 78 (2d Cir.1999) (quoting *United States v. Lora*, 895 F.2d 878, 880 (2d Cir.1990)). As such, review of an acceptance of a guilty plea "examine[s] critically even slight procedural deficiencies to ensure that ... none of the defendant's substantive rights ha[ve] been compromised." *Id* at 78 (quoting *United States v. Maher*, 108 F.3d 1513, 1520 (2d Cir.1997) (internal quotation marks omitted)). "[I]f the requirements of Rule 11 have not been met, 'the plea must be treated as a nullity.'" *Renaud*, 999 F.2d at 624 (quoting *United States v. Journet*, 544 F.2d 633, 636 (2d Cir.1976)). However, "[n]ot every deviation from Rule 11 constitutes a violation of the Rule." *Frederick*, 308 F.3d at 197. "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed.R.Crim.P. 11(h). Therefore, a guilty plea should not be vacated "when there has been [only] a minor and technical violation of Rule 11 which amounts to harmless error." *Renaud*, 999 F.2d at 624 (quoting *United States v. Ferrara*, 954 F.2d 103, 106 (2d Cir.1992) (quoting Fed. R.Crim.P. 11 advisory committee's note (1983 amendment))).

One of the requirements set forth by Rule 11 is that a guilty plea be voluntary. This requirement codifies the due process standard set forth in *Boykin v. Alabama*, 395 U.S. 238, 242–44, 89 S.Ct. 1709, 1711–13, 23 L.Ed.2d 274 (1969), that a guilty plea be intelligently and voluntarily given and that the defendant be competent to understand the nature of the charge, his constitutional rights and the scope of the penalty provided by law. The Second Circuit has identified three major purposes of Rule 11(d): (1) to make certain that the plea is indeed voluntary; (2) to prevent the misconception by defendants that anyone but the court has the authority to determine their sentence; and (3) to preserve the integrity of the plea by eliminating the basis for a later claim by the defendant that the plea was defective. *United States v. Gonzalez*, 820 F.2d 575, 579 (2d Cir. 1987).

The petitioner claims that his acceptance of a guilty plea violated Rule 11(d) because it was not voluntary. Specifically, he claims that the government made representations to both his counsel and himself that a guilty plea would earn a sentence without imprisonment, and that he pled guilty based in large part on these alleged representations.

The petitioner's assertions are contradicted by the record. During the plea allocution, Judge Lindsay specifically addressed these issues:

> THE COURT: Are you entering this plea of guilty voluntarily and of your own free will?
>
> DEFENDANT S. BENIGNO: Yes.
>
> THE COURT: Has anyone threatened or forced you to plead guilty?
>
> DEFENDANT S. BENIGNO: No.
>
> THE COURT: Other than the agreement with the Government that is set forth on the record, has anyone made any promises to cause you to plead guilty?
>
> DEFENDANT S. BENIGNO: No.
>
> THE COURT: Has anyone made any promises to you as to what your sentence will be?
>
> DEFENDANT S. BENIGNO: No.

P. Tr. 28–29.*

In addition to the petitioner's responses to Judge Lindsay's inquiries, the petitioner was explicitly warned that the final deci-

* Citations to the petitioner's plea on June 28, 2002 are referred to as "P. Tr. __". While citations to the petitioner's sentence on October 18, 2002 are referred to as "S. Tr. __".

sion on sentencing was up to this Court and that this Court was not bound by the government's estimated guideline range:

> THE COURT: I just want you to be very clear that although the Government estimates that the guideline range here is a Level 9 which carries a range of imprisonment of from four to ten months, what you both need to be absolutely clear about is that that's the Government's estimate and it is not a binding estimate on Judge Spatt. Ultimately, it will be Judge Spatt who will determine what the proper guideline range is and he might conclude that the guideline range should be higher which means the range of imprisonment could be higher, or he may conclude that the guideline range is lower. In either case, whether he goes higher or lower, you can't withdraw your pleas. Do you each understand that?
> DEFENDANT S. BENIGNO: Yes.
> . . . . .
> THE COURT: The only agreement you have is that if Judge Spatt imposes a sentence of imprisonment of more than ten months you can appeal the sentence but that doesn't mean that you can withdraw your plea and your right to appeal the sentence doesn't mean that he can't impose a sentence of eleven months, twelve months, whatever the guideline range calls for and the basis of any appeal would only be is it legally correct.

P. Tr. 11–12.

[7] "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977). Indeed, " '[a] defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea.' " *United States v. Hirsch*, 239 F.3d 221, 225 (2d Cir.2001) (quoting *United States v. Torres*, 129 F.3d 710, 715 (2d Cir.1997)). Nor should they be permitted to vacate a guilty plea after sentence has been imposed. The petitioner contends, however, that his assertions are not simply "bald statements" and points to his former attorney's Affirmation regarding the government's representations to support his contention. Even with the Affirmation, however, the substance of the petitioner's assertions are belied by his responses to Judge Lindsay's inquiries. Such assertions are also contradicted by the express terms of the plea agreement that both the petitioner and his attorney signed, which explicitly states that "[n]o promises, agreements or conditions have been entered into by the parties other than those set forth in this agreement and none will be entered into unless memorialized in writing and signed by all parties."

The Second Circuit has stated that when a defendant pleads guilty while being aware of the potential maximum prison term and knowing that the sentence to be imposed was within the court's discretion, "a defendant [is] not entitled to withdraw a guilty plea simply because his attorney erroneously predicted his sentence." *United States v. Sweeney*, 878 F.2d 68, 70 (2d Cir.1989). Although *Sweeney* dealt with a pre-sentence motion to withdraw a guilty plea, it lends support for the government's position. Where a defendant knows the potential sentence he faces, pleads guilty and is sentenced, allowing the post-sentence prong of Rule 32(e) to serve to have the conviction vacated and set aside "would pervert the rule and threaten the integrity of the sentencing process." *Id.* at 70.

[8] The petitioner also attacks the voluntariness of his guilty plea by claiming that he believed the word "imprisonment" to mean "home detention." Specifically,

he claims that based on the government's alleged representations regarding sentencing and his attorney's recounting of such representations, the petitioner never contemplated a sentence of custodial incarceration prior to its imposition during the sentencing proceeding.

A review of the Second Circuit's precedent concerning the difference between the definition of "imprisonment" and "community confinement" is relevant to the instant discussion. " 'Imprisonment' and 'community confinement' are not synonyms. 'Imprisonment' is the condition of being removed from the community and placed in prison, whereas 'community confinement' is the condition of being controlled and restricted within the community." *United States v. Adler,* 52 F.3d 20, 21 (2d Cir.1995). Under this rationale, "imprisonment" and "home detention" are differing punishments as well, with the latter meaning the condition of being detained within the home. Such an analysis is supported by the language of Sentencing Guidelines Section 5C1.1(c)(2), which allows a court to order "a sentence of *imprisonment* that includes a term of supervised release with a condition that substitutes community confinement or *home detention* . . . provided that at least one month is satisfied by *imprisonment.*" U.S. Sentencing Guidelines Manual § 5C1.1(c)(2) (2001) (emphases added). By phrasing the Guidelines language to limit the condition of home detention to supervised release and requiring at least one month imprisonment, the drafters made it clear that "home detention" is a different type of punishment than "imprisonment." This language was candidly summarized in the pre-sentence report, which states,

> "Guideline Provisions: Based on a total offense level of 9 and a criminal history category of 1, the guideline *imprisonment* range is 4 to 10 months. As an alternative, pursuant to Guideline 5C1.1(c)(2), Your Honor may impose a term of *imprisonment* of 1 month followed by a term of supervised release with a special condition requiring 3 months community confinement or *home detention.*"

P.S.R. ¶ 56 (emphases added). The report's language clearly distinguishes *imprisonment* from *home detention.* Both the petitioner and his attorney stated that they reviewed the PSR and found it to be error-free:

> THE COURT: Have you reviewed the presentence report with the defendant?
>
> MR. HELLER: Yes, your honor.
>
> THE COURT: Are there any errors in the presentence report?
>
> MR. HELLER: No, there aren't, your honor.
>
> THE COURT: Mr. Benigno, have you reviewed the presentence report?
>
> THE DEFENDANT: Yes, your honor.
>
> THE COURT: Are there any errors in the presentence report?
>
> THE DEFENDANT: No.

S. Tr. 2–3.

[9] The petitioner also claims a second, separate violation of Rule 11(d) based on the court's failure to specifically ask "whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney." Fed. R.Crim.P. 11(d). Although the absence of this inquiry is a technical violation of Rule 11, "[n]onetheless, such an error does not automatically require reversal." *United States v. Basket,* 82 F.3d 44, 48 (2d Cir. 1996). The Second Circuit has held that Rule 11(d) falls within the purview of Rule 11(h)'s harmless-error analysis. *Id.* at 48–49. The relevant inquiry accordingly be-

comes whether this violation of Rule 11(d) affected the petitioner's substantial rights. The Court finds that it did not.

The petitioner asserts that Judge Lindsay's failure to inquire concerning prior discussions between the prosecution and himself and his counsel perpetuated "misconceptions" about sentencing that the petitioner would have been "disabused" of had she made the proper inquiry. The Second Circuit's interpretation of the purpose of Rule 11(d), however, is narrower than the petitioner suggests. The Second Circuit has stated that Rule 11(d) is meant to prevent the misconception by defendants that anyone but the court has the authority to determine their sentence. *Gonzalez,* 820 F.2d at 579. Judge Lindsay did just that when she told the petitioner:

> THE COURT: I just want you to be very clear that although the Government estimates that the guideline range here is a Level 9 which carries a range of imprisonment of from four to ten months, what you both need to be absolutely clear about is that that's the Government's estimate and it is not a binding estimate on Judge Spatt. Ultimately, it will be Judge Spatt who will determine what the proper guideline range is and he might conclude that the guideline range should be higher which means the range of imprisonment could be higher, or he may conclude that the guideline range is lower. In either case, whether he goes higher or lower, you can't withdraw your pleas. Do you each understand that?
>
> DEFENDANT S. BENIGNO: Yes.

P. Tr. 11. In addition, Judge Lindsay reiterated the point when she informed the petitioner of the potential maximum sentence that he could receive:

> THE COURT: Now, in actuality, what you need to be aware of is what is the maximum that Judge Spatt can sentence you to. The maximum term of imprisonment in this case is three years. That's the maximum he can impose but within that range depending on what Judge Spatt determines the guideline range to be, he's not going to be limited by the Government's estimate.

P. Tr. 12. Finally, Judge Lindsay confirmed that the petitioner read and understood the plea agreement, which stated clearly that the Guidelines estimate set forth in the agreement was not binding on the Court and which was signed by both the petitioner and his attorney.

Taken together, it is clear that Judge Lindsay did her best to achieve the Second Circuit's stated goal of Rule 11(d) despite her procedural error. The absence of the second half of the Rule 11(d) inquiry left no misconception with the petitioner concerning who had the authority to determine his sentence or what that sentence may be. Accordingly, the error was harmless pursuant to Rule 11(h).

The petitioner relies on *Gonzalez* as authority for the proposition that the absence of the "prior discussions" inquiry requires vacatur of the sentence. In *Gonzalez,* the Second Circuit vacated a conviction predicated on a guilty plea because of a potential misunderstanding that the defendant may have had as a result of one or several of his counsel's remarks regarding sentencing. *Gonzalez,* 820 F.2d at 579. The court reasoned that the harmless-error analysis in Rule 11(h) was not applicable because the defendant showed no clear indication of his awareness that not even his attorney could make a binding promise of a non-custodial sentence. *Id.* at 579–80. However, the Second Circuit has made it clear that the harmless-error analysis of Rule 11(h) is generally applicable to Rule 11(d), as noted above. *See Basket,* 82 F.3d at 48–49. Indeed, the petitioner in the instant case did indicate his awareness

that only this Court can determine his sentence and that promises by the prosecutor are not binding on the court. As such, the petitioner's argument is without merit.

Finally, in support of the above analysis, it is relevant to note that the 2002 amendments to Rule 11(d) specifically eliminated the "prior discussions" language from the rule.

> The reference to an inquiry in current Rule 11(d) whether the plea has resulted from plea discussions with the government has been deleted. That reference, which was often a source of confusion to defendants who were clearly pleading guilty as part of a plea agreement with the government, was considered unnecessary.

Fed.R.Crim.P. 11 advisory committee's note (2002 amendment). The committee note clearly states that the inquiry was considered unnecessary; and its absence should not supercede the harmless-error analysis and serve as the basis for a vacatur of a conviction. Accordingly, the motion to withdraw the petitioner's guilty plea and vacate his conviction based on a Rule 11 violation is denied.

C. The Constitutional Inadequacy of the Plea

In addition to his attack on the plea allocution, the petitioner claims that, even if this Court finds that his allocution complied with Rule 11, his plea was nonetheless involuntary because it was based on alleged critical misrepresentations by the government and the petitioner's first attorney, Steven Heller. To support this assertion, the petitioner submitted an affirmation from Heller confirming that he "was informed by [the United States Attorney's Office and the Department of Justice, Antitrust Division,] that ... if [the petitioner pled guilty], he would under the guidelines be sentenced to a term of house arrest as in prior cases of this nature." Heller further affirmed that he and the petitioner "were assured that he would not receive any jail term if he [pled guilty]." Finally, Heller states that "[he is] certain that it was these assurances that led to Mr. Benigno's decision to plead guilty in this matter."

The government disputes Heller's affirmation, claiming that "[s]tatement's [sic] by prosecutors, in the context of plea negotiations, do not come even close to becoming 'assurances.' " The government also points out that the petitioner was aware of the minimum and maximum terms of imprisonment if convicted and that he was aware that sentencing was entirely in the Court's discretion.

The petitioner relies on *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) for the proposition that if there exists a "possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment," the court must, at a minimum, examine the defendant's assertions. *Blackledge*, 431 U.S. at 75, 97 S.Ct. at 1629–30. In *Blackledge*, the Supreme Court affirmed a reversal of a denial of a request for an evidentiary hearing into a claim that a guilty plea was involuntary because the prosecutor, the court and the defense attorney promised the defendant a sentence of ten years when in fact he was sentenced to seventeen-to-twenty-one years. The Supreme Court remanded the case and ordered that the defendant be given a full opportunity for presentation of the relevant facts, commenting that it may turn out that a full evidentiary hearing was not necessary. *Id.* at 82–83, 97 S.Ct. 1621.

The facts in *Blackledge* are different from the instant case in several respects. First, in that case, the court took part in the alleged promise of sentence. *Id.* at 68–69, 97 S.Ct. 1621. In this case, Judge Lindsay properly informed the petitioner of the actual minimum and maximum sentence that he faced and advised him repeatedly that this Court had the sole discretion to determine his sentence. As previously discussed, the petitioner received a plea allocution that complied with Rule 11 and that achieved the goals for that rule as stated by the Second Circuit. Any contrary belief should have been dispelled by Judge Lindsay's warnings, as described above.

Second, the defendant in *Blackledge* claimed that his lawyer instructed him to deny the existence of any promises. *Id.* at 69, 97 S.Ct. 1621. In the instant case, the petitioner makes no claim that he was instructed on how to answer the court's questions during the allocution. In fact, the petitioner does not explicitly assert anywhere in either of his lengthy memoranda that he did not in fact answer the Court's questions truthfully and honestly. Finally, *Blackledge* involved a state habeas corpus petition, *id.* at 65, 97 S.Ct. 1621, while here the petition involves a federal conviction. In that regard, *Blackledge* itself explicitly states that:

> In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a 2255 motion, even though he could not similarly dispose of a habeas corpus petition challenging a state conviction but presenting identical allegations.... To this extent, the standard may be administered in a somewhat different fashion.

Id. at 74 n. 4, 97 S.Ct. 1621.

Despite the differences between *Blackledge* and the instant case, this Court recognizes the thrust of that case and therefore will examine a defendant's allegation of constitutional inadequacy of a guilty plea for viability, despite the adequacy of the Rule 11 plea allocution. Under this review, the Court holds that an evidentiary hearing is not necessary to determine that the petitioner's claim of constitutional inadequacy lacks merit.

[10, 11] " '[I]f a defendant's guilty plea is not ... voluntary and knowing, it has been obtained in violation of due process and is therefore void.' " *United States v. Yu*, 285 F.3d 192, 198 n. 2 (2d Cir.2002) (quoting *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969)). As discussed above, Rule 11 codifies the due process standard for obtaining a guilty plea as set forth by the Supreme Court in *Boykin*. This Court has determined that the petitioner's allocution met those requirements. Hence, the only remaining issue is whether the alleged misrepresentations of the government and Heller vitiated the petitioner's ability to knowingly and voluntarily plead guilty. The court finds that they did not.

The Second Circuit has stated that a guilty plea cannot be withdrawn because a defendant's attorney misled him regarding the consequences of his plea. *See United States v. Hernandez*, 242 F.3d 110, 112–13 (2d Cir.2001) (per curiam). The Second Circuit has also dismissed the contention that a defendant's guilty plea was unknowing and involuntary due to misrepresentations by the prosecution and his own counsel concerning his possible sentence. *See Alessi v. United States*, 653 F.2d 66, 69 (2d Cir.1981). Under the weight of this precedent, the petitioner's argument cannot serve as the basis for relief of the type the petitioner seeks. Accordingly, the motion to vacate the conviction based on the constitutional inadequacy of the plea is denied.

D. The Claim of Ineffective Assistance of Counsel

In the alternative to arguing that his plea was unknowing and involuntary, the petitioner asserts that he received ineffective assistance from his first attorney, Steven Heller, during the plea negotiation and sentencing phases of his case. In particular, the petitioner argues that Heller was ineffective because: (1) he advised him to plead guilty even though he informed counsel that he was not guilty; (2) he promised the petitioner that he would not receive a term of custodial incarceration; (3) he failed to advise the petitioner after receipt of the PSR that the Sentencing Commission recommended a term of custodial punishment; (4) he failed to object to holding the sentencing hearing less than 35 days after receiving the PSR (*See* Rule 32(b)(6)); and (5) he failed to argue that the petitioner's offense fell outside the heartland of offenses contemplated by the Sentencing Commission. Based on the above claims of ineffective assistance of counsel, the petitioner moves to set aside or vacate his sentence.

To establish ineffective assistance of counsel during the plea process, a petitioner must demonstrate: (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) (setting forth the modern standard for evaluating ineffective assistance of counsel); *see also Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 369–70, 88 L.Ed.2d 203 (1985) (applying the *Strickland* standard to counsel's performance during the plea process). When applying the *Strickland* test, "judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). "The court's central concern is not with 'grading counsel's performance,' ... but with discerning 'whether despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.' " *United States v. Aguirre*, 912 F.2d 555, 561 (2d Cir.1990) (quoting *Strickland*, 466 U.S. at 696–97, 104 S.Ct. at 2069).

1. As to Petitioner's Claim that Counsel Advised him to Plead Guilty Even Though He Informed Counsel That He Was Not Guilty

[12] The petitioner's first claim of ineffective assistance of counsel is that Heller advised him to plead guilty even though the petitioner informed Heller that he was not guilty. Heller stated in an affirmation that, "[if] we had not been assured by the government officials that Mr. Benigno would not receive a term of imprisonment if he pleaded guilty, I would not have recommended that he do so." In essence, this claim is based on three premises: (1) the prosecution allegedly misrepresented the petitioner's potential sentence exposure to Heller; (2) based on this misrepresentation, Heller advised the petitioner to plead guilty despite the petitioner's claim that he was in fact not guilty of any antitrust crimes; and (3) such advice constituted ineffective assistance of counsel because of its faulty premise.

As discussed above, the Second Circuit has rejected claims of ineffective assistance of counsel where the prosecution and the defendant's attorney have misinformed the defendant about the possible sentences he could receive. *Alessi,* 653 F.2d at 69. Moreover, the Court relies on the petitioner's own sworn testimony affirming that he took part in a conspiratorial agreement to illegally restrain interstate trade and commerce in violation of the Sherman Act, *see* P. Tr. 29, which "carr[ies] a strong presumption of verity," *Blackledge,* 431 U.S. at 74, 97 S.Ct. at 1629, and is in direct contradiction with his current claim. The Court has declined to give credence to assertions that an attorney advised a defendant to plead guilty irrespective of the truth of his innocence when the record as a whole belied such a protestation. *See Rosenfeld v. United States,* 972 F.Supp. 137, 141 (E.D.N.Y.1997). The overall record in this case similarly contradicts the petitioner's present assertion.

In addition, the petitioner fails to meet the second prong of the *Strickland* standard. The petitioner makes no argument that had he proceeded to trial, there would have been a reasonable probability that he would have been acquitted. The closest he comes to making such an argument is the discussion of this Court's initial reservations regarding the charges against one of his co-conspirators. In fact, however, two of the petitioner's co-conspirators pleaded guilty prior to the petitioner's plea, and the possibility existed that they would have been called as witnesses to testify against him at a trial. Also, Heller was made privy to some of the government's evidence against the petitioner, including portions of extensive tape recordings that implicated him in the conspiracy. Thus, the Court is unable to conclude that there is a reasonable probability that but for Heller's alleged advise, the result of the proceedings would have been different. As such, the petitioner fails to show that he suffered prejudice as a result of Heller's advice to plead guilty.

2. As to the Petitioner's Claim that Counsel Promised Him that He Would Not Receive a Term of Custodial Incarceration

[13] The petitioner next claims that Heller provided ineffective assistance because he assured the petitioner that no custodial sentence would be imposed. However, as discussed above, the Second Circuit has made it clear that a promise of sentence by a defense attorney does not provide an adequate basis for a defendant to withdraw a guilty plea. *See Hernandez,* 242 F.3d at 112–13 (per curiam); *Sweeney,* 878 F.2d at 70. Indeed, "[a] district court [is] entitled to rely upon the defendant's sworn statements, made in open court . . ., that he understood the consequences of his plea, had discussed the plea with his attorney, knew that he could not withdraw the plea, understood that he was waiving his right to appeal a sentence below [ten] months, and had been made no promises except those contained in the plea agreement." *Hernandez,* 242 F.3d at 112 (citing *Blackledge,* 431 U.S. at 74, 97 S.Ct. at 1629). As such, this argument is without merit.

The petitioner argues that his plea must be vacated in this case. In support of this contention, the petitioner cites *Boria v. Keane,* 99 F.3d 492, 496–98 (2d Cir.1996) (counsel is constitutionally required to discuss advisability of accepting an offered plea bargain and failure to do so violates a defendant's right to effective assistance of counsel), and *United States v. Gordon,* 156 F.3d 376, 380–82 (2d Cir.1998) (counsel's gross underestimation of sentence exposure during plea negotiations constituted ineffective assistance of counsel where defendant rejected plea bargain offer), and

argues that failure to accurately advise a client as to the potential sentence exposure of a guilty plea must be deemed sub-standard performance.

The petitioner's argument is without merit. In the two cited cases, the defendants rejected plea bargains in lieu of trials based on their counsels' faulty advice regarding sentence exposure. Had their counsels given objectively accurate advice, there was a reasonable probability that the results of those proceedings would have been different, i.e. the defendants would have accepted the plea bargains and would have received reduced sentences.

In this case, the petitioner accepted a plea bargain based on his counsel's alleged faulty advice. As outlined above, the petitioner makes no showing that but for his counsel's alleged faulty advice, there existed a reasonable probability that he would have succeeded at trial. Furthermore, had the petitioner been convicted after a trial, he would have faced a sentence potentially twice as harsh, if not more, than what he received. By entering into a plea agreement and accepting responsibility for his actions, the petitioner earned a two-level reduction in his offense computation.

Finally, there is recent Second Circuit precedent that a defense attorney's mistaken advice on sentence exposure leading to the defendant's rejection of a plea agreement did not warrant a finding of ineffective assistance of counsel because the defendant could not prove prejudice. *Aeid v. Bennett*, 296 F.3d 58, 63–64 (2d Cir.2002). Based on *Aeid* and in light of the potential for a harsher sentence that the petitioner avoided by pleading guilty, he has not demonstrated that he suffered prejudice by his counsel's erroneous advice on sentence exposure.

It is also relevant to note that any faulty advice on potential sentence exposure "was cured by the Court's detailed questioning of the petitioner at the plea allocution, which alerted the petitioner of the 'actual sentencing possibilities.' " *Rosenfeld*, 972 F.Supp. at 146 (quoting *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir.1992) (citation omitted)).

3. As to Petitioner's Claim that Counsel Failed to Advise Him After Receipt of the PSR That the Sentencing Commission Recommended a Term of Custodial Punishment

[14] The petitioner argues that Heller's failure to inform him that the Sentencing Commission recommended that alternatives to prison not be imposed in antitrust cases, constituted ineffective assistance. Specifically, the petitioner claims that "Heller never advise[d][him] that the Sentencing Commission recommends sentences of imprisonment for antitrust offenders." The petitioner further claims that prior to the imposition of his sentence, he was unaware that he could face a term of custodial incarceration. Again, these assertions are totally contradicted by the record. Heller told this Court that he reviewed the PSR with the petitioner. S. Tr. 2–3. The petitioner told this Court that he had reviewed the PSR. *Id.* They both stated that they found no errors in the PSR. *Id.* Furthermore, during his plea allocution, the petitioner was informed by Judge Lindsay of the maximum and minimum sentences that this Court could impose. P. Tr. 11–12.

In addition to conflicting with the assertions made in the petitioner's affidavit and Heller's affirmation, the overall record provides no basis by which to warrant a finding that the petitioner was prejudiced by Heller's lack of advice on this issue. There is no showing that, had Heller submitted "motions" in determining the petitioner's sentence as he claims in his affir-

mation he would have, the Court would have granted such applications. Indeed, the Court has sentenced the petitioner to the lowest end of the applicable guideline range and imposed a fine below the mandatory minimum. Again, the petitioner cannot show that, but for his counsel's lack of advice, there was a reasonable probability that an alternative course of action from the guilty plea, i.e. a trial, would have provided a different result. Accordingly, the petitioner fails to establish the second prong of the *Strickland* standard.

4. As to Petitioner's Claim that Counsel Failed to Object to Holding the Sentencing Hearing Less Than 35 Days After Receiving the PSR, As Stated by Rule 32(b)(6)

[15] The petitioner argues that Heller's failure to object to holding the sentencing proceeding within 35 days of receipt of the PSR, the time limit set forth in Rule 32(b)(6), constitutes ineffective assistance of counsel. In particular, he argues that he would have withdrawn his guilty plea upon discovering the Guidelines advisory for anti-trust cases regarding custodial incarceration, if he had the additional time to review the PSR. The petitioner further claims that Heller was ineffective because he failed to inform him of his procedural option of objecting to the pre–35 day sentencing and of his ability to withdraw his guilty plea.

Rule 32(b)(6) states that "[n]ot less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government." Fed.R.Crim.P. 32(b)(6). A number of courts have held that participation in a sentencing proceeding without objection on the basis of the 35–day rule constitutes a waiver of this requirement. *See United States v. Jones*, 80 F.3d 436, 438 (10th Cir.1996); *United States v. Navejar*, 963 F.2d 732, 734–35 (5th Cir.1992); *United States v. Knorr*, 942 F.2d 1217, 1221 (7th Cir.1991); *United States v. Turner*, 898 F.2d 705, 714–15 (9th Cir.1990). While the Second Circuit has not made such a ruling on this issue, it has declined to determine that a defense attorney's failure to object on this ground constitutes ineffective assistance of counsel. *See United States v. Workman*, 110 F.3d 915, 919–20 (2d Cir.1997).

Here, the Court holds that Heller's failure to object constitutes a waiver of the Rule 32(b)(6) time requirement and does not constitute ineffective assistance of counsel. The PSR, which was only 17 pages in length, was in the possession of Heller and the petitioner for 15 days. While the petitioner was entitled to additional time with the report under the rule, with reasonable certainty, he had enough time to review it with counsel, as he stated he did under oath before this Court. S. Tr. 2–3. Moreover, there has been no showing that if the petitioner had the extra 20 days, there would have been a different result. Accordingly, this argument does not meet the second prong of the *Strickland* standard because the petitioner failed to demonstrate that Heller's failure to object to the timeliness of the PSR prejudiced him in any manner.

5. As to Petitioner's Claim that Counsel Failed to Argue That his Offense Fell Outside the Heartland of Offenses Contemplated By the Sentencing Commission

[16] The petitioner's final argument is that Heller was ineffective because he failed to argue that the petitioner's conduct fell outside the heartland of the offense conduct contemplated by the Sentencing Commission when drafting

Application Note 5. Again, the petitioner provides no basis in the record to show that such an omission prejudiced him.

"The Sentencing Commission has explained that 'courts should treat each guideline' as 'carving out' a 'heartland,' a set of typical cases' and that, 'when a court finds an atypical case,' that 'significantly differs from the norm, the court may consider whether a departure is warranted.' " *United States v. Milikowsky,* 65 F.3d 4, 7 (2d Cir.1995) (quoting *United States v. Merritt,* 988 F.2d 1298, 1309 (2d Cir.1993)) (quoting U.S.S.G., intro. 4(b)). Based on this important rule, a departure from the guidelines should be supported by a showing that the conduct of the applicant differs from that regarded by the Commission as within the typical set of cases, also known as the heartland. Indeed, it is "the Commission's expectation that departures based on factors not mentioned in the Guidelines will be highly infrequent." *Koon v. United States,* 518 U.S. 81, 82, 116 S.Ct. 2035, 2038, 135 L.Ed.2d 392 (1996).

The petitioner provides no support for his argument that this case warranted a motion for a downward departure on the ground that it was "outside the heartland." Nor is there any indication that such a motion, if made, would have been granted. Indeed, in both his initial memorandum and reply memorandum, there is only a reference to this Court's comments regarding a plea allocution of one of the petitioner's co-conspirators. These comments by the Court were directed to the sufficiency of that allocution and not to an "atypical case." This crime was not outside the "heartland" of an anti-trust offense. Indeed, a review of recent case law shows that similar bid-rigging conspiracies have in fact been litigated under the Sherman Act, both civilly and criminally. *See New York ex rel. Spitzer v. Feldman,* No. 01–6691, 2003 WL 21576518 (S.D.N.Y. July 10, 2003); *United States v. Pook,* No. 87–274, 1988 WL 36379 (E.D.Pa. Apr.8, 1988).

Accordingly, under the *Strickland* standard, the petitioner has failed to demonstrate that Heller's failure to make an "outside the heartland" downward departure motion constituted ineffective assistance of counsel. Further, even if the Court assumes that such conduct did fall below the objective standard, the petitioner failed to show that he was prejudiced by such failure. Thus, neither prong of the *Strickland* analysis is met by this argument. Accordingly, the petitioner has failed to establish ineffective assistance of counsel in either the plea or the sentencing phase of this case.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the petitioner's motion to withdraw his plea of guilty and vacate his conviction pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255 for lack of voluntariness as required by Rule 11 of the Federal Rules of Criminal Procedure is denied; and it is further

ORDERED, that the petitioner's motion to withdraw his plea of guilty for lack of voluntariness under the Constitution is denied; and it is further

ORDERED, that the petitioner's motion to set aside or vacate his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel is denied; and it is further

ORDERED, that pursuant to Fed. R.App. P. 22(b) and 28 U.S.C. § 2253(c)(2) a certificate of appealability is denied as the petitioner has not made a substantial showing of a denial of a constitutional right in that the issues involved in this case are not debatable among jurists of reason; that a court could resolve the issues in a

different manner; or that the questions involved deserve encouragement to proceed further, *see Lucidore v. N.Y. State Div. of Parole,* 209 F.3d 107, 112 (2d Cir. 2000); and it is further

ORDERED, that the petitioner is to surrender himself to the Office of the U.S. Marshall, 225 Cadman East Plaza, Brooklyn, New York, on October 20, 2003, prior to 12:00 noon, to begin serving his sentence of four months' incarceration; and it is further

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Leslie RICHARDSON, Plaintiff,

v.

CITY OF NEW YORK and the New York City Police Department, Defendants.

No. 00 CV 6732 NG MDG.

United States District Court, E.D. New York.

Sept. 25, 2003.

Former employee of city police department brought suit against city and department pursuant to Title VII and the New York City Human Rights Law, claiming that she was terminated in retaliation for having filed a prior harassment lawsuit. Defendants moved for summary judgment. The District Court, Gershon, J., held that there was no evidence that retaliatory motive was substantial factor behind employee's termination.

Motion granted.

1. Municipal Corporations ⇐1016

As agency of the City of New York, New York City Police Department (NYPD) is not subject to suit and cannot be held independently liable for claims against it. New York City Charter, § 3986.

2. Civil Rights ⇐1505(4)
Municipal Corporations ⇐185(1)

Former employee's claims, based on police department's alleged actions in retaliation for her prior harassment lawsuit, which were not filed within 300 days of alleged retaliatory acts, as required under Title VII, were time-barred. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

3. Civil Rights ⇐1505(7)

In Title VII action, continuing violation doctrine does not permit untimely claims for discrete acts, as opposed to hostile work environment claims, even where they are related to a timely claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐1243

To establish a prima facie case of retaliation under Title VII a plaintiff must show (1) participation in protected activity; (2) that defendant knew of protected activity; (3) adverse employment action; and (4) causal connection between protected activity and adverse employment action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐1251
Municipal Corporations ⇐185(1)

There was no evidence that retaliatory motive was substantial factor behind police

LEGAL AUTHORITY AA-71

Judicial Council Of California Civil Jury Instruction 203

Judicial Council Of California Civil Jury Instructions | August 2020 Update
By the Judicial Council of California Advisory Committee on Civil Jury Instructions

Evidence

203 Party Having Power to Produce Better Evidence

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

New September 2003

Directions for Use

An instruction on failure to produce evidence should not be given if there is no evidence that the party producing inferior evidence had the power to produce superior evidence. (Thomas v. Gates (1899) 126 Cal. 1, 6 [58 P. 315]; Hansen v. Warco Steel Corp. (1965) 237 Cal.App.2d 870, 876 [47 Cal.Rptr. 428]; Holland v. Kerr (1953) 116 Cal.App.2d 31, 37 [253 P.2d 88].)

The reference to "stronger evidence" applies to evidence that is admissible. This instruction should not be construed to apply to evidence that the court has ruled inadmissible. (*Hansen, supra,* 237 Cal.App.2d at p. 877.)

For willful suppression of evidence, see CACI No. 204, Willful Suppression of Evidence.

Sources and Authority

- Power to Produce Better Evidence. Evidence Code section 412.
- Section 412 does not incorporate the "best evidence rule," but instead deals with "stronger and more satisfactory" evidence. (Largey v. Intrastate Radiotelephone, Inc. (1982) 136 Cal.App.3d 660, 672 [186 Cal.Rptr. 520] (giving of instruction was proper because corporate records concerning date of meeting could have been stronger evidence than recollection of participants several years later).)
- This inference was a mandatory presumption under former Code of Civil Procedure section 1963(6). It is now considered a permissible inference. (See 3 Witkin, California Evidence (4th ed. 2000) § 114, p. 152.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 302

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial § 11.10 (Cal CJER 2019)

WEST'S EDITORIAL REFERENCES

Direct References:

- See BAJI 2.02

Related References:

- BAJI 2.03, 2.27

Statutory References:

- Evid. Code, § 412

Library References:

- Cal. Jur. 3d, Evidence §§ 91, 100

Research References:

- West's Key Number Digest, Trial 211, 234(8), 252(22)
- C.J.S., Trial §§ 501 to 504, 568, 586, 623, 631, 663, 665

End of Document

LEGAL AUTHORITY AA-72

142 Cal.App.4th 453
Court of Appeal, Second District, Division 4, California.

CAZA DRILLING (CALIFORNIA), INC., Plaintiff, Cross-defendant and Respondent,
v.
TEG OIL & GAS U.S.A., INC., Defendant, Cross-complainant and Appellant;
Sefton Resources, Inc., Cross-complainant and Appellant.

No. B182892.
|
Aug. 29, 2006.

Synopsis

Background: In response to drilling company's complaint against oil corporation, alleging breach of contract and other causes of action, corporation and its parent filed cross-complaint seeking compensation for economic loss and physical harm to equipment and facilities in connection with drilling blowout. The Superior Court, Los Angeles County, No. PC033872, Barbara M. Scheper, J., granted drilling company summary judgment on cross-complaint based on exculpatory clause in drilling contract. Oil corporation and parent appealed.

Holdings: The Court of Appeal, Epstein, P.J., held that:

[1] corporation was proper party in appeal even though litigation remained as to company's complaint against corporation;

[2] general provision in "daywork drilling contract" between company and corporation, placing liability on corporation controlled over more specific provisions setting forth certain duties;

[3] liability provision was not invalid under statute prohibiting exculpatory clauses when public interest was involved;

[4] corporation's allegations that drilling company violated law did not invalidate exculpatory provision; and

[5] statutes and regulations governing operators of oil facilities did not apply to drilling company.

Affirmed.

West Headnotes (12)

[1] Appeal and Error🡐Determination of part of controversy

Where a defendant cross-claims against the plaintiff, dismissal of the cross-complaint is not a final judgment for purposes of appeal unless there is a separate and distinct party involved and adjudication of the cross-complaint represents a final adverse adjudication as to that party.

1 Cases that cite this headnote

[2] Appeal and Error🡐Error affecting coparty or other related party

On appeal from summary judgment for drilling company in cross-complaint against company by oil corporation and its parent, parent had standing to assert issues concerning contract between company and corporation and damages to corporation's facilities, even though cross-complaint alleged no facts that other parties intended to confer any benefit on parent; trial court overruled company's demurrer made on ground of parent's standing, and thus there was no occasion to amend cross-complaint.

[3] Appeal and Error🡐Determination of part of controversy
Appeal and Error🡐Parties jointly liable or having joint interests

Oil corporation was proper party in appeal from summary judgment for drilling company in cross-complaint against company by oil corporation and its parent, even though litigation remained as to company's complaint against corporation, since corporation's claims were inextricably intertwined with issues of appeal.

See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 73; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 2:41.5 (CACIVAPP Ch. 2-B).

[4] **Appeal and Error**🔑Determination of part of controversy

Where the issues involved in an appeal are inextricably intertwined with claims raised by a party still involved in litigation at the trial court level, judicial economy permits that party to join in the appeal.

[5] **Mines and Minerals**🔑Contracts for testing or working

General provision in "daywork drilling contract" between drilling company and oil corporation, placing liability on corporation for economic consequences of operation, controlled over more specific provisions requiring drilling company to use all reasonable means to prevent fires and blowouts, and requiring both parties to comply with all federal, state, and local laws, rules, and regulations.

1 Cases that cite this headnote

[6] **Contracts**🔑Exemption from liability
Contracts🔑Exculpatory contracts

For an agreement to be construed as precluding liability for "active" or "affirmative" negligence, there must be express and unequivocal language in the agreement which precludes such liability, and an agreement which seeks to limit liability generally without specifically mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.

6 Cases that cite this headnote

[7] **Contracts**🔑Exculpatory contracts

Whether an exculpatory clause covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control.

2 Cases that cite this headnote

[8] **Contracts**🔑Exemption from liability

When the parties knowingly bargain for protection from liability for negligence, the protection should be afforded, which requires an inquiry by the court into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.

4 Cases that cite this headnote

[9] **Contracts**🔑Exemption from liability

As a matter of contractual interpretation, there is nothing to hinder voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.

2 Cases that cite this headnote

[10] **Contracts** Exemption from liability

Provision in "daywork drilling contract" between drilling company and oil corporation, placing liability on corporation for economic consequences of operation, was not invalid under statute prohibiting exculpatory clauses relieving party from consequences of its own negligence when public interest was involved; while production of oil was important to public, this drilling was important only to parties, and corporation's failure to plan such that company was only suitable option to perform drilling was not type of unequal bargaining power contemplated by statute. West's Ann.Cal.Civ.Code § 1668.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 659 et seq.; Cal. Jur. 3d, Contracts, §§ 139, 140; Cal. Civil Practice (Thomson/West 2003) Business Litigation, § 24:48 et seq.

3 Cases that cite this headnote

[11] **Contracts** Exemption from liability

Oil corporation's allegations that drilling company violated statutes and regulations did not invalidate exculpatory provision in parties' "daywork drilling contract," limiting drilling company's liability for economic consequences of operation such as blowouts; parties were commercial business entities, and company did not seek complete exemption from culpability but accepted responsibility for damage to its equipment, injury to employees, and certain environmental activity. West's Ann.Cal.Civ.Code § 1668.

11 Cases that cite this headnote

[12] **Mines and Minerals** Oil and Gas in General

Statutes and regulations governing persons engaged in "operating" oil or gas wells did not apply to drilling company working under "daywork drilling contract" with oil corporation. West's Ann.Cal.Pub.Res.Code § 3219; 14 CCR § 1722 et seq.

1 Cases that cite this headnote

Attorneys and Law Firms

****273** Ford, Walker, Haggerty & Behar and K. Michele Williams, Long Beach, for Defendant, Cross-complainant and Appellant, TEG Oil & Gas U.S.A., Inc., and Cross-complainant and Appellant, Sefton Resources, Inc.

Clifford & Brown, Grover H. Waldon, and Daniel T. Clifford for Plaintiff, Cross-defendant and Respondent.

Opinion

EPSTEIN, P.J.

***457** Appellants TEG Oil & Gas U.S.A., Inc. (TEG) and its parent company Sefton Resources, Inc. (Sefton) appeal the grant of summary judgment on their cross-complaint against respondent CAZA Drilling (California), Inc. (CAZA). TEG hired CAZA pursuant to a written agreement to drill a well on an oil field leased by TEG and Sefton and operated by TEG. CAZA argued, and the trial court agreed, that ****274** exculpatory and limitation of liability provisions in the parties' agreement precluded the recovery of the types of damages sought in the cross-complaint: compensation for economic loss and physical harm to equipment and facilities. The court entered judgment on the cross-complaint, despite appellants' contention that CAZA was both negligent and in violation of various regulations governing oil drilling operations.

On appeal, appellants take the position that the exculpatory and limitation of liability provisions in the parties' agreement are invalid under Civil Code section 1668 (section 1668), which prohibits enforcement of contracts that have for their object the exemption of parties from responsibility for fraud, willful injury, or violations of law. We conclude that the contractual provisions represented a valid limitation on liability rather than a complete exemption from responsibility, and that, in any event, appellants have failed in their repeated

efforts to identify a specific law or regulation potentially violated by CAZA. We shall affirm the trial court judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Certain background facts are not disputed. In 2002, CAZA was hired by TEG to drill a well at the Tapia oil field, located in Castaic, California. The well was referred to as "Yule 6." The work was performed under a standardized contract entitled "Daywork Drilling Contract—U.S."[1] A few days after drilling began, there was a blowout, resulting in the death of a CAZA employee, injury to others, and complete destruction of Yule 6.

It is appellants' position the blowout was the result of the negligence of CAZA's crew in pulling the drillstring out of the wellhole too quickly (referred to as "swabbing in"), which caused a fire to ignite. Under appellants' theory, the crew committed further negligence by failing to close the blowout preventer after the fire began. Nonetheless, TEG felt constrained to engage CAZA to do additional work to help repair the damage. In 2003, the parties signed a second Daywork Drilling Contract and a "Payment Schedule" to deal with outstanding invoices due under the 2002 agreement.

Complaint

In November 2003, CAZA sued TEG for breach of contract, open book account, account stated, quantum meruit, and foreclosure of oil and gas liens. Initially, the complaint was based on the Payment Schedule. CAZA claimed to be owed $33,219.94, plus interest.

Subsequently, CAZA amended the complaint to include claims for breach of the two Daywork Drilling Contracts. The claim for unpaid work was increased to $117,824.73, based on work performed under the 2003 agreement.

Cross–Complaint

TEG and Sefton cross-claimed against CAZA for breach of contract, negligence, and negligence per se based on violations of various safety provisions contained in state and federal regulations. The cross-complaint alleged that as a result of CAZA's actions appellants suffered "damage to the Well and the hole, as well as unexpected and otherwise unnecessary cleanup and remediation damage, and losses to [appellants'] business operations." Although there is a reference to the related lawsuit by the survivors of the deceased worker (****275** *Currington et al., v. TEG Oil & Gas U.S.A. et al.* (Super. Ct. Los Angeles County, 2003, No. PC033424 (*Currington*)), the cross-complaint does not seek indemnification for damages paid to the plaintiffs in that lawsuit.

Daywork Drilling Contract

The 2002 Daywork Drilling Contract consists of a standardized form agreement with a number of blanks for the name of the operator, the contractor, the location of the well, the commencement date of drilling operations, the rates to be charged for various tasks, and other items. TEG was designated the "Operator" and CAZA was described as the "Contractor." The contract begins with a statement that "Operator [TEG] engages Contractor [CAZA] as an Independent Contractor to drill the hereinafter designated well or wells in search of oil or gas on a daywork basis" and that "Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator." "Daywork basis" is defined to mean that "Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations)." The contract also provides that: "When operating on a daywork basis, Contractor shall be fully paid at the applicable rates of payment and assumes only the obligations and liabilities stated herein. ***459** Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis, including results and all other risks or liabilities incurred in or incident to such operations."

Paragraph 8, entitled "DRILLING METHODS AND PRACTICES" includes the following pertinent subparagraphs: "8.1 Contractor [CAZA] shall maintain well control equipment in good condition at all times and shall use all reasonable means to prevent and control fires and blowouts and to protect the hole. [¶] ... [¶] 8.3 Each party hereto agrees to comply with all laws, rules, and

regulations of any federal, state or local governmental authority which are now or may become applicable to that party's operations covered by or arising out of the performance of this Contract."

Paragraph 14 governs "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK." Under subparagraph 14.1, the contractor (CAZA) "assume[s] liability" for "damage to or destruction of Contractor's surface equipment," unless the damage fell under paragraph 10, which requires the operator (TEG) to prepare a "sound location" to support the drilling rig, or subparagraph 14.3, which requires the operator to assume liability for damage to or destruction of the contractor's equipment "caused by exposure to highly corrosive or otherwise destructive elements, including those introduced into the drilling fluid." Subparagraph 14.2 requires the operator to assume liability for "damage to or destruction of Contractor's in-hole equipment."

Subparagraph 14.4 requires the operator (TEG) to assume liability "for damage to or destruction of Operator's equipment ... regardless of when or how such damage or destruction occurs," and to "release Contractor of any liability for any such loss or damage." Similarly, under subparagraph 14.5, the operator is to "be solely responsible for ... damage to or loss of the hole, including the casing therein" and the operator ****276** is to "release Contractor [CAZA] of any liability for damage to or loss of the hole" and in addition "protect, defend and indemnify Contractor from and against any and all claims, liability, and expense relating to such damage to or loss of the hole."

In subparagraph 14.6, the operator releases the contractor from liability for, and agrees to indemnify the contractor from and against claims "on account of injury to, destruction of, or loss or impairment of any property right in or to oil, gas, or other mineral substance or water" unless "reduced to physical possession above the surface of the earth," and for "any loss or damage to any formation, strata, or reservoir beneath the surface of the earth."

***460** Subparagraphs 14.8 and 14.9 require the parties to indemnify each other for claims based on injuries to their own employees "without regard to the cause or causes thereof or the negligence of any party or parties."

Subparagraph 14.10 states that the operator is liable "for the cost of regaining control of any wild well, as well as for cost of removal of any debris."

The parties focus particular attention on subparagraph 14.11. Entitled "Pollution and Contamination," it provides:

"Notwithstanding anything to the contrary contained herein, except the provisions of Paragraphs 10 and 12[2], it is understood and agreed by and between Contractor and Operator that the responsibility for pollution and contamination shall be as follows: [¶] (a) Unless otherwise provided herein, Contractor [CAZA] shall assume all responsibility for, including control and removal of, and shall protect, defend and indemnity Operator from and against all claims, demands and causes of action of every kind and character arising from pollution or contamination, which originates above the surface of the land or water from spills of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballast, bilge and garbage, except unavoidable pollution from reserve pits, wholly in Contractor's possession and control and directly associated with Contractor's equipment and facilities.

"(b) Operator [TEG] shall assume all responsibility for, including control and removal of, and shall protect, defend and indemnify Contractor from and against all claims, demands, and causes of action of every kind and character arising directly or indirectly from all other pollution or contamination which may occur during the conduct of operations hereunder, including, but not limited to, that which may result from fire, blowout, cratering, seepage of any other uncontrolled flow of oil, gas, water or other substance, as well as the use or disposition of all drilling fluids, including, but not limited to, oil emulsion, oil base or chemically treated drilling fluids, contaminated cuttings or cavings, lost circulation and fish recovery materials and fluids. Operator shall release Contractor of any liability for the foregoing."

Subparagraph 14.12 provides that neither party is liable to the other for "special, indirect or consequential damages resulting from or arising out of this Contract, including, without limitation, loss of profit or business interruptions including loss or delay of production, however same may be caused."

***461** Finally, subparagraph 14.13 entitled "Indemnity Obligation" provides: "Except as otherwise expressly limited herein, it is ****277** the intent of parties hereto that all releases, indemnity obligations and/or liabilities assumed by such parties under terms of this Contract, including, without limitation, Subparagraphs 14.1 through 14.12 hereof, be without limit and without regard to the cause or causes thereof (including preexisting conditions), strict liability, regulatory or statutory liability, breach of

warranty (express or implied), any theory of tort, breach of contract or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive."

There are two nonstandardized provisions. A handwritten term provides for a $10 million umbrella policy, in addition to the statutory workers' compensation insurance and the comprehensive general and automobile liability insurance policies. The other change is the deletion by interlineation of a provision requiring TEG to pay motel expenses for CAZA employees.

CAZA's Motion for Summary Judgment

CAZA moved for summary judgment on the cross-complaint on the ground that the 2002 Daywork Drilling Contract allocates liability for all damages claimed by appellants in the cross-complaint to TEG. The statement of undisputed material facts (SOF) is quite brief. With respect to the 2002 Daywork Drilling Contract, it states that the parties entered into the contract on November 7, 2002, that the contract identified TEG as operator and CAZA as contractor, and that TEG "claims that it is owed money for losses that resulted from the performance of the day work contract."

Other factual allegations were geared toward establishing that the parties' agreement contract was not an adhesion contract. In this regard, the SOF states that TEG had discussions with seven other drilling companies before settling on CAZA because CAZA "had the only drilling rig available in the area" at the time, although TEG "could have waited until a rig owned by [three other companies] became available"; that TEG's agent, Karl F. Arleth, refused to sign the 2002 contract until TEG was named an additional insured under CAZA's umbrella policy; that "[Arleth] struck out a term of the day work contract that would have required [TEG] to compensate CAZA" for its employees' hotel expenses; and that "[a]ll terms of the day work contract are negotiable for a price."

The remaining factual allegations relate to establishing that appellants were not at a disadvantage in negotiating with CAZA and were equally knowledgeable concerning the vagaries of drilling for oil. In this regard, the SOF states that Sefton had a market capitalization between $3 and $4 million; that its CEO, Jim Ellerton, was "well versed in the formation of oil ***462** and gas exploration companies"; that Arleth "held various positions in the oil and gas industry" since obtaining his degree; that Arleth worked for 22 years with "the international oil and gas conglomerate Amaco"; that Arleth's position with Amaco included "exploration geologist" and "president of Amaco Polant, Limited"; that "[d]rilling a commercial oil well is an extremely costly process that can result in the expenditure of hundreds of thousands of dollars"; and that "Craig Krummerich, the drilling engineer hired by [TEG], was hired for the express purpose of executing the 'drilling program with the drilling company, CAZA.' "

In a separate declaration, Gene Gaz, area manager for CAZA, explained that there are many different contracts covering drilling services. Besides the standard "Daywork Drilling" contract there are standard "Turnkey" contracts and "Footage" contracts, and operators sometimes ****278** prepare their own agreements. Under a Turnkey contract, the contractor hires a geologist and formulates a drilling plan, but under a Daywork Drilling contract, "the Operator is in control" and "[t]he Contractor receives all of its direction from the Operator." Gaz stated that standard provisions are negotiable and that if a company wished to place responsibility for damage caused to the geologic structure on CAZA, "CAZA [would] allow such a change in exchange for a dramatically increased drilling cost to the Operator."[3]

In its memorandum of points and authorities, CAZA relied primarily on the 2002 Daywork Drilling Contract provision that "Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a Daywork basis, including results and all other risks or liabilities incurred in or incident to such operations" to establish that it could not be liable to appellants on the cross-complaint. The memorandum also references subparagraph 14.11 governing liability for environmental pollution, subparagraph 14.5 governing liability for damage to the hole, and subparagraph 14.12 prohibiting the recovery of consequential damages.

Appellants' Opposition

In their opposition SOF, appellants disputed that the provisions of the Daywork Drilling Contract were negotiable. Karl Arleth, TEG's former president and a director of Sefton who signed the contract on behalf of TEG, stated in a declaration that he was "never informed by CAZA that any of the provisions in the standard, pre-printed form were negotiable," and that "under the circumstances (the small size of our company and the unavailability of other drilling rigs and CAZA's awareness of these facts), it was clear to me ***463** that they were not negotiable." He also stated, however, that "we agreed with a hand-written change that CAZA would

provide a $10 million umbrella policy and we also agree[d] to eliminate what appeared to be virtually duplicate per diem reimbursements by deleting the motel expense line and leaving the daily subsistence amount."

With respect to their losses, appellants stated that "Cross–Complainant [[4] claims that it is owed money for damages to its well and other costs and expenses resulting from CAZA's breach of the contract and from CAZA's gross negligence and violation of law." They further stated that "[t]he blowout and fire at the Yule 6 well caused injury and death and completely destroyed the well, forcing [appellants] to expend funds for remediation and clean-up, and for other costs and expenses, leaving TEG without income and resulting in Sefton having to sell its stock at a depressed price to raise capital."

Appellants disputed that any of their employees was expert in drilling. They asserted that CAZA "had the only drilling rig available for work which would allow TEG to begin drilling work during the latter part of 2002" and that "[f]or financial reasons and because of duties to stockholders, [appellants] could not wait for other companies to have a rig available at a later time."

The remainder of appellants' SOF describes in detail the actions or omissions of ****279** CAZA's crew that appellants believe caused the blowout and fire. These assertions were supported by the declaration of expert witness, Gregg S. Perkin. Perkin expressed the opinion that "the CAZA crew swabbed in TEG's well as the drill stem was being pulled from the well"; that "the swabbing of the Yule 6 wellbore by the actions of the CAZA crew, and not an earlier reduction in the drilling mud's weight, caused the well to kick" resulting in "the well's blowing out and catching fire"; and that "[m]ore likely than not ... the drill stem was being pulled out of the hole [in a] negligent manner." He based this opinion on his review of the report of the Department of Gas and Geothermal Resources, the "DataHub EDR Log," and CAZA's "Master Driller Reference Guide." Perkin stated that in undertaking these actions, CAZA violated "Part 30 of the Code of Federal Regulations, Part 250.410(b), which stated that: [¶] '4) Drill pipe and downhole tool running and pulling speeds shall be at controlled rates so as not to induce an influx of formation fluids from the effects of swabbing nor cause a loss of drilling fluid and corresponding hydrostatic pressure decrease from the effects of surging. [¶] 5) When there is an indication of swabbing or influx of ***464** formation fluids, the safety devices and measures necessary to control the well shall be employed. The mud shall be circulated and conditioned, on or near the bottom, unless well or mud conditions prevent running the drill pipe back to the bottom.' " (Emphasis omitted.)

Trial Court Order

The trial court granted the motion for summary judgment on the cross-complaint, stating in its order: "[CAZA] asserts that the cross-complaint is barred by the provisions of the contract between the parties assigning liability 'for all consequences of operations by both parties' to [TEG]. Therefore, the issue is one of contract interpretation and is a matter of law for the court to decide. [¶][TEG] points to clauses in the contract requiring [CAZA] to maintain and control well equipment and follow the law. These provisions, however, do not negate the provisions assigning liability to [TEG] 'for all consequences of operation.' [TEG] argues further that the exculpatory provisions of the contract are void as against public policy under Civil Code Section 1668. The court disagrees for the reasons set forth in the moving papers."

Judgment was entered on the cross-complaint, and both Sefton and TEG purported to appeal, although TEG was a party to the still pending complaint.

DISCUSSION

I

[1] [2] Where a defendant cross-claims against the plaintiff, dismissal of the cross-complaint is not a final judgment for purposes of appeal unless there is a separate and distinct party involved and adjudication of the cross-complaint represents a final adverse adjudication as to that party. (See, e.g., *Kantor v. Housing Authority* (1992) 8 Cal.App.4th 424, 429, 10 Cal.Rptr.2d 695; *County of Los Angeles v. Guerrero* (1989) 209 Cal.App.3d 1149, 1152, fn. 2, 257 Cal.Rptr. 787; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 73, p. 128.) Because TEG is still involved in litigation with CAZA, we asked the parties to explain how it could be a proper party to this appeal. We also asked them to address Sefton's standing to assert any issues pertaining to the 2002 Daywork Drilling Contract and damage to the oil facilities. The cross-complaint alleged that Sefton was a

third-party beneficiary of the agreement, but the sole basis for that contention appeared to be its status as TEG's **280 parent. No facts were alleged to show an intent by the parties to confer any benefit on Sefton, other than the indirect benefit derived from profits earned by its subsidiary TEG. (See *465 *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 405, 87 Cal.Rptr.2d 745 ["It is elementary that a party asserting a claim must have standing to do so. In asserting a claim based upon a contract, this generally requires the party to be a signatory to the contract, or to be an intended third party beneficiary"]; *Luis v. Orcutt Town Water Co.* (1962) 204 Cal.App.2d 433, 441–442, 22 Cal.Rptr. 389 [holding that to assert a claim as a third-party beneficiary, "a plaintiff must plead a contract which was made expressly for his benefit and one in which it clearly appears that he was a beneficiary.... The fortuitous fact that he may have suffered detriment by reason of the nonperformance of the contract does not give him a cause of action"]; *National Rural Telecommunications v. DirecTV* (C.D.Cal.2003) 319 F.Supp.2d 1040, 1057 ["In general, a parent corporation and its subsidiary are legally distinct entities, and a contract under the corporate name of one is not treated as that of both"].)

In a supplemental brief, appellants explain that CAZA raised the issue of Sefton's standing in a demurrer to the cross-complaint that preceded the summary judgment motion. The trial court overruled the demurrer. Accordingly, appellants had no occasion to amend the cross-complaint. In their supplemental brief, appellants contend that Sefton owned the oil field where the injury occurred and the mineral rights impacted by the drilling accident. Since the order overruling the demurrer is not before us, we express no opinion on whether it was properly decided. But we agree with appellants that, under the circumstances, it would be unfair for this court to assume that appellants could not have amended the cross-complaint to assert direct injury to Sefton had the trial court required that they do so.

[3] [4] We turn to the issue of whether TEG is a proper party to this appeal. Where the issues involved in an appeal are "inextricably intertwined" with claims raised by a party still involved in litigation at the trial court level, "judicial economy" permits that party to join in the appeal. (*Miller v. Silver* (1986) 181 Cal.App.3d 652, 658, 226 Cal.Rptr. 479; accord, *Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 684–685, 36 Cal.Rptr.2d 12; see *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 60, 271 Cal.Rptr. 410 [where order sustaining demurrer was final and appealable with respect to some of the named defendants, court treated appeal from that order as it related to other defendants as a writ petition]; *G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325, 13 Cal.Rptr.2d 803 [same, except that appeal was taken from an order granting summary judgment].) That describes this case. We conclude, therefore, that TEG is a proper party here.

***466 II**

[5] We now turn to the merits. According to the 2002 Daywork Drilling Contract, "[e]xcept for such obligations and liabilities specifically assumed by [CAZA], [TEG] shall be solely responsible and assume liability for all consequences of operations by both parties." This was the provision chiefly relied upon by CAZA in seeking summary judgment. Preliminarily, appellants contend this general language cannot control over more specific provisions of subparagraphs 8.1, requiring CAZA to use "all reasonable means" to **281 prevent fires and blowouts, and 8.3, requiring that both parties comply with all federal, state, and local laws, rules, and regulations.

Appellants are correct that when general and specific provisions are inconsistent, the latter control. (Code Civ. Proc., § 1859; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 754, p. 845.) However, as we have seen, the general provision just quoted is not the only provision in the agreement relating to allocation and limitation of liability. Paragraph 14 describes in detail the parties' respective "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK." Under its terms, each party was to be liable for damage to its own equipment, with certain limited exceptions, and for injury to its own employees. Responsibility for damage to the hole and the underground minerals and for regaining control of a "wild well" was fixed on the operator. Liability for "Pollution and Contamination" was allocated between the parties depending on the cause. Neither party was to be liable for the other's consequential damages. These provisions are more specific with respect to allocation and limitation of liability than the language cited by appellants.

Beyond that, we do not believe that the allocation and limitation of liability provisions are contradicted by subparagraphs 8.1 and 8.3. The latter describes CAZA's duties under the contract. To the extent TEG can establish that CAZA failed to perform these duties, it is entitled to raise that breach as a defense to CAZA's claim for

payment under the 2002 Daywork Drilling Contract.[5] The provisions of paragraph 14 are intended to limit contract damages by excluding consequential damages and allocating liability for tort damages for injuries to persons or property in the case of negligence. There is nothing inherently inconsistent in a party to a contract agreeing to do "X," but stating that if it does not, the other party may not recover consequential damages or stating that if negligence occurs during the performance of "X," liability will be limited.

The authorities upon which appellants rely—*Woodall v. Wayne Steffner Productions* (1962) 201 Cal.App.2d 800, 20 Cal.Rptr. 572 and *Continental* ***467** *Mfg. Corp. v. Underwriters at Lloyds London* (1960) 185 Cal.App.2d 545, 8 Cal.Rptr. 276—were decided before the Supreme Court's seminal decision in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (*Tunkl*), which we discuss more fully below. Their conclusion that a party cannot limit its liability for a duty it has undertaken to perform by contract when that duty is negligently performed does not represent the current state of the law in this area.

[6] [7] [8] Appellants also contend that the provisions of the various subparagraphs of paragraph 14 cannot be read as excluding liability for negligence because negligence was not specifically mentioned in every subparagraph. It is true that " '[f]or an agreement to be construed as precluding liability for "active" or "affirmative" negligence, there must be express and unequivocal language in the agreement which precludes such liability' " and that " '[a]n agreement which seeks to limit liability generally without specifically mentioning negligence is construed to shield a party only for passive negligence, not for active negligence.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1066, 20 Cal.Rptr.3d 562, quoting *Salton Bay Marina,* ****282** *Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 932–933, 218 Cal.Rptr. 839.) But it is equally true that "[w]hether an exculpatory clause 'covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.' " (*Id.* at p. 1066, 20 Cal.Rptr.3d 562, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 632, 119 Cal.Rptr. 449, 532 P.2d 97.)

[9] Subparagraph 14.13 specifically states that the allocations of liability set forth in subparagraphs 14.1 through 14.12 are "without limit" and "without regard to the cause or causes thereof," including "regulatory or statutory liability," "breach of contract or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive." Read as a whole, the provisions of paragraph 14 make clear the parties' intent—to limit "the Operator's" ability to recover for injury resulting from accidents, even those caused by the negligence of "the Contractor." As a matter of contractual interpretation, there is nothing to hinder a "voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." (*Tunkl, supra,* 60 Cal.2d at p. 101, 32 Cal.Rptr. 33, 383 P.2d 441.) Such an agreement may, however, run afoul of section 1668, to which we now turn.

***468 III**

Section 1668 provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." As explained in *Tunkl,* early interpretations of this provision expressed the view that section 1668 absolutely prohibited a party from limiting its liability for its own negligence. (*Tunkl, supra,* 60 Cal.2d at p. 95, 32 Cal.Rptr. 33, 383 P.2d 441, citing *England v. Lyon Fireproof Storage Co.* (1928) 94 Cal.App. 562, 271 P. 532.) In *Mills v. Ruppert* (1959) 167 Cal.App.2d 58, 333 P.2d 818, however, the court pointed out that "the only use of the word negligent in said section is in a restrictive sense and only in connection with violations of law." (*Id.* at p. 62, 333 P.2d 818.) It necessarily followed that " 'contracts seeking to relieve individuals from the results of their own negligence are not invalid as against the policy of the law as therein provided, and hence are neither contrary to public policy nor expressed provision of the law....' " (*Id.* at p. 63, 333 P.2d 818; accord, *Werner v. Knoll* (1948) 89 Cal.App.2d 474, 475–476, 201 P.2d 45.)

In *Tunkl,* the Supreme Court limited the holding in *Mills v. Ruppert.* The court concluded that exculpatory clauses relieving a party from the consequences of its own negligence cannot be enforced where the public interest was involved, even if the conduct did not involve a violation of law. The court described factors or characteristics which identify a transaction implicating the public interest: (1) the transaction "concerns a business of a type generally thought suitable for public regulation";

(2) "[t]he party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public"; (3) "[t]he party holds himself out as willing to perform this service for any member of the **283 public who seeks it, or at least for any member coming within certain established standards"; (4) "[a]s a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services"; (5) "[i]n exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence"; and (6) "[a]s a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Tunkl, supra,* 60 Cal.2d at pp. 98–101, 32 Cal.Rptr. 33, 383 P.2d 441, fns. omitted.)

[10] Appellants contend these factors are present here. We disagree. Although the Supreme Court did not specifically exclude contracts between **469 relatively equal business entities from its definition of contracts in the public interest, it is difficult to imagine a situation where a contract of that type would meet more than one or two of the requirements discussed in *Tunkl.* With respect to the second and third factors, for example, CAZA did not hold itself out as performing services for the public, but only for the small number of entities that happened to be oil field operators. While the production of oil is of great importance to the public, the drilling of a particular oil well is generally only important to the party who will profit from it. With respect to the fourth and fifth factors, appellants' argument that it was forced into an adhesion contract boils down to this: "Although two provisions in the agreement were altered during negotiations, we did not know we could alter any provisions during negotiations." The fact that TEG found itself backed into a corner in late 2002 as a result of failure to plan ahead and had no choice but to deal with the only company that had a suitable drill rig available at that specific point in time, is not the sort of unequal bargaining power to which the court in *Tunkl* referred.

Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal.App.3d 1, 262 Cal.Rptr. 716, where commercial entities similarly tried to undercut contractual limitations on liability by reliance on *Tunkl,* is instructive. In that case, a rocket manufactured by defendant McDonnell Douglas Corp. failed to boost a communications satellite to the required orbit. As a result, the satellite had to be written off as a total loss. The insurers of the satellite owner sought to recoup their loss from McDonnell Douglas, contending that limitation of liability provisions in the parties' agreement were contrary to public policy. With regard to plaintiffs' argument that McDonnell Douglas's services were open to any member of the public and provided a service of great importance to some members of the public, the court stated: "[T]he provision of space hardware and launch services is of practical necessity to no individual member of the public; it is of 'practical necessity' only to a few, very large commercial and governmental entities dealing in highly specialized fields such as telecommunications." (*Appalachian Ins. Co. v. McDonnell Douglas Corp., supra,* at p. 29, 262 Cal.Rptr. 716.) Further, "all [sales] were to large, sophisticated commercial and governmental entities." (*Id.* at p. 30, 262 Cal.Rptr. 716.) With regard to the supposedly " 'essential nature' " of the services, the court stated: "*Tunkl's* focus was on whether the service was 'essential' to individual members of the public. Here, the service is 'essential' only to a small number of large corporations and governmental entities; it 'is not a compelled, essential service' but 'a voluntary relationship **284 between the parties.' (*Okura v. United States Cycling Federation* [(1986)] 186 Cal.App.3d 1462, 1468 [231 Cal.Rptr. 429].) Finally, this case does not involve a 'decisive advantage of bargaining strength [used] against any member of the public who seeks [the] services.' (*[Tunkl], supra,* 60 Cal.2d [at p.] 100 [32 Cal.Rptr. 33, 383 P.2d 441].) This case does not involve a large entity using its bargaining strength against an individual member of the *470 public. This case involves two large, sophisticated corporations with relatively equal bargaining power who negotiated the terms of a voluntary agreement." (*Ibid.,* fn. omitted.)

The same is true here. CAZA's services may have been essential to TEG, but the agreement between the parties did not implicate the public interest in the way required to abrogate exculpatory provisions limiting liability for negligence under *Tunkl.*

IV

[11] If *Tunkl* were the only basis raised by appellants for the applicability of section 1668, we could end our analysis. However, in their cross-complaint and their opposition to the motion for summary judgment, appellants contend that CAZA violated various statutes and regulations in performing drilling activities. They

argue that section 1668 invalidates any exculpatory language that would relieve CAZA of liability for performing drilling operations in violation of law "without regard to whether any public interest [was] involved." They cite for support this court's recent decision in *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 39 Cal.Rptr.3d 425 (*Capri*).

The plaintiff in *Capri* had joined a health club, signing a membership agreement which contained a release and waiver of liability for injuries caused by the club's negligence. Plaintiff was using the club's outdoor swimming pool when he slipped and fell on the pool deck. After the accident, he noticed an accumulation of algae around the drain in the area where the accident occurred. In defense to plaintiff's personal injury suit, the club raised the release. However, in his complaint, plaintiff had alleged that the club violated Health and Safety Code sections 116040 and 116043, which require operators of public swimming pools to maintain them in a sanitary, healthful, and safe manner. Section 116065 of that code made violation of these provisions a crime. In reversing summary judgment in favor of the club, we held that because plaintiff had alleged that the club violated Health and Safety Code sections 116040 and 116043, and that the violation of these laws was the cause of his slip and fall, the limitation on liability "falls squarely within the explicit prohibition in section 1668 against contractual exculpation for a 'violation of law' and is invalid." (*Capri v. L.A. Fitness International, LLC, supra,* 136 Cal.App.4th at p. 1085, 39 Cal.Rptr.3d 425.)

We found support for our conclusion in *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 36 Cal.Rptr. 150, where tenants suffered property damage after fire system sprinklers flooded their leased premises. The landlord allegedly had failed to install the kind of sprinklers require by the municipal ***471** code. The appellate court held that "[s]ince the claim for damages because of negligence embodied in the first cause of action of each tenant was predicated upon the alleged violation of section 94.30312 of the Municipal Code, the exculpatory provision could not be a defense to that cause of action if the evidence showed such violation to be a proximate cause of the tenant's loss." (*Id.* at p. 792, 36 Cal.Rptr. 150.) Similarly, in *Halliday v. Greene* (1966) 244 Cal.App.2d 482, 53 Cal.Rptr. 267, plaintiffs were injured in a fire ****285** to their apartment building while exiting down the only available staircase. Plaintiffs provided evidence of a general industry safety order requiring two escape exits from a work area. The Court of Appeal reversed a nonsuit in favor of defendant, holding that plaintiffs were entitled to the benefit of the safety order, and hence that the exculpatory clause in the lease agreement was ineffective under section 1668. (*Halliday,* at pp. 487–490, 53 Cal.Rptr. 267.)

Capri is significantly different from the present case because it involved personal injury to a consumer. Here, the contract was between two business entities and the damages claimed are entirely economic. In only one recent case has a court applied section 1668 to invalidate provisions in a contract between business entities: *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 6 Cal.Rptr.3d 235 (*Health Net*). The agreement at issue there was between Health Net and the Department of Health Services (DHS), and stated that remedies for noncompliance with laws not expressly incorporated into the contract "shall not include money damages." (*Id.* at p. 229, 6 Cal.Rptr.3d 235, italics omitted.) In an action against DHS under the agreement, Health Net claimed that DHS had violated a provision of the Welfare and Institutions Code. The trial court agreed and issued an injunction, but refused to award monetary damages because of the limitation of liability provision in the contract. The trial court thought that section 1668 did not apply since the transaction did not affect the public interest within the meaning of *Tunkl.* On review, that decision was reversed because "section 1668 prohibits the enforcement of any contractual clause that seeks to exempt a party from liability for violations of statutory and regulatory law, regardless of whether the public interest is affected." (*Health Net, supra,* at p. 235, 6 Cal.Rptr.3d 235.)

The holding in *Health Net* does not apply to this case because, as the court explained, the exculpatory clause at issue in that case "prohibit [ed] ... the recovery of *any damages at all* for DHS's statutory for regulatory violations" and "exempt[ed] DHS *completely* from responsibility for completed wrongs." (113 Cal.App.4th at pp. 240–241, 6 Cal.Rptr.3d 235, italics added.) The court believed that even in a commercial case, "an exculpation of any liability for *any* damages for *any* statutory violation surely rises to the level of an 'exempt[ion] from responsibility' within the meaning of the plain language of section 1668." (*Id.* at p. 239, 6 Cal.Rptr.3d 235.) The provisions at issue here do not exempt CAZA from all liability, but merely limit its responsibility with respect to economic damages. The court in *Health Net* expressly declined to decide ***472** whether "*some* contractual limitations over the scope of available remedies" would "necessarily run afoul of section 1668." (*Ibid.,* italics added; see *Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74, 70 Cal.Rptr.2d 85 ["Although exemptions from *all* liability for intentional wrongs, gross negligence and violations of the law have been

consistently invalidated [citations], we have not found any case addressing a *limitation* on liability for intentional wrongs, gross negligence or violations of the law"].)

Although it did not reach the issue, the court in *Health Net* cited *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 54 Cal.Rptr. 609 as an example of a case where the court invalidated a provision in a commercial contract that merely limited liability. Plaintiff in *Klein* was a farmer who had purchased mislabeled seed that came with a disclaimer of liability limiting the buyer's damages to the price of the seed. The Court of Appeal upheld a different measure of damages: the difference between the reasonable market value of the ****286** crop as actually produced and the value of the theoretical crop that would have been produced had the seed been as labeled. The court concluded that the limitation on liability ran afoul of section 1668 because a provision of the Agricultural Code made the sale of mislabeled seed an unlawful act. (*Klein, supra,* at p. 100, 54 Cal.Rptr. 609.)

The court in *Health Net* did not point out that the decision in *Klein* represented something of an anomaly. In the majority of commercial situations, courts have upheld contractual limitations on liability, even against claims that the breaching party violated a law or regulation. (See, e.g., *Nunes Turfgrass, Inc. v. Vaughan–Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1534–1539, 246 Cal.Rptr. 823 [court upheld a contractual provision precluding consequential damages although a violation of law occurred when a seed seller mislabeled packages of grass seed misrepresenting the percentage of annual rye grass because "[t]he California Uniform Commercial Code expressly allows the limitation or exclusion of consequential damages for commercial loss unless the limitation or exclusion is unconscionable"].) A relatively early case, *Delta Air Lines, Inc. v. McDonnell Douglas Corporation* (5th Cir.1974) 503 F.2d 239, involved the purchase of an aircraft from the manufacturer by a major airline. The purchase agreement contained an exculpatory clause limiting damages in the case of the manufacturer's negligence. The airline suffered economic damage when the nose gear of the aircraft collapsed during a landing because a part had allegedly been incorrectly installed. On appeal, the airline contended that the limitation of liability clause was "in clear violation of the public policy of California," pointing to section 21.165 of the Federal Aviation Administration (FAA) regulations "which provides in effect that an airplane manufacturer must determine that any airplane proposed for certification is in a condition for safe operation." (*Delta,* at pp. 243–244.) Applying California law, the Fifth Circuit disagreed that the alleged violation of the regulation rendered the limitation of liability ***473** clause invalid under section 1668: "[The airline] ... confuses a negligence theory of action, under which violation of a law or a regulation may be evidence of negligence, [citation], with the liability that may be imposed by law. [The manufacturer] is still answerable to the FAA and third parties for any responsibility established by the regulation, and any statutory right of action that might be given to [the airline] by FAA regulations has not been abrogated. But none of these causes of action are involved in an action based on common law negligence. We are unable to agree that the contract between two industrial giants fixing the dollar responsibility for [the manufacturer's] alleged negligence would be void under California law, any more than would be an insurance contract which might be written for the same purpose." (*Id.* at p. 244.)

Nearly a decade after the Fifth Circuit decision in *Delta Air Lines, Inc. v. McDonnell Douglas Corporation,* the Ninth Circuit addressed the identical issue and reached the same result. (*Airlift Intern., Inc. v. McDonnell Douglas Corp.* (9th Cir.1982) 685 F.2d 267.) Again seeking to invalidate a contractual limitation on liability, the airline specifically argued that "the exculpation clause was vitiated under state law by [the manufacturer's] violation of federal air regulations." (*Id.* at p. 269.) The court rejected that argument based on the authorities enforcing such clauses in similar situations. (*Ibid.*)

Continental Airlines v. Goodyear Tire & Rubber Co. (9th Cir.1987) 819 F.2d 1519 is to the same effect. That case also involved a limitation of liability provision in a contract for the sale of an aircraft. The ****287** airline argued that the exculpatory clause was "unenforceable to the extent that it bars [the airline] from showing that [the manufacturer] violated federal aviation regulations, which violations allegedly caused the accident." (*Id.* at p. 1527.) The Ninth Circuit disagreed: "The exculpatory clause does not permit [the manufacturer] to violate the federal regulations with impunity; it merely bars suit *by [the airline]* on this ground. Other sanctions remain in place. As we have said in a similar case, 'nothing inhibits the operation of the regulation[s] in question through [passengers'] suits ... or sanction imposed by the [FAA].' " (*Ibid.,* quoting *S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co.* (9th Cir.1981) 641 F.2d 746, 753.)

This line of authority was followed in *In re Air Crash Disaster, Detroit Metro. Airport* (E.D.Mich.1989) 757 F.Supp. 804, where the court, applying California law, upheld an exculpatory clause in a contract between an airline and an aircraft manufacturer even though some of the airline's claims were based on violation of FAA regulations because "[t]he preclusion of [the airline's]

claim would not fully vindicate [the manufacturer] from the adverse repercussions that could result from a violation of federal aviation regulations." (*Id.* at p. 811.) "To the extent that [the manufacturer] violated any ***474** federal aviation regulations, it may be held accountable in the form of civil judgments and/or FAA sanctions. The mere fact that [the airline] is contractually precluded from similarly pursuing [the manufacturer] does not violate the spirit of section 1668." (*Id.* at p. 812.)

While no reported California case has expressly relied on this federal precedent, a similar issue was addressed in *Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal.App.2d 95, 47 Cal.Rptr. 518. There, the court upheld a limitation of liability provision in a contract for the sale of an aircraft against a claim that it involved the public interest as defined by *Tunkl.* The court did not resolve whether a violation of law on the part of the manufacturer would have rendered the provision invalid under section 1668 because it concluded that no such violation had been established. (*Delta, supra,* at pp. 105–106, 47 Cal.Rptr. 518.) Although the lack of a proven violation of law precluded the court from reaching section 1668, in its discussion of the *Tunkl* public interest issue, it indicated that the outcome of the appeal would not have been substantially different had such a violation occurred: "The fact that [the airline] is a regulated enterprise and carries passengers has no relevance to the present decision. The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against [the manufacturer] for negligence. [Citation.] Also, their right to bring an action against [the manufacturer] for breach of implied warranty would not be interfered with because the passengers were not a party to the contract containing the exculpatory clause. [¶] In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, [the airline] (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on [the manufacturer] (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why [the airline], having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed ****288** to shift the risk so assumed to [the manufacturer], which had neither agreed to assume it nor been compensated for such assumption." (*Delta, supra,* at pp. 104–105, 47 Cal.Rptr. 518 fns. omitted.)

The same public policy issue was addressed more recently in *Philippine Airlines, Inc. v. McDonnell Douglas Corp.* (1987) 189 Cal.App.3d 234, 234 Cal.Rptr. 423, and, once again, the same result obtained. There, alleged negligence in the manufacture of an airplane led to a crash during takeoff and personal injury to a number of the airline's passengers. The passengers filed a lawsuit against the airline, and the trial court ruled that the limitation of liability clause in the airline's contract with the manufacturer barred the ***475** airline's cross-complaint for indemnity. Although it did not point to any specific law or regulation, the airline argued on appeal that the provision created a disincentive for manufacturers to produce safe aircraft and was thus directly contrary to California public policy. The appellate court disagreed: "[C]ontractual allocations of risk in nonconsumer commercial settings are routinely upheld. The reason, we think, lies with our laws of negligence and products liability, and with the economic realities of the marketplace. It may be true, as [the airline] argues, that the ultimate consumer—here the passenger—is provided with a streamlined remedy against the [airline] carrier [and therefore may never have incentive to sue the manufacturer directly]. Given, however, the realities of litigation, and the possibility that [an airline] carrier might have insufficient resources to cover what might be extensive liability should an aircraft malfunction, it would make little economic sense for a manufacturer to place on the market a defective product on the belief that it somehow would be insulated from the personal injury claims of passengers. Moreover, and aside from its potential liability to passengers, a manufacturer whose defective products caused its customers to be sued would not long remain in business. And a manufacturer ... is still answerable to the Federal Aviation Commission. We are thus of the opinion that the argued 'disincentive' to produce safe aircraft resulting from a finding that the disclaimer of liability at issue is valid, is largely illusory." (*Id.* at p. 242, 234 Cal.Rptr. 423, fn. omitted.)

Based on these authorities, we conclude that the challenged provisions in the 2002 Daywork Drilling Contract represent a valid limitation on liability rather than an improper attempt to exempt a contracting party from responsibility for violation of law within the meaning of section 1668. CAZA did not seek or obtain complete exemption from culpability on account of its potential negligence or violation of any applicable regulations. It merely sought to limit its liability for economic harm suffered by TEG. The parties foresaw the possibility that a blowout could occur and agreed between themselves concerning where the losses would fall. Significantly, the agreement required CAZA to accept responsibility for damage to its equipment, injury to its employees, and certain pollution and contamination

removal and control activities. Thus, the limitation of liability provisions did not adversely affect the public or the workers employed by CAZA. As appellants concede, CAZA accepted liability for the bodily injury that occurred as the result of the blowout, and has defended and indemnified appellants, through its carrier, in the *Currington* litigation. Under these facts, we agree with the federal courts and the court in *Delta Air Lines, Inc. v. Douglas Aircraft Co., supra,* 238 Cal.App.2d 95, 47 Cal.Rptr. 518: where the only question is which of two equal bargainers should bear the risk of economic loss in the event of a particular ****289** mishap, there is no reason for the courts to intervene and remake the parties' agreement.

***476 V**

[12] Finally, appellants made no serious effort to identify a specific law or regulation potentially violated by CAZA so as to trigger application of section 1668. In their cross-complaint, appellants contended that CAZA violated Public Resources Code section 3219, as well as California Code of Regulations, title 14, sections 1722, subdivisions (a) and (c), 1722.2, 1722.5, 1722.6, and 1744, and title 8, sections 3202, 6507, and 6573, subdivision (a). Appellants did not mention any of these provisions in opposing the summary judgment motion. The only reference to a statutory or regulatory violation was in an expert declaration, where Perkin contended that CAZA violated (former) 30 Code of Federal Regulations, part 250.410(b).[6] We asked for clarification in a letter to counsel, and, in one of the sections in their supplemental brief, appellants cited yet another set of statutes: Public Resources Code sections 3714 to 3716, 3724, 3724.1, 3739, 3740, 3754, and 3757.

The statutes cited in the supplemental brief are contained in chapter 4 of division 3 of the Public Resources Code. While division 3 is entitled "Oil and Gas," chapter 4 deals entirely with "geothermal resources" defined as "the natural heat of the earth, the energy, in whatever form, below the surface of the earth present in, resulting from, or created by, or which may be extracted from, such natural heat, and all minerals in solution or other products obtained from naturally heated fluids, brines, associated gases, and steam, in whatever form, found below the surface of the earth, *but excluding oil, hydrocarbon gas or other hydrocarbon substances.*" (Pub. Resources Code, § 6903, italics added; see Pub. Resources Code, § 3701.) Since the well involved in this case was not for the production of geothermal resources, the statutory provisions cited in the supplemental brief cannot apply.

The federal regulations quoted in Perkin's declaration, are contained in a subchapter that regulates "oil, gas, and sulphur exploration, development, and production operations *on the outer Continental Shelf.*" (30 C.F.R. §§ 250.101, 250.102, italics added.) Obviously, they have no application to this case.[7]

At first glance, the statutory and regulatory provisions cited in the cross-complaint seem more relevant. Public Resources Code section 3219 appears in chapter 1 of division 3, which covers "oil and gas" wells. (Pub. Resources Code, § 3008.) Section 3219 provides: "Any person engaged in operating any ***477** oil or gas well wherein high pressure gas is known to exist, and any person drilling for oil or gas in any district where the pressure of oil or gas is unknown shall equip the well with casing of sufficient strength, and with such other safety devices as may be necessary, in accordance with methods approved by the supervisor, and shall use every effort and endeavor effectually to prevent blowouts, explosions, and fires." But, on examination, the flaw in appellants' attempt to hold CAZA accountable for ensuring compliance with this chapter of the Public Resources Code and the safety regulations promulgated under it becomes apparent.

Section 3219 of the Public Resources Code refers to persons engaged in "operating" ****290** oil or gas wells. Section 3009 defines "[o]perator" as "any person who, by virtue of ownership, or under the authority of a lease or any other agreement, has the right to drill, operate, maintain, or control a well." It would be stretching the definition of "operator" to include a company performing drilling work by the day. This is confirmed by other statutory provisions found in this chapter of the Public Resources Code, which imposes duties on "the operator" that a drilling company such as CAZA could not reasonably be expected to fulfill. (See Pub. Resources Code, § 3203 [operator must file a written notice of intent to commence drilling]; § 3204 [operator must post an indemnity bond prior to engaging in drilling; §§ 3210–3211 [owner or operator required to keep a log of the history of the drilling of the well showing, among other things, the formations encountered or passed through]; § 3227 [owner required to file monthly production reports]; *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 605–606, 61 Cal.Rptr.2d 826 ["It would be illogical to impose upon someone who has no authority or responsibility for a well the duty to: file a notice of intent to drill (§ 3203); post an indemnity bond prior to engaging in drilling (§ 3204); maintain a log of

drilling operations (§ 3211); employ specific safety devices on wells and drilling techniques (§§ 3219, 3220); file monthly production reports (§ 3227); or abandon a well in accordance with the instructions of the Division (§§ 3228, 3229, 3230, and 3232)"].)

Review of the governing regulations further illustrates the point that "operator" means something more than a daywork contractor. Section 1722.1.1 of title 14 of the California Code of Regulations requires that there be posted at each well location a sign "with the name of the operator." Section 1722, subdivision (b) of title 14 requires "the operator" to "develop an oil spill contingency plan." Section 1722, subdivision (c) of title 14 requires "the operator" to submit "a blowout prevention and control plan, including provisions for the duties, training, supervision, and schedules for testing equipment and performing personnel drills." Other regulations, while not specifically referencing owners or operators, similarly impose duties that a drilling company hired on a daywork basis could not reasonably be ***478** expected to undertake. Section 1722.2 of title 14 requires wells to have casings "designed to provide anchorage for blowout prevention equipment" and "to withstand anticipated collapse, burst, and tension forces." Sections 1722.3 and 1722.4 of title 14 require cement casings of a certain depth and strength.

Appellants draw our attention to California Code of Regulations, title 14, sections 1722.5 and 1722.6, which are specifically designed to prevent blowouts and "uncontrolled flow of fluids from any well."[8] ****291**

While neither provision expressly imposes responsibility for compliance on well owners and operators, there is no reason to interpret them as imposing legal responsibility on a contractor like CAZA, when all the other statutes and regulations in this area are clearly directed at the owner or operator.

In short, unlike plaintiff in *Capri,* appellants have failed to set forth a specific statute or regulation purportedly violated. Accordingly, no basis has been presented that justifies invalidating the exculpatory provisions of the 2002 Daywork Drilling Contract.

***479 DISPOSITION**

The judgment is affirmed.

We concur: WILLHITE, and HASTINGS[*], JJ.

All Citations

142 Cal.App.4th 453, 48 Cal.Rptr.3d 271, 163 Oil & Gas Rep. 1052, 06 Cal. Daily Op. Serv. 8109, 2006 Daily Journal D.A.R. 11,506

Footnotes

1 The same document also contained the "Drilling Bid Proposal" from CAZA.

2 As we have seen, paragraph 10 obligates the operator to prepare a sound location. Paragraph 12 provides for termination of the contractor's liability after restoration of the location.

3 Under the 2002 Daywork Drilling Contract, CAZA charged approximately $7,780 per day plus approximately $6,000 for mobilization and demobilization costs.

4 Since appellants' SOF used the term "Cross–Complainant" in the singular, it is unclear whether TEG or Sefton is being referred to or if it was a typographical error and both parties claim to have suffered such damages.

5 Of course, the parties' rights and responsibilities may have been modified by the Payment Schedule and the 2003 Daywork Drilling Contract, neither of which are before us.

6 The requirements quoted by Perkin now appear at 30 Code of Federal Regulations, part 250.456(d) and (e) (2005).

7 California Code of Regulations, title 14, section 1744, cited in the cross-complaint, also applies to "wells on offshore sites."

8 Section 1722.5 provides: "Blowout prevention and related well control equipment shall be installed, tested, used, and maintained in a manner necessary to prevent an uncontrolled flow of fluid from a well. Division of Oil, Gas, and Geothermal Resources

publication No. MO 7, 'Blowout Prevention in California,' shall be used by division personnel as a guide in establishing the blowout prevention equipment requirements specified in the division's approval of proposed operations." (Cal.Code Regs., tit. 14, § 1722.5.)

Section 1722.6 provides: "The operational procedures and the properties, use, and testing of drilling fluid shall be such as are necessary to prevent the uncontrolled flow of fluids from any well. Drilling fluid additives in sufficient quantity to ensure well control shall be kept readily available for immediate use at all times. Fluid which does not exert more hydrostatic pressure than the known pressure of the formations exposed to the well bore shall not be used in a drilling operation without prior approval of the supervisor. [¶] (a) Before removal of the drill pipe or tubing from the hole is begun, the drilling fluid shall be conditioned to provide adequate pressure overbalance to control any potential source of fluid entry. Proper overbalance shall be confirmed by checking the annulus to ensure that there is no fluid flow or loss when there is no fluid movement in the drill pipe or tubing. The drilling fluid weight, the weight and volume of any heavy slug or pill, and the fact that the annulus was checked for fluid movement shall be noted on the driller's log. During removal of the drill pipe or tubing from the hole, a hole-filling program shall be followed to maintain a satisfactory pressure overbalance condition. [¶] (b) Tests of the drilling fluid to determine viscosity, water loss, weight, and gel strength shall be performed at least once daily while circulating, and the results of such tests shall be recorded on the driller's log. Equipment for measuring viscosity and fluid weight shall be maintained at the drill site. Exceptions to the test requirements may be granted for special cases, such as shallow development wells in low pressure fields, through the field rule process." (Cal.Code Regs., tit. 14, § 1722.6.)

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

End of Document

LEGAL AUTHORITY AA-73

son, did *not* equate *Lee's* test with strict scrutiny, and in fact it mentioned strict scrutiny only when it quoted the portion of *Turner* that *rejects* strict scrutiny as the proper standard of review in the prison context. 321 F.3d, at 798. Even Johnson did not make the leap equating *Lee* with strict scrutiny when he requested that the Court of Appeals rehear his case. Appellant's Petition for Panel Rehearing with Suggestion for Rehearing En Banc in No. 01–56436(CA9), pp. 4–5. That leap was first made by the judges who dissented from the Court of Appeals' denial of rehearing en banc. 336 F.3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc).

Thus, California is now, after the close of discovery, subject to a more stringent standard than it had any reason to anticipate from Johnson's pleadings, the Court of Appeals' initial decision, or even the Court of Appeals' decision below. In such circumstances, California should be allowed to present evidence of narrow tailoring, evidence it was never obligated to present in either appearance before the District Court. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031–1032, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (remanding for consideration under the correct legal standard); *id.*, at 1033, 112 S.Ct. 2886 (KENNEDY, J., concurring in judgment) ("Although we establish a framework[550] for remand, ... we do not decide the ultimate [constitutional] question [because] [t]he facts necessary to the determination have not been developed in the record").

* * *

Petitioner Garrison Johnson challenges not permanent, but temporary, segregation of only a portion of California's prisons. Of the 17 years Johnson has been incarcerated, California has assigned him a cellmate of the same race for no more than a year (and probably more like four months); Johnson has had black cellmates during the other 16 years, but by his own choice. Nothing in the record demonstrates that if Johnson (or any other prisoner) requested to be housed with a person of a different race, it would be denied (though Johnson's gang affiliation with the Crips might stand in his way). Moreover, Johnson concedes that California's prisons are racially violent places, and that he lives in fear of being attacked because of his race. Perhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory.

543 U.S. 631, 161 L.Ed.2d 66

CHEROKEE NATION OF OKLAHOMA and Shoshone–Paiute Tribes of the Duck Valley Reservation, Petitioners,

v.

Michael O. LEAVITT, Secretary of Health and Human Services, et al.

Michael O. Leavitt, Secretary of Health and Human Services, Petitioner,

v.

Cherokee Nation of Oklahoma.

Nos. 02–1472, 03–853.

Argued Nov. 9, 2004.

Decided March 1, 2005.

Background: Indian tribes sued Secretary of Health and Human Services (HHS) under Indian Self-Determination and Education Assistance Act (ISDEAA), seeking to recover full contract support costs, i.e.

reasonable administrative costs incurred by tribes pursuant to self-determination health services contracts, that would not have been incurred by HHS' Indian Health Service (IHS). The United States District Court for the Eastern District of Oklahoma, 190 F.Supp.2d 1248, Frank Howell Seay, C.J., granted summary judgment to HHS Secretary. The United States Court of Appeals for the Tenth Circuit affirmed, 311 F.3d 1054. In second action, tribe appealed contracting officer's denial of its claim for similar costs. The Department of Interior Board of Contract Appeals found in tribe's favor. The United States Court of Appeals for the Federal Circuit affirmed, 334 F.3d 1075. Certiorari was granted to resolve conflict.

Holding: The United States Supreme Court, Justice Breyer, held that, where Congress had appropriated sufficient legally unrestricted funds to pay contracts in question, government could not avoid its contractual obligation to pay contract support costs on grounds of "insufficient appropriations."

Affirmed in part and reversed in part and remanded.

Justice Scalia filed opinion concurring in part.

The Chief Justice took no part in the decision of the cases.

Indians ⇨139

Where Congress had appropriated sufficient legally unrestricted funds, via general appropriation to Indian Health Service (IHS), to pay specific contracts made pursuant to Self-Determination and Education Assistance Act (ISDEAA) under which tribes provided health services otherwise providable by IHS, government could not, on grounds of "insufficient appropriations," avoid its contractual promise to pay full contract support costs, even though Act made provision of funds "subject to availability of appropriations," and even if IHS' total lump-sum appropriation was insufficient to pay all contracts IHS had made. Indian Self–Determination and Education Assistance Act, §§ 106(a)(2), (b), 108, as amended, 25 U.S.C.A. §§ 450j–1(a)(2), (b), 450*l*; Contract Disputes Act of 1978, § 2 et seq., 41 U.S.C.A. § 601 et seq.

631 *Syllabus* *

The Indian Self–Determination and Education Assistance Act (Act) authorizes the Government and Indian tribes to enter into contracts in which tribes promise to supply federally funded services that a Government agency normally would provide, 25 U.S.C. § 450f(a); and requires the Government to pay, *inter alia*, a tribe's "contract support costs," which are "reasonable costs" that a federal agency would not have incurred, but which the tribe would incur in managing the program, § 450j–1(a)(2). Here, each Tribe agreed to supply health services normally provided by the Department of Health and Human Services' Indian Health Service, and the contracts included an annual funding agreement with a Government promise to pay contract support costs. In each instance, the Government refused to pay the full amount promised because Congress had not appropriated sufficient funds. In the first case, the Tribes submitted administrative payment claims under the Contract Disputes Act of 1978, which the Department of the Interior (the appropriations manager) denied. They then brought a breach-of-contract action.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The District Court found against them, and the Tenth Circuit affirmed. In the second case, the Cherokee Nation submitted claims to the Department of the Interior, which the Board of Contract Appeals ordered paid. The Federal Circuit affirmed.

Held: The Government is legally bound to pay the "contract support costs" at issue. Pp. 1177–1183.

(a) The Government argues that it is legally bound by its promises to pay the relevant costs only if Congress appropriated sufficient funds, which the Government contends Congress did not do in this instance. It does not deny that it promised, but failed, to pay the costs; that, were these ordinary procurement contracts, its promises to pay would be legally binding; that each year Congress appropriated more than the amounts at issue; that those appropriations Acts had no relevant statutory restrictions; that where Congress makes such appropriations, a clear inference arises that it does not intend to impose legally binding restrictions; and that as long as Congress has appropriated sufficient legally unrestricted funds to pay contracts, as it did here, the Government normally cannot back out of a promise to pay on grounds of insufficient appropriations. Thus, in order to show that its promises were not legally binding, the Government must show something special about the promises at issue. It fails to do so here. Pp. 1177–1178.

(b) The Act does not support the Government's initial argument that, because the Act creates a special contract with a unique nature differentiating it from standard Government procurement contracts, a tribe should bear the risk that a lump-sum appropriation will be insufficient to pay its contract. In general, the Act's language runs counter to this view, strongly suggesting instead that Congress, *in respect to a promise's binding nature,* meant to treat alike promises made under the Act and ordinary contractual promises. The Act uses "contract" 426 times to describe the nature of the Government's promise, and "contract" normally refers to "a promise . . . for the breach of which the law gives a remedy, or the performance of which the law . . . recognizes as a duty," Restatement (Second) of Contracts § 1. Payment of contract support costs is described in a provision containing a sample "Contract," 25 U.S.C. § 450*l* (c), and contractors are entitled to "money damages" under the Contract Disputes Act if the Government refuses to pay, § 450m–1(a). Nor do the Act's general purposes support any special treatment. The Government points to the statement that tribes need not spend funds "in excess of the amount of funds awarded," § 450*l* (c), but that kind of statement often appears in procurement contracts; and the statement that "no [self-determination] contract . . . shall be construed to be a procurement contract," § 450b(j), in context, seems designed to relieve tribes and the Government of technical burdens that may accompany procurement, not to weaken a contract's binding nature. Pp. 1178–1179.

(c) Neither of the phrases in an Act proviso renders the Government's promise nonbinding. One phrase—"the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe," § 450j–1(b)—did not make the Government's promise nonbinding, since the relevant appropriations contained unrestricted funds sufficient to pay the claims at issue. When this happens in an ordinary procurement contract case, the Government admits that the contractor is entitled to payment even if the agency has allocated the funds to another purpose. That the Government used the unrestricted funds to satisfy important needs—*e.g.,* the cost of running the Indian Health Ser-

vice—does not matter, for there is nothing special in the Act's language or the contracts to convince the [633] Court that anything but the ordinary rule applies here. The other proviso phrase—which subjects the Government's provision of funds under the Act "to the availability of appropriations," *ibid.*—also fails to help the Government. Congress appropriated adequate unrestricted funds here, and the Government provides no convincing argument for a special, rather than ordinary, interpretation of the phrase. Legislative history shows only that Executive Branch officials wanted discretionary authority to allocate a lump-sum appropriation too small to pay for all contracts, not that Congress granted such authority. And other statutory provisions, *e.g.,* § 450j–1(c)(2), to which the Government points, do not provide sufficient support. Pp. 1179–1181.

(d) Finally, the Government points to § 314 of the later-enacted 1999 Appropriations Act, which states that amounts "earmarked in committee reports for the ... Indian Health Service ... for payments to tribes ... for contract support costs ... are the total amounts available for fiscal years 1994 through 1998 for such purposes." The Court rejects the Government's claims that this statute merely clarifies earlier ambiguous appropriations language that was wrongly read as unrestricted. Earlier appropriations statutes were not ambiguous, and restrictive language in Committee Reports is not legally binding. Because no other restrictive language exists, the earlier statutes unambiguously provided unrestricted lump-sum appropriations. Nor should § 314 be interpreted to retroactively bar payment of claims arising under 1994 through 1997 contracts. That would raise serious constitutional issues by undoing binding governmental contractual obligations. Thus, the Court adopts the interpretation that Congress intended to forbid the Indian Health Service to use unspent appropriated funds to pay unpaid contract support costs. So interpreted, § 314 does not bar recovery here. Pp. 1181–1183.

No. 02–1472, 311 F.3d 1054, reversed; No. 03–853, 334 F.3d 1075, affirmed; and both cases remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part, *post,* p. 1183. REHNQUIST, C. J., took no part in the decision of the cases.

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Sri Srinivasan, for petitioner in No. 03–853 and respondent in No. 02–1472.

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For U.S. Supreme Court briefs, see:

2004 WL 2030951 (Pet.Brief)

2004 WL 1427674 (Pet.Brief)

2004 WL 2326556 (Reply.Brief)

Justice BREYER delivered the opinion of the Court.

[634]The United States and two Indian Tribes have entered into agreements in which the Government promises to pay certain "contract support costs" that the Tribes incurred during fiscal years (FYs) 1994 through 1997. The question before us is whether the Government's promises are legally binding. We conclude that they are.

I

The Indian Self–Determination and Education Assistance Act (Act), 88 Stat. 2203, as amended, 25 U.S.C. § 450 *et seq.,* (2000 ed. and Supp. II), authorizes the Government and Indian tribes to enter into contracts in which the tribes promise to supply federally funded services, for example tribal health services, that a Government agency would otherwise provide. See § 450f(a); see also § 450a(b). The Act specifies that the Government must pay a tribe's costs, including administrative expenses. See §§ 450j–1(a)(1) and (2). Administrative expenses include (1) the amount that the agency would have spent "for the operation of the progra[m]" had the agency itself managed the program, § 450j–1(a)(1), [635]and (2) "contract support costs," the costs at issue here. § 450j–1(a)(2).

The Act defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization" acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." *Ibid.* "[C]ontract support costs" can include indirect administrative costs, such as special auditing or other financial management costs, § 450j–1(a)(3)(A)(ii); they can include direct costs, such as workers' compensation insurance, § 450j–1(a)(3)(A)(i); and they can include certain startup costs, § 450j–1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." Brief for Federal Parties 7; see 25 U.S.C. §§ 450b(f)-(g).

The first case before us concerns Shoshone–Paiute contracts for FYs 1996 and 1997 and a Cherokee Nation contract for 1997. The second case concerns Cherokee Nation contracts for FYs 1994, 1995, and 1996. In each contract, the Tribe agreed to supply health services that a Government agency, the Indian Health Service, would otherwise have provided. See, *e.g.,* App. 88–92 (Shoshone–Paiute Tribal Health Compact), 173–175 (Compact between the United States and the Cherokee Nation). Each contract included an "Annual Funding Agreement" with a Government promise to pay contract support costs. See, *e.g., id.,* at 104–128, 253–264. In each instance, the Government refused to pay the full amount promised because, the Government says, Congress did not appropriate sufficient funds.

Both cases began as administrative proceedings. In the first case, the Tribes submitted claims seeking payment under the Contract Disputes Act of 1978, 92 Stat. 2383, 41 U.S.C. § 601 *et seq.,* and the Act, 25 U.S.C. §§ 450m–1(a), (d), 458cc(h), from the Department of the Interior (which manages the relevant appropriations). See, *e.g.,* App. 150–[636]151, 201–203. The Department denied their claim; they then brought a breach-of-contract action in the Federal District Court for the Eastern District of Oklahoma seeking $3.5 million (Shoshone–Paiute) and $3.4 million (Cherokee Nation). See *Cherokee Nation of Okla. v. Thompson,* 311 F.3d 1054, 1059

(C.A.10 2002). The District Court found against the Tribes. *Cherokee Nation of Okla. v. United States,* 190 F.Supp.2d 1248 (E.D.Okla.2001). And the Court of Appeals for the Tenth Circuit affirmed. 311 F.3d 1054 (2002).

In the second case, the Cherokee Nation submitted claims to the Department of the Interior. See App. 229–230. A contracting officer denied the claims; the Board of Contract Appeals reversed this ruling, ordering the Government to pay $8.5 million in damages. *Cherokee Nation of Okla.,* 1999–2 BCA ¶ 30,462, p. 150488, 1999 WL 440045; App. to Pet. for Cert. in No. 03–853, pp. 38a–40a. The Government sought judicial review in the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the Board's determination for the Tribe. *Thompson v. Cherokee Nation of Okla.,* 334 F.3d 1075 (C.A.Fed.2003).

In light of the identical nature of the claims in the two cases and the opposite results that the two Courts of Appeals have reached, we granted certiorari. We now affirm the Federal Circuit's judgment in favor of the Cherokee Nation, and we reverse the Tenth Circuit's judgment in favor of the Government.

II

The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay. Its sole defense consists of the argument that it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so.

The Government in effect concedes yet more. It does not deny that, *were these contracts ordinary procurement contracts,* its promises to pay would be legally binding. The 637 Tribes point out that each year Congress appropriated far more than the amounts here at issue (between $1.277 billion and $1.419 billion) for the Indian Health Service "to carry out," *inter alia,* "the Indian Self–Determination Act." See 107 Stat. 1408 (1993); 108 Stat. 2527–2528 (1994); 110 Stat. 1321–189 (1996); *id.,* at 3009–212 to 3009–213. These appropriations Acts contained no relevant statutory restriction.

The Tribes (and their *amici*) add, first, that this Court has said that

> "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency." *Lincoln v. Vigil,* 508 U.S. 182, 192[, 113 S.Ct. 2024, 124 L.Ed.2d 101] (1993) (internal quotation marks omitted).

See also *International Union, United Auto., Aerospace & Agricultural Implement Workers of America v. Donovan,* 746 F.2d 855, 860–861 (C.A.D.C.1984) (Scalia, J.); *Blackhawk Heating & Plumbing Co. v. United States,* 224 Ct.Cl. 111, 135, and n. 9, 622 F.2d 539, 552, and n. 9 (1980).

The Tribes and their *amici* add, second, that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. See *Ferris v. United States,* 27 Ct.Cl. 542, 546 (1892) ("A contractor who is one of

several persons to be paid out [638] of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects"); see also *Blackhawk*, *supra*, at 135, and n. 9, 622 F.2d, at 552, and n. 9.

As we have said, the Government denies none of this. Thus, if it is nonetheless to demonstrate that its promises were not legally binding, it must show something special about the promises here at issue. That is precisely what the Government here tries, but fails, to do.

A

The Government initially argues that the Act creates a special kind of "self-determination contrac[t]" with a "unique, government-to-government nature" that differentiates it from "standard government procurement contracts." Brief for Federal Parties 4. Because a tribe does not bargain with the Government at arm's length, *id.*, at 24, the law should charge it with knowledge that the Government has entered into other, similar contracts with other tribes; the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contracts) will not prove sufficient to pay *all* similar contracts, *id.*, at 23–25. Because such a tribe has elected to "ste[p] into the shoes of a federal agency," *id.*, at 25, the law should treat it like an agency; and an agency enjoys no legal entitlement to receive promised amounts from Congress, *id.*, at 24–25. Rather, a tribe should receive only the portion of the total lump-sum appropriation allocated to it, not the entire sum to which a private contractor might well be entitled. *Id.*, at 24.

The Government finds support for this special treatment of its promises made pursuant to the Act by pointing to a statutory provision stating that " 'no [self-determination] contract . . . shall be construed to be a procurement contract,' " *id.*, at 23 (quoting 25 U.S.C. § 450b(j); alterations in original). It finds supplementary support in another provision [639] that says that a tribe need not deliver services " 'in excess of the amount of funds awarded,' " Brief for Federal Parties 24 (quoting 25 U.S.C. § 450*l* (c); citing § 458aaa–7(k)).

These statutory provisions, in our view, fall well short of providing the support the Government needs. In general, the Act's language runs counter to the Government's view. That language strongly suggests that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts). The Act, for example, uses the word "contract" 426 times to describe the nature of the Government's promise; and the word "contract" normally refers to "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," Restatement (Second) of Contracts § 1 (1979). The Act also describes payment of contract support costs in a provision setting forth a sample "Contract." 25 U.S.C. § 450*l* (c) (Model Agreement §§ 1(a)(1), (b)(4)). Further, the Act says that if the Government refuses to pay, then contractors are entitled to "money damages" in accordance with the Contract Disputes Act. 25 U.S.C. § 450m–1(a); see also §§ 450m–1(d), 458cc(h).

Neither do the Act's general purposes support any special treatment. The Act seeks greater tribal self-reliance brought about through more "effective and meaningful participation by the Indian people" in, and less "Federal domination" of, "programs for, and services to, Indians." § 450a(b). The Act also reflects a con-

gressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. See, *e.g.,* § 450j–1(g); see also §§ 450j–1(a), (d)(2).

The specific statutory language to which the Government points—stating that tribes need not spend funds "in excess of the amount of funds awarded," § 450*l* (c) (Model Agreement [640] § 1(b)(5))—does not help the Government. Cf. Brief for Federal Parties 18. This kind of statement often appears in ordinary procurement contracts. See, *e.g.,* 48 CFR § 52.232–20(d)(2) (2004) (sample "Limitation of Cost" clause); see generally W. Keyes, Government Contracts Under the Federal Acquisition Regulation § 32.38, p. 724 (3d ed.2003). Nor can the Government find adequate support in the statute's statement that "no [self-determination] contract ... shall be construed to be a procurement contract." 25 U.S.C. § 450b(j). In context, that statement seems designed to relieve tribes and the Government of the technical burdens that often accompany procurement, not to weaken a contract's binding nature. Cf. 41 CFR § 3–4.6001 (1976) (applying procurement rules to tribal contracts); S.Rep. No. 100–274, p. 7 (1987) (noting that application of procurement rules to contracts with tribes "resulted in excessive paperwork and unduly burdensome reporting requirements"); *id.,* at 18–19 (describing decision not to apply procurement rules to tribal contracts as intended to "greatly reduc[e]" the federal bureaucracy associated with them). Finally, we have found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors. Compare Brief for Federal Parties 23–24 with *Ferris,* 27 Ct.Cl., at 546.

B

The Government next points to an Act proviso, which states:

> "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is [1] *subject to the availability of appropriations* and the Secretary [2] is *not required to reduce funding for programs, projects, or activities serving a tribe to make* [641] *funds available to another tribe* or tribal organization under this subchapter." 25 U.S.C. § 450j–1(b) (emphasis and bracketed numbers added).

The Government believes that the two italicized phrases, taken separately or together, render its promises nonbinding.

1

We begin with phrase [2]. This phrase, says the Government, makes nonbinding a promise to pay one tribe's costs where doing so would require funds that the Government would otherwise devote to "programs, projects, or activities serving ... another tribe," *ibid.* See Brief for Federal Parties 27–36. This argument is inadequate, however, for at the least it runs up against the fact—found by the Federal Circuit, see 334 F.3d, at 1093–1094, and nowhere here denied—that the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue. And as we have said, *supra,* at 1177–1178, the Government itself tells us that, in the case of ordinary contracts, say, procurement contracts,

> "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the*

funds to another purpose or assumes other obligations that exhaust the funds." Brief for Federal Parties 23 (emphasis added).

See, *e.g., Lincoln*, 508 U.S., at 192, 113 S.Ct. 2024; *Blackhawk*, 224 Ct.Cl., at 135, and n. 9, 622 F.2d, at 552, and n. 9; *Ferris, supra*, at 546.

The Government argues that these other funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable to pay "contract support costs" because the Government had to use those funds to satisfy a critically important need, namely, to pay the costs of "inherent federal functions," such as the cost [642] of running the Indian Health Service's central Washington office. Brief for Federal Parties 9–10, 27–34. This argument cannot help the Government, however, for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose. If an important alternative need for funds cannot rescue the Government from the binding effect of its promises where ordinary procurement contracts are at issue, it cannot rescue the Government here, for we can find nothing special in the statute's language or in the contracts.

The Government's best effort to find something special in the statutory language is unpersuasive. The Government points to language that forbids the Government to enter into a contract with a tribe in which it promises to pay the tribe for performing federal functions. See 25 U.S.C. § 458aaa–6(c)(1)(A)(ii); see also §§ 450f(a)(2)(E), 450j–1(a)(1), 450*l* (c) (Model Agreement § 1(a)(2)). Language of this kind, however, which forbids the Government to contract for certain kinds of services, says nothing about the *source* of funds used to pay for the supply of contractually legitimate activities (and that is what is at issue here).

We recognize that agencies may sometimes find that they must spend unrestricted appropriated funds to satisfy needs they believe more important than fulfilling a contractual obligation. But the law normally expects the Government to avoid such situations, for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or, if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise. See *New York Airways, Inc. v. United States*, 177 Ct.Cl. 800, 808–811, 369 F.2d 743, 747–748 (1966) *(per curiam);* 31 U.S.C. §§ 1341(a)(1)(A) and (B) (Anti–Deficiency Act); 41 [643] U.S.C. § 601 *et seq.* (Contract Disputes Act); 31 U.S.C. § 1304 (Judgment Fund); see generally 2 General Accounting Office, Principles of Federal Appropriations Law 6–17 to 6–19 (2d ed. 1992) (hereinafter GAO Redbook). The Government, without denying that this is so as a general matter of procurement law, says nothing to convince us that a different legal rule should apply here.

2

Phrase [1] of the proviso says that the Government's provision of funds under the Act is "subject to the availability of appropriations." 25 U.S.C. § 450j–1(b). This language does not help the Government either. Language of this kind is often used with respect to Government contracts. See, *e.g.*, 22 U.S.C. § 2716(a)(1); 42 U.S.C. §§ 6249(b)(4), 12206(d)(1). This kind of language normally makes clear that an agency and a contracting party can

negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. See, *e.g., Blackhawk, supra,* at 133–138, 622 F.2d, at 551–553; see generally 1 GAO Redbook 4–6 (3d ed.2004); 2 *id.,* at 6–6 to 6–8, 6–17 to 6–19 (2d ed.1992). It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations. See *Ferris,* 27 Ct.Cl., at 546; *New York Airways, supra,* at 809–813, 369 F.2d, at 748–749; *Dougherty v. United States,* 18 Ct.Cl. 496, 503 (1883); 31 U.S.C. §§ 1341(a)(1)(A) and (B) (providing that without some such special authority, a contracting officer cannot bind the Government in the absence of an appropriation). Since Congress appropriated adequate unrestricted funds here, phrase [1], if interpreted as ordinarily understood, would not help the Government.

The Government again argues for a special interpretation. It says the language amounts to "an affirmative *grant* of authority[644] to the Secretary to adjust funding levels based on appropriations." Brief for Federal Parties 41 (emphasis in original). In so arguing, the Government in effect claims (on the basis of this language) to have the legal right to disregard its contractual promises if, for example, it reasonably finds other, more important uses for an otherwise adequate lump-sum appropriation.

In our view, however, the Government must again shoulder the burden of explaining why, in the context of Government contracts, we should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary. We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services. See, *e.g., Franconia Associates v. United States,* 536 U.S. 129, 142, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002); *United States v. Winstar Corp.,* 518 U.S. 839, 884–885, and n. 29, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality opinion); *id.,* at 913, 116 S.Ct. 2432 (BREYER, J., concurring); *Lynch v. United States,* 292 U.S. 571, 580, 54 S.Ct. 840, 78 L.Ed. 1434 (1934). The Government, in our view, has provided no convincing argument for a special, rather than ordinary, interpretation here.

The Government refers to legislative history, see Brief for Federal Parties 41–42 (citing, *e.g.,* S.Rep. No. 100–274, at 48, 57), but that history shows only that Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into; the history does not show that Congress granted such authority. Nor can we find sufficient support in the other statutory provisions to which the Government points. See 25 U.S.C. § 450j–1(c)(2) (requiring the Government to report underpayments of promised contract support costs); 107 Stat. 1408 (Appropriations Act for FY 1994) (providing that $7.5 million[645] for contract support costs in "initial or expanded" contracts "shall remain available" until expended); 108 Stat. 2528 (same for FY 1995); 110 Stat. 1321–189 (same for FY 1996); *id.,* at 3009–213 (same for FY 1997). We cannot adopt the Government's special interpretation of phrase [1] of the proviso.

C

Finally, the Government points to a later enacted statute, § 314 of the Depart-

ment of the Interior and Related Agencies Appropriations Act, 1999, which says:

> "Notwithstanding any other provision of law [the] amounts appropriated to or *earmarked in committee reports* for the ... Indian Health Service ... for payments to tribes ... for contract support costs ... are the total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681–288 (emphasis added).

See Brief for Federal Parties 45–50. The Government adds that congressional Committee Reports "earmarked," *i.e.,* restricted, appropriations available to pay "contract support costs" in each of FYs 1994 through 1997. *Id.,* at 48. And those amounts have long since been spent. See *id.,* at 12. Since those amounts "are the total amounts available for" payment of "contract support costs," the Government says, it is unlawful to pay the Tribes' claims. *Id.,* at 45–48.

The language in question is open to the interpretation that it retroactively bars payment of claims arising under 1994 through 1997 contracts. It is also open to another interpretation. Just prior to Congress' enactment of § 314, the Interior Department's Board of Contract Appeals considered a case similar to the present ones and held that the Government was legally bound to pay amounts it had promised in similar contracts. *Alamo Navajo School Bd., Inc. and Miccosukee Corp.,* 1998–2 BCA ¶ 29,831, p. 147681 (1997), and ¶ 29,832, p. 147699, 1997 WL 759441 (1998). The Indian Health Service contemporaneously issued a draft document that suggested the 646 use of unspent funds appropriated in prior years to pay unpaid "contract support costs." App. 206–209. Indeed, the document referred to use of unobligated funds from years including 1994 through 1997 to pay "contract support cost" debts. *Id.,* at 206–207. Section 314's language may be read as simply forbidding the Service to use those leftover funds for that purpose.

On the basis of language alone we would find either interpretation reasonable. But there are other considerations. The first interpretation would undo a binding governmental contractual promise. A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution. See, *e.g., Winstar, supra,* at 875–876, 116 S.Ct. 2432 (plurality opinion); *Perry v. United States,* 294 U.S. 330, 350–351, 55 S.Ct. 432, 79 L.Ed. 912 (1935); *Lynch, supra,* at 579–580, 54 S.Ct. 840; *United States v. Klein,* 13 Wall. 128, 144–147, 20 L.Ed. 519 (1872); see also, *e.g., Winstar, supra,* at 884–885, and n. 29, 116 S.Ct. 2432 (plurality opinion) (describing practical disadvantages flowing from governmental repudiation); *Lynch, supra,* at 580, 54 S.Ct. 840 (same). And such an interpretation is disfavored. See *Clark v. Martinez, ante,* 543 U.S., at 380–382, 125 S.Ct. 716, 723–724, 160 L.Ed.2d 734; *Zadvydas v. Davis,* 533 U.S. 678, 689, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). This consideration tips the balance against the retroactive interpretation.

The Government, itself not relying on either interpretation, offers us a third. It says that the statute simply clarifies earlier ambiguous appropriations language that was wrongly read as unrestricted. Brief for Federal Parties 48 (citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380–381, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)). The earlier appropriations statutes, however, were not ambiguous. The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding. See, *e.g., Lincoln,* 508 U.S., at 192, 113 S.Ct. 2024; *International Union,* 746 F.2d, at 860–861; *Blackhawk,* 224 Ct.Cl., at 135, and n. 9, 622 F.2d, at 552, and n. 9. No other restrictive

language exists. The earlier appropriations statutes[647] unambiguously provided unrestricted lump-sum appropriations. We therefore cannot accept the Government's interpretation of § 314.

Hence we, like the Federal Circuit, are left with the second interpretation, which we adopt, concluding that Congress intended it in the circumstances. See *Zadvydas, supra,* at 689, 121 S.Ct. 2491; cf. 334 F.3d, at 1092. So interpreted, the provision does not bar recovery here.

For these reasons, we affirm the judgment of the Federal Circuit; we reverse the judgment of the Tenth Circuit; and we remand the cases for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of these cases.

Justice SCALIA, concurring in part.

I join the Court's opinion except its reliance, *ante,* at 1179, on a Senate Committee Report to establish the meaning of the statute at issue here. That source at most indicates the intent of one Committee of one Chamber of Congress—and realistically, probably not even that, since there is no requirement that Committee members vote on, and small probability that they even read, the entire text of a staff-generated report. It is a legal fiction to say that this expresses the intent of the United States Congress. And it is in any event not the inadequately expressed intent of the Congress, but the meaning of what it enacted, that we should be looking for. The only virtue of this cited source (and its entire allure) is that it says precisely what the Court wants.

543 U.S. 551, 161 L.Ed.2d 1

Donald P. ROPER, Superintendent, Potosi Correctional Center, Petitioner,

v.

Christopher SIMMONS.

No. 03–633.

Argued Oct. 13, 2004.

Decided March 1, 2005.

Background: Defendant convicted after he turned 18 of committing first-degree murder when he was 17, and sentenced to death, 944 S.W.2d 165, petitioned for writ of habeas corpus. The Missouri Supreme Court, Laura Denvir Stith, J., 112 S.W.3d 397, granted relief. Certiorari was granted.

Holding: The Supreme Court, Justice Kennedy, held that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments; abrogating *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306.

Affirmed.

Justice Stevens concurred and filed opinion in which Justice Ginsburg joined.

Justice O'Connor dissented and filed opinion.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined.

1. Sentencing and Punishment ⚿1482

Court must refer to evolving standards of decency that mark progress of maturing society when determining which punishments are so disproportionate as to be "cruel and unusual," within meaning of Eighth Amendment prohibition. U.S.C.A. Const.Amend. 8.

LEGAL AUTHORITY AA-74

974 F.Supp.2d 362
United States District Court,
S.D. New York.

CHEVRON CORPORATION, Plaintiff,
v.
Steven DONZIGER, et al., Defendants.

No. 11 Civ. 0691(LAK).
|
March 4, 2014.

Synopsis
Background: Petroleum company brought action against attorney who represented indigenous peoples of Amazonian rain forest and individuals and organizations that assisted him in environmental litigation against it, alleging that they engaged in fraud, civil conspiracy, and violations of Racketeer Influenced and Corrupt Organizations Act (RICO), and seeking declaratory judgment that judgment entered against it in Republic of Ecuador was unenforceable and unrecognizable. Bench trial was held.

Holdings: The District Court, Lewis A. Kaplan, J., held that:

[1] company's withdrawal of its damages claim did not divest court of subject matter jurisdiction;

[2] company had standing to bring action;

[3] judgment entered against company was procured by fraud, and thus was unenforceable;

[4] application of RICO was not impermissibly extraterritorial;

[5] litigation team in environmental action constituted RICO "enterprise";

[6] actions taken by attorney during environmental litigation were sufficiently extortionate in nature to violate Hobbs Act;

[7] attorney violated Foreign Corrupt Practices Act (FCPA) and Travel Act;

[8] defendants engaged in pattern of racketeering activity;

[9] company's injuries satisfied RICO's direct causation mandate;

[10] Ecuadorian decisions in defendants' favor were not entitled to recognition in United States;

[11] lead attorney was subject to personal jurisdiction in New York;

[12] company was not judicially estopped from attacking validity of Ecuadorian judgment;

[13] imposition of constructive trust on attorney's contractual and other rights to fees was warranted; and

[14] imposition of permanent injunction barring enforcement of judgment was warranted.

Ordered accordingly.

West Headnotes (105)

[1] Evidence Sufficiency to support verdict or finding

Disbelief of denial of fact that adverse party has burden of proving is not sufficient to sustain adverse party's burden.

[2] Evidence Credibility of witnesses in general

Factfinder is entitled to believe part or even most of testimony even of one who, it concludes, deliberately has lied under oath as to other particulars.

[3] Racketeer Influenced and Corrupt

OrganizationsJurisdiction and venue

Petroleum company's withdrawal of its damages claim against parties that obtained allegedly fraudulent judgment against it in environmental litigation in Republic of Ecuador and its decision to limit geographic scope of injunction against enforcement of judgment to United States did not divest federal district court of subject matter jurisdiction over company's action alleging fraud, civil conspiracy, and violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and seeking declaratory judgment that Ecuadorian judgment was unenforceable, where company continued to have standing because it sought damages in its original complaint, and continued to seek equitable relief. 18 U.S.C.A. § 1961 et seq.

[4] **Federal Civil Procedure**In general; injury or interest
Federal Courts Timeliness issues

Subject matter jurisdiction, including standing, is determined as of time that action is brought.

[5] **Federal Courts**Rights and interests at stake

Assuming existence of case or controversy at time action is brought, federal court continues to have subject matter jurisdiction unless and until suit becomes moot, i.e., until issues presented are no longer live or parties lack legally cognizable interest in outcome. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] **Federal Courts**Available and effective relief

Case becomes moot only when it is impossible for court to grant any effectual relief whatever to prevailing party.

[7] **Federal Courts**Rights and interests at stake

As long as parties have concrete interest, however small, in litigation's outcome, case is not moot.

[8] **Declaratory Judgment**Validity and construction of judgments and orders
Federal Courts Torts in general
Federal Courts Racketeering

Petroleum company's withdrawal of its damages claim against parties that had obtained allegedly fraudulent judgment against it in environmental litigation in Republic of Ecuador, and its decision to limit geographic scope of injunction against enforcement of judgment to United States, did not render moot company's action alleging fraud, civil conspiracy, and violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and seeking declaratory judgment that Ecuadorian judgment was unenforceable, where company sought equitable relief to rectify past injuries and prevent further injury, and court could still impose constructive trust on proceeds of judgment, including proceeds of intellectual property and royalties already seized from company in Ecuador in judgment enforcement proceedings and $96 million arbitration award in company's favor against Ecuador, in order to prevent defendants from profiting unjustly at company's expense. 18 U.S.C.A. § 1961 et seq.

[9] **Federal Civil Procedure**In general; injury or interest
Federal Civil Procedure Causation; redressability

Irreducible constitutional minimum of standing contains three elements: (1) plaintiff must have suffered injury in fact, i.e., invasion of legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical, that is (2) fairly traceable to defendant's challenged action, and (3) likely to be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[10] **Declaratory Judgment** Subjects of relief in general

Petroleum company had standing to bring action against parties that had obtained allegedly fraudulent judgment against it in environmental litigation in Republic of Ecuador alleging fraud, civil conspiracy, and violations of Racketeer Influenced and Corrupt Organizations Act (RICO) and seeking declaratory judgment that Ecuadorian judgment was unenforceable, even though company had withdrawn its claim for monetary damages, and relief sought would not remedy all past harms or prevent all threatened harms, where company claimed that it already had suffered substantial damages as result of loss of its Ecuadorian trademarks and related revenue streams, which were being applied to satisfaction of judgment, that entry of large judgment against it was imminent as result of alleged corruption, that defendants would move promptly to seek to enforce that judgment, that it was threatened with irreparable injury absent equitable intervention barring defendants from seeking to enforce judgment anywhere in world, and that its injuries were redressable by constructive trust. U.S.C.A. Const. Art. 3, § 2, cl. 1; 18 U.S.C.A. § 1961 et seq.

[11] **Equity** Equity acts in personam, not in rem

Equity acts in personam—it acts on person subject to its jurisdiction, and it therefore may command persons properly before it to cease or perform acts outside its territorial jurisdiction.

[12] **Injunction** Foreign judgments

Principle that equity acts in personam means that court of equity having jurisdiction over individual parties may enjoin those parties from enforcing, or afford other equitable relief with respect to, judgment of another state or another nation.

[13] **Federal Civil Procedure** Fraud; misconduct

Fraud in its procurement is basis for enjoining enforcement of or granting other equitable relief with respect to judgment where other requisites of exercise of equitable power are present.

[14] **Federal Civil Procedure** Fraud; misconduct

Judgment may be avoided if judgment resulted from corruption of or duress upon court.

[15] **Federal Civil Procedure** Fraud; misconduct

Where judge accepts bribe, person injured thereby is entitled to equitable relief.

[16] **Federal Civil Procedure** Fraud; misconduct

Equitable relief will be given from valid judgment to party injured thereby because of duress upon court by other party or third person

if judge submits to duress.

[17] **Judgment** Judgments of Courts of Foreign Countries

Judgment entered against petroleum company in environmental litigation in Republic of Ecuador was procured by fraud, and thus was unenforceable, where plaintiffs agreed to pay trial judge $500,000 out of proceeds of judgment in exchange for him deciding case in their favor and signing judgment provided by them.

[18] **Judgment** Judgments of Courts of Foreign Countries

Judgment entered against petroleum company in environmental litigation in Republic of Ecuador was procured by fraud, and thus was unenforceable, even though court stated in its judgment that expert report played no role in its ultimate decision, where plaintiffs' attorneys coerced presiding judge to allow them to terminate remaining judicial inspections of allegedly contaminated sites, to appoint global expert, and to designate their hand-picked choice for that position by threatening judge with filing of misconduct complaint at time when he was especially vulnerable and by other pressure, and expert's report was in fact relied upon by judgment's author or authors and it played important role in holding company liable to extent of more than $8 billion.

[19] **Judgment** Judgments of Courts of Foreign Countries

Judgment entered against petroleum company in environmental litigation in Republic of Ecuador was procured by fraud, and thus was unenforceable, where plaintiffs bribed court-appointed global expert to submit to court under his name report prepared by their expert.

1 Cases that cite this headnote

[20] **Judgment** Judgments of Courts of Foreign Countries

Plaintiffs in environmental litigation against petroleum company in Republic of Ecuador committed fraud on court and/or extrinsic fraud by ghostwriting all or part of judgment in their favor, and thus judgment was unenforceable, even if judge had not been bribed to enter judgment in their favor.

[21] **Judgment** Judgments of Courts of Foreign Countries

Plaintiffs' deception of trial court by their misrepresentations that court-appointed expert in environmental litigation against petroleum company in Republic of Ecuador was independent and impartial and by passing off of report that was ghostwritten by their experts as his work was fraud warranting equitable relief precluding enforcement of judgment, even absent bribery, where court and company were aware of court-appointed expert's reliance on plaintiffs' experts.

[22] **Federal Civil Procedure** Fraud; misconduct

In considering whether litigant is entitled to relief from prior judgment on ground of fraud, court may consider whether (1) fraud, whether intrinsic or extrinsic, prevented full and fair presentation or determination of litigant's claim or defense in prior action or otherwise would

render it unconscionable to give effect to prior judgment, (2) party seeking relief was diligent in discovering fraud and attacking judgment, and (3) evidence of fraud is clear and convincing.

[23] **Federal Civil Procedure**🔑Fraud; misconduct

If tribunal has been corrupted, no worthwhile interest is served in protecting its judgment.

[24] **Federal Civil Procedure**🔑Fraud; misconduct

Even in cases of extrinsic fraud short of judicial corruption, plaintiff seeking equitable relief from judgment need not prove that prior case's outcome would have been different absent fraud, but ordinarily must show only that fraud prevented losing party from fully and fairly presenting his case or defense or otherwise significantly tainted process.

[25] **Federal Civil Procedure**🔑Fraud; misconduct

Judgments will not be set aside or denied recognition where only impact of misconduct or other taint is to prevent litigant from presenting cumulative evidence, to deceive as to peripheral issue, or the like.

[26] **Racketeer Influenced and Corrupt Organizations**🔑Persons Entitled to Sue or Recover

Equitable relief is available to private plaintiffs under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1964(a).

[27] **Statutes**🔑Extraterritorial operation

When statute gives no clear indication of extraterritorial application, it has none.

[28] **Racketeer Influenced and Corrupt Organizations**🔑Foreign activity
Racketeer Influenced and Corrupt Organizations🔑Pattern of Activity

Racketeer Influenced and Corrupt Organizations Act's (RICO) focus is on pattern of racketeering activity for purposes of analyzing statute's extraterritorial application. 18 U.S.C.A. § 1961 et seq.

[29] **Racketeer Influenced and Corrupt Organizations**🔑Foreign activity

Application of Racketeer Influenced and Corrupt Organizations Act (RICO) was not impermissibly extraterritorial in petroleum company's action alleging that attorney who represented indigenous peoples of Amazonian rain forest and individuals and organizations that assisted him in environmental litigation against it in Republic of Ecuador obtained judgment by fraudulent means, where attorney, who was New York resident, formulated and conducted scheme to victimize company through pattern of racketeering, which included substantial conduct in United States, including use of American firm to ghostwrite expert report used in Ecuadorian case, use of American public relations advisors and lobbyists to create campaign designed to injure company's reputation and impact its stock price, use of New York-based and recruited film maker to prepare film supporting his case, and improper efforts to ward off discovery through

United States courts, and case funding came principally from United States. 18 U.S.C.A. § 1961 et seq.

[30] **Racketeer Influenced and Corrupt Organizations** Informal entities; associations-in-fact

For purposes of Racketeer Influenced and Corrupt Organizations Act (RICO), "enterprise" may consist of group of persons associated together for common purpose of engaging in course of conduct, existence of which is proven by evidence of ongoing organization, formal or informal, and by evidence that various associates function as continuing unit. 18 U.S.C.A. § 1961(4).

[31] **Racketeer Influenced and Corrupt Organizations** Informal entities; associations-in-fact

Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise need not have hierarchical structure or chain of command, and decisions may be made on ad hoc basis and by any number of methods. 18 U.S.C.A. § 1961(4).

[32] **Racketeer Influenced and Corrupt Organizations** Separateness from predicate acts, pattern, or persons

Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise is entity separate and apart from pattern of activity in which it engages, and must be proved separately. 18 U.S.C.A. § 1961(4).

[33] **Racketeer Influenced and Corrupt Organizations** Separateness from predicate acts, pattern, or persons

Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise need not be illegitimate or illegal, and enterprise itself or members of associated-in-fact enterprise need not commit any racketeering acts at all. 18 U.S.C.A. § 1961(4).

[34] **Racketeer Influenced and Corrupt Organizations** Informal entities; associations-in-fact

Litigation team in environmental action against petroleum company in Republic of Ecuador and its affiliates, which included American and Ecuadorian lawyers, groups representing indigenous peoples of Amazonian rain forest, investors who gave money to finance litigation, public relations companies, expert consultants, and others, were group of persons associated in fact for common purpose of pursuing recovery of money from company, whether by settlement or by enforceable judgment, coupled with exertion of pressure on company to pay, and thus constituted "enterprise" within meaning of Racketeer Influenced and Corrupt Organizations Act (RICO), even if not each and every member of enterprise committed acts of racketeering activity. 18 U.S.C.A. § 1961(4).

[35] **Racketeer Influenced and Corrupt Organizations** Association with or participation in enterprise; control or intent

Defendant must have participated in enterprise's operation or management in order to be liable under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(c).

[36] **Racketeer Influenced and Corrupt Organizations**Association with or participation in enterprise; control or intent

Liability under Racketeer Influenced and Corrupt Organizations Act (RICO) is not confined to those with primary responsibility for enterprise's affairs, or to those with formal position in enterprise, and discretionary authority in carrying out instructions of enterprise's principals is sufficient to satisfy RICO's "operation or management" requirement. 18 U.S.C.A. § 1962(c).

[37] **Commerce**Federal Offenses and Prosecutions

Any interference with or effect upon interstate or foreign commerce, however slight, subtle, or even potential, is sufficient to uphold prosecution under Hobbs Act. 18 U.S.C.A. § 1951.

[38] **Commerce**Federal Offenses and Prosecutions

Proof of defendants' intent to affect commerce is unnecessary to support claim under Hobbs Act where interference is natural consequence of offense. 18 U.S.C.A. § 1951.

[39] **Extortion**Threat or duress

Hobbs Act may be violated by threat that causes victim to fear only economic loss. 18 U.S.C.A. § 1951.

[40] **Extortion**Threat or duress
Racketeer Influenced and Corrupt Organizations Extortion

Actions taken by attorney during environmental litigation against petroleum company in Republic of Ecuador were sufficiently extortionate in nature to violate Hobbs Act, as predicate act in company's action against attorney and his accomplices under Racketeer Influenced and Corrupt Organizations Act (RICO), despite attorney's contention that he did nothing more than conduct lawsuit, where attorney used wrongful means to pressure company to settle without exhausting legal process, including coercing trial judge to appoint global expert attorney had selected to examine allegedly contaminated sites, making secret payments to expert to ensure his cooperation, knowingly using false damages estimates, engaging outside firm to write most of expert's report, paying former judge to influence content of trial judge's decisions and to ghostwrite final judgment, bribing trial judge, inciting official investigations and inquiries, attempting to incite criminal prosecution of company's former lawyers, and conducting public relations campaign based on misrepresentations. 18 U.S.C.A. §§ 1951, 1962(c).

2 Cases that cite this headnote

[41] **Constitutional Law**Right to Petition for Redress of Grievances
Racketeer Influenced and Corrupt Organizations Extortion

Attorney's acts of attempted extortion in environmental lawsuit against petroleum company in Republic of Ecuador were not protected petitioning activities under First Amendment, and thus could serve as predicate acts in company's action against attorney and others under Racketeer Influenced and Corrupt Organizations Act (RICO), even if case was not entirely baseless, where attorney and others corrupted case by bribing judge and by other

corrupt and fraudulent means in order to instill fear in company of catastrophic result sufficient to compel it to settle matter. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 1961 et seq.

[42] **Extortion** Threat or duress

Hobbs Act requires only obtaining, or attempting to obtain, property from another, with his consent, induced by wrongful use of fear; no verbal or explicit threat is required. 18 U.S.C.A. § 1951.

[43] **Extortion** Statutory Provisions

Application of Hobbs Act to attorney's extortionate behavior during environmental litigation against petroleum company in Republic of Ecuador was not impermissibly extraterritorial, where attorney's plan was hatched in and run from United States, and its object was multi-billion dollar payment from United States-based company. 18 U.S.C.A. § 1951.

[44] **Postal Service** Effectiveness of matter mailed to further fraud

Any mailing that is incident to essential part of scheme satisfies mail fraud statute's mailing element, even if mailing itself contains no false information. 18 U.S.C.A. § 1341.

[45] **Telecommunications** Knowledge that communication be part of scheme; foreseeability

To violate wire fraud statute, it is not necessary that defendant personally communicate by wire; he or she need only cause wires to be used or initiate series of events that foreseeably would result in their use. 18 U.S.C.A. § 1343.

[46] **Telecommunications** Success or possibility of success of scheme

Scheme need not be successful in order for liability to obtain under wire fraud statute. 18 U.S.C.A. § 1343.

[47] **Telecommunications** Knowledge and intent in general

Fraudulent intent required to establish wire fraud violation is established by proof of intentional fraud or by demonstrating reckless indifference to truth. 18 U.S.C.A. § 1343.

[48] **Telecommunications** Knowledge and intent in general

Intentional fraud under wire fraud statute is established by conscious knowing intent to defraud and that defendant contemplated or intended some harm to victim's property rights. 18 U.S.C.A. § 1343.

[49] **Telecommunications** False pretenses or representations

Materiality element under wire fraud statute is satisfied if false pretense or representation has

some independent value or bears on transaction's ultimate value. 18 U.S.C.A. § 1343.

[50] **Telecommunications**🔑False pretenses or representations

Actions taken by attorney during environmental litigation against petroleum company in Republic of Ecuador violated wire fraud statute, and thus constituted predicate act in company's action against attorney and his accomplices under Racketeer Influenced and Corrupt Organizations Act (RICO), where attorney extensively used wires to transmit messages in connection with several deceptive schemes to pressure company to settle without exhausting legal process, including coercing trial judge to appoint global expert he had selected to examine allegedly contaminated sites, making secret payments to expert to ensure his cooperation, knowingly using false damages estimates, engaging outside firm to write most of expert's report, paying former judge to influence content of trial judge's decisions and to ghostwrite final judgment, bribing trial judge, inciting official investigations and inquiries, attempting to incite criminal prosecution of company's former lawyers, and conducting public relations campaign based on misrepresentations. 18 U.S.C.A. §§ 1343, 1962(c).

[51] **Currency Regulation**🔑Money laundering
Racketeer Influenced and Corrupt Organizations🔑Particular acts

Lead attorney in environmental litigation against petroleum company in Republic of Ecuador engaged in money laundering, as predicate act in company's action against attorney and his accomplices under Racketeer Influenced and Corrupt Organizations Act (RICO), where attorney's responsibilities included obtaining money to fund litigation and related activities, including public relations and media, and disbursing, or causing disbursement of, funds thus raised to vendors and to recipients in Ecuador, and money sent from United States was used to pay court-appointed expert outside court process and to bribe trial judge. 18 U.S.C.A. §§ 1956, 1962(c).

[52] **Racketeer Influenced and Corrupt Organizations**🔑Particular acts

Obstruction of justice is predicate act under Racketeer Influenced and Corrupt Organizations Act (RICO) in cases where defendant's efforts were designed to prevent detection and prosecution of organization's illegal activities and were part of consistent pattern that was likely to continue for indefinite future, absent outside intervention. 18 U.S.C.A. § 1961 et seq.

[53] **Obstructing Justice**🔑Falsifying or altering evidence
Racketeer Influenced and Corrupt Organizations🔑Particular acts

Attorney's submission, in petroleum company's proceeding for discovery of documents prepared for attorney's clients for use in environmental litigation against company in Republic of Ecuador, of declaration prepared by Ecuadorian lawyer explaining how report allegedly prepared by court-appointed expert in case came to contain information from report prepared by their consultants was obstruction of justice, and thus constituted predicate act in company's action against attorney and his accomplices under Racketeer Influenced and Corrupt Organizations Act (RICO), where declaration failed to mention that declarant had threatened judge with misconduct complaint unless he cancelled judicial inspections and appointed global expert, and that they had made secret payments to expert outside court process, purpose of declaration was to prevent disclosure of consultants' documents, and attorney was aware of falsity of declarant's statements. 18

U.S.C.A. § 1961 et seq.; 28 U.S.C.A. § 1782.

[54] **Obstructing Justice** Influencing testimony; procuring false testimony

Attempt by attorney representing indigenous peoples of Amazonian rain forest in environmental litigation against petroleum company to have outside consultant materially alter declaration he submitted in prior judicial proceeding with regard to his contacts with court-appointed expert constituted witness tampering, where attorney knew that representations he wanted consultant to make were false, and purpose of suggested statements was to mislead court.

[55] **Commerce** Federal Offenses and Prosecutions
Commerce Offenses involving activity unlawful under state law
Securities Regulation Foreign Transactions or Securities

American attorney's use of internet to send emails in furtherance of scheme to bribe court-appointed expert in environmental litigation in Republic of Ecuador and his transfer of funds to secret bank account in Ecuador to pay expert satisfied interstate commerce requirement of Foreign Corrupt Practices Act (FCPA) and Travel Act. Foreign Corrupt Practices Act of 1977, § 103(a) et seq., 15 U.S.C.A. § 78dd–1 et seq.; 18 U.S.C.A. § 1512.

[56] **Commerce** Offenses involving activity unlawful under state law
Racketeer Influenced and Corrupt Organizations Bribery
Securities Regulation Foreign Transactions or Securities

American attorney's use of internet to send emails in furtherance of scheme to bribe court-appointed expert in environmental litigation in Republic of Ecuador and his transfer of funds to secret bank account to pay expert were corrupt and intended to influence official action, in violation of Foreign Corrupt Practices Act (FCPA) and Travel Act, and thus constituted predicate acts under Racketeer Influenced and Corrupt Organizations Act (RICO), where attorney intended that at least part of payments via secret account would ensure that expert did what attorney and his confederates wanted him to do to influence outcome of litigation in their favor. Foreign Corrupt Practices Act of 1977, § 103(a) et seq., 15 U.S.C.A. § 78dd–1 et seq.; 18 U.S.C.A. §§ 1512, 1961(1)(C).

[57] **Securities Regulation** Foreign Transactions or Securities

Attorney's payments to court-appointed expert in environmental litigation in Republic of Ecuador satisfied Foreign Corrupt Practices Act's (FCPA) business purpose test, where attorney made payments to increase likelihood that expert's report would result in favorable judgment for his clients, thereby permitting him to obtain contingency fee. Foreign Corrupt Practices Act of 1977, § 103(a) et seq., 15 U.S.C.A. § 78dd–1 et seq.

[58] **Racketeer Influenced and Corrupt Organizations** Continuity or relatedness; ongoing activity

To establish pattern of racketeering activity under Racketeer Influenced and Corrupt Organizations Act (RICO), open-ended continuity requires threat of continuing criminal activity beyond period during which predicate acts were performed. 18 U.S.C.A. § 1961(5).

1 Cases that cite this headnote

[59] Racketeer Influenced and Corrupt Organizations Time and duration

To establish pattern of racketeering activity under Racketeer Influenced and Corrupt Organizations Act (RICO), closed-ended continuity requires predicate acts extended over substantial period of time, with two years generally considered minimum duration necessary. 18 U.S.C.A. § 1961(5).

[60] Racketeer Influenced and Corrupt Organizations Time and duration

Efforts by attorney who represented indigenous peoples of Amazonian rain forest and individuals and organizations that assisted him to hold petroleum company liable for environmental damages in Republic of Ecuador satisfied Racketeer Influenced and Corrupt Organizations Act's (RICO) pattern of racketeering activity requirement, where defendants engaged in five-year scheme to extort and defraud company through series of predicate actions, including bribery of Ecuadorian judge and court-appointed expert, witness tampering, money laundering, wire fraud, extortion, and fraudulent misrepresentations. 18 U.S.C.A. § 1961(5).

[61] Racketeer Influenced and Corrupt Organizations Foreign activity

Conduct within United States of litigation team that brought environmental action against petroleum company in Republic of Ecuador demonstrated domestic pattern of racketeering activity, and thus imposition of liability did not constitute impermissible extraterritorial application of Racketeer Influenced and Corrupt Organizations Act (RICO), even though certain actions took place abroad, where lead attorney was American, funding for litigation came from United States, company was American, environmental organizations that help pressure Ecuadorian officials operated in United States, American scientists prepared fraudulent expert report used as basis for Ecuadorian judgment, predicate acts of bribery of Ecuadorian judge and court-appointed expert, witness tampering, money laundering, wire fraud, extortion, and fraudulent misrepresentations were indictable and/or chargeable under statutes enumerated in RICO statute, and American law firms were used to attempt to prevent disclosure of truth regarding expert and his report. 18 U.S.C.A. § 1961 et seq.

[62] Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

Damages and equitable relief are available under Racketeer Influenced and Corrupt Organizations Act (RICO) only to those persons injured by reason of defendant's predicate acts. 18 U.S.C.A. § 1964(c).

1 Cases that cite this headnote

[63] Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

Plaintiff asserting claim under Racketeer Influenced and Corrupt Organizations Act (RICO) must prove only injury directly resulting from some or all activities comprising violation, and need not prove that every predicate act constituting pattern injured plaintiff in some way. 18 U.S.C.A. § 1964(c).

[64] **Racketeer Influenced and Corrupt Organizations**🔑Causal relationship; direct or indirect injury

Petroleum company's injuries resulting from fraudulent actions taken by litigation team in environmental action in Republic of Ecuador, including attachment of its property in Ecuador, and threat of enforcement of Ecuadorian judgment elsewhere, satisfied Racketeer Influenced and Corrupt Organizations Act's (RICO) direct causation mandate, where litigation team engaged in multiple extortionate acts, wire fraud, and violations of Travel Act and Foreign Corrupt Practices Act (FCPA) to obtain judgment, including ghostwriting court-appointed expert's report and Ecuadorian court's judgment, and paying expert and judge bribes to sign those documents, and lead attorney realized gains from his unlawful acts and threatened to realize more as result of his retainer agreement and contingent fee agreement. Foreign Corrupt Practices Act of 1977, § 103(a) et seq., 15 U.S.C.A. § 78dd–1 et seq.; 18 U.S.C.A. §§ 1343, 1512, 1964(c).

1 Cases that cite this headnote

[65] **Conspiracy**🔑Racketeering conspiracies in general

Racketeer Influenced and Corrupt Organizations Act's (RICO) conspiracy provision does not require overt act to effect conspiracy's object. 18 U.S.C.A. § 1962(d).

[66] **Evidence**🔑Judicial Acts and Records

Ecuadorian trial court judgment and appellate court decisions did not fall within scope of public records exception to hearsay rule, and thus were not admissible for truth of matters asserted therein in action alleging that judgment had been procured by fraudulent means. Fed.Rules Evid.Rule 803(8), 28 U.S.C.A.

[67] **Judgment**🔑Judgments of Courts of Foreign Countries

Ecuadorian intermediate appellate court's decision affirming trial court's multi-billion dollar judgment against petroleum company in environmental action did not break chain of causation arising from plaintiffs' litigation team's fraud in obtaining judgment, where appellate court expressly declined to examine company's allegations of fraud and corruption, and did not review record de novo.

[68] **Judgment**🔑Judgments of Courts of Foreign Countries

Judgment of Ecuadorian National Court of Justice affirming trial court's multi-billion dollar judgment against petroleum company in environmental action did not break chain of causation arising from plaintiffs' litigation team's fraud in obtaining judgment, where court reviewed legal arguments only, and dismissed company's claim that proceedings should have been nullified due to underlying fraud because "it is not possible to seek the cassation of a judgment by making these kinds of allegations" where "appeal does not indicate which law has been violated" or "which legal rules have been infringed."

[69] **Judgment**🔑Judgments of Courts of Foreign Countries

United States courts may not give comity to or recognize foreign state's judgment if judgment was rendered under judicial system that does not provide impartial tribunals or procedures

compatible with due process of law. U.S.C.A. Const.Amend. 5.

[70] **Judgment**Judgments of Courts of Foreign Countries

In determining whether foreign legal system provides impartial tribunals and procedures compatible with due process of law, and is thus enforceable in United States, court considers not only structure and design of judicial system at issue, but also its practice during period in question. U.S.C.A. Const.Amend. 5.

[71] **Constitutional Law**Foreign judgments
JudgmentJudgments of Courts of Foreign Countries

Ecuadorian decisions finding petroleum company liable for billions of dollars for environmental damage to Amazonian rain forest did not comport with requirements of due process, and thus were not entitled to recognition in United States, in light of evidence that, at time judgment was entered, judicial system in Ecuador was weak, lacked integrity, was subject to control by executive branch, and sometimes decided cases based on substantial outside pressures, especially in cases of interest to government. U.S.C.A. Const.Amend. 5; N.Y.McKinney's CPLR 5301 et seq.

[72] **Constitutional Law**Non-residents in general
Federal Courts Actions by or Against Nonresidents; "Long-Arm" Jurisdiction

In determining whether court has personal jurisdiction over out-of-state defendant, it must determine whether plaintiff has shown that defendants are amenable to service of process under forum state's laws, and it must assess whether court's assertion of jurisdiction under these laws comports with requirements of due process. U.S.C.A. Const.Amend. 14.

[73] **Federal Courts**Particular Relationships

Lead attorney for indigenous peoples of Amazonian rain forest in environmental litigation against petroleum company in Republic of Ecuador was subject to personal jurisdiction in New York in company's action seeking declaratory judgment that judgment entered against it in Ecuador was unenforceable and unrecognizable, where attorney lived and worked in New York, his family and law practice were in New York, attorney had filed related action in New York court, many of attorney's and his associates' actions in support of their fraudulent strategy took place in New York, bank accounts used to support litigation were in New York, attorney managed fundraising efforts and media campaign for case largely from New York, and attorney orchestrated litigation team's efforts first to conceal and later to minimize fraud in obtaining judgment from New York. N.Y.McKinney's CPLR 302(a)(1).

[74] **Federal Courts**Particular Entities, Contexts, and Causes of Action

Representative plaintiffs in environmental litigation by indigenous peoples of Amazonian rain forest against petroleum company in Republic of Ecuador transacted business in New York, and thus were subject to personal jurisdiction in New York in company's action seeking declaratory judgment that judgment entered against it in Ecuador was unenforceable and unrecognizable, even though plaintiffs did not consent to or control case management and strategy minutiae, where representatives had engaged New York-based lawyer as their lead attorney, lawyer conducted substantial activities in New York in connection with Ecuador

litigation, actions that lawyer took in New York relating to Ecuador litigation and pressure campaign were designed to secure substantial judgment in their favor, representatives filed suit in New York court, and company's fraud claims arose out of many of lawyer's activities in New York, including orchestrating fraudulent expert report for use in Ecuador, retaining expert and later misusing his work, supervising Ecuadorian lawyers, and engaging in public relations pressure campaign against company. N.Y.McKinney's CPLR 302(a)(1).

[75] **Courts**Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction

Under New York law, among factors considered in evaluating agency-based personal jurisdiction are whether nondomiciliary consented to actor's conduct, whether nondomiciliary benefited from that conduct, and whether nondomiciliary exercised some control over agent. N.Y.McKinney's CPLR 302(a)(1).

[76] **Courts**Business contacts and activities; transacting or doing business

In order to establish personal jurisdiction under New York's long-arm statute, plaintiff must prove that its cause of action arises out of defendant's transaction of business in New York. N.Y.McKinney's CPLR 302(a)(1).

[77] **Courts**Business contacts and activities; transacting or doing business

New York long-arm statute's requirement that cause of action arise out of defendant's transaction of business in New York requires articulable nexus, or substantial relationship, between claim asserted and actions that occurred in New York, but it does not require causal link between defendant's New York business activity and plaintiff's injury; it is enough that at least one element of cause of action arises from New York contacts. N.Y.McKinney's CPLR 302(a)(1).

[78] **Constitutional Law**Representatives of organizations; officers, agents, and employees **Federal Courts**Particular Entities, Contexts, and Causes of Action

Exercise of personal jurisdiction over representative plaintiffs in environmental litigation by indigenous peoples of Amazonian rain forest against petroleum company in Republic of Ecuador comported with due process in company's action seeking declaratory judgment that judgment entered against it in Ecuador was unenforceable and unrecognizable, even though representatives were unable to obtain testimony or documents from their Ecuadorian lawyers, where representatives filed multiple lawsuits against company in New York, representative hired New York lawyer as lead attorney in Ecuador litigation, and representatives made no effort to obtain testimony or documents from their Ecuadorian lawyers. U.S.C.A. Const.Amend. 14.

[79] **Estoppel**Claim inconsistent with previous claim or position in general

Petroleum company was not judicially estopped from attacking validity of judgment entered against it in environmental litigation in Republic of Ecuador due to fact that company it purchased agreed to being sued in Ecuador, offered to satisfy any judgment rendered there except in limited circumstances, and extolled supposed virtues of Ecuadorian legal system in order to procure dismissal of prior New York action on forum non conveniens grounds, where

company was not party to prior lawsuit, acquired company continued to operate independently as separate corporation, and acquired company reserved right to contest validity of any judgment entered in Ecuador in circumstances permitted by Recognition of Foreign Country Money Judgments Act. N.Y.McKinney's CPLR 5301 et seq.

[80] **Equity** Nature of unconscionable conduct

Petroleum company's claim that judgment obtained against it in environmental litigation in Republic of Ecuador was procured by fraudulent means, and thus was unenforceable and unrecognizable in United States, was not barred by unclean hands, despite plaintiffs' allegation that employee of one of its contractors schemed to have trial judge removed from case by threatening to disclose that he was involved in bribery scheme and would rule against company, where there was no evidence that employee acted at company's behest when he recorded meetings in question, company released tapes to Ecuadorian government and public after it became aware of them, and company's purported wrongdoing did not approach plaintiffs' misconduct in gravity.

[81] **Injunction** Foreign judgments

Petroleum company had no adequate remedy at law, for purposes of determining whether it was entitled to equitable relief preventing enforcement of judgment entered against it in environmental litigation in Republic of Ecuador, despite plaintiffs' contention that company could attempt to modify or vacate judgment in Ecuador, or raise its claim that judgment was procured by fraud wherever and whenever judgment was sought to be enforced, where Ecuador did not provide impartial tribunals or procedures compatible with due process, judgment had already been enforced in Ecuador and assets were transferred beyond reach of United States or Ecuadorian courts, plaintiffs' enforcement strategy contemplated attacks on company, its assets, and subsidiaries in multiple jurisdictions outside United States followed by proceedings in United States, defending multiple enforcement actions would require company to expend significant legal fees, and success in those actions would not remedy harms to its reputation and goodwill.

1 Cases that cite this headnote

[82] **Equity** Adequacy of Legal Remedy

Fact that there is some remedy at law does not preclude equitable relief.

[83] **Equity** Adequacy of Legal Remedy

Equitable relief is appropriate where legal remedy is incomplete and inadequate to accomplish substantial justice.

[84] **Injunction** Foreign judgments

Money damages were not adequate remedy for harm suffered by petroleum company as result of fraudulently-obtained judgment entered against it in environmental litigation in Republic of Ecuador, for purposes of determining whether it was entitled to equitable relief preventing enforcement of judgment.

[85] **Trusts** Fraud in general

Imposition of constructive trust on attorney's contractual and other rights to fees and other payments for work performed in connection

with environmental litigation against petroleum company in Republic of Ecuador was warranted, where attorney had fraudulently obtained judgment by ghostwriting opinion of court-appointed expert used to calculate damages and trial judge's judgment, and bribing expert and judge to sign those documents.

[86] **Trusts** Nature of constructive trust

Court of equity in decreeing constructive trust is bound by no unyielding formula; equity of transaction must shape measure of relief.

[87] **Injunction** Foreign judgments

Imposition of permanent injunction barring enforcement of judgment that was procured in environmental litigation against petroleum company in Republic of Ecuador through fraud and violation of Racketeer Influenced and Corrupt Organizations Act (RICO) was warranted, even though no action had yet been filed to enforce judgment in United States, where prevailing plaintiffs had always intended to seek to enforce judgment in United States, but had delayed doing so temporarily for tactical reasons. 18 U.S.C.A. § 1961 et seq.

[88] **Evidence** Form and Sufficiency in General

Requirements for qualification as business record can be met by documentary evidence, affidavits, or parties' admission, i.e., by circumstantial evidence, or by combination of direct and circumstantial evidence. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[89] **Evidence** Banks, carriers, telegraphs, and telephones

Court would take judicial notice that banks routinely produce periodic statements for their customers and that those periodic statements reflect any and all deposits, withdrawals, debits, and credits during stated periods of time. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[90] **Evidence** Statements of account

Bank statements showing series of deposits into former judge's bank account were admissible under business records exception to hearsay rule in action alleging that plaintiffs in underlying litigation had made payments to former judge as compensation for favorable orders he drafted in that case. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

1 Cases that cite this headnote

[91] **Evidence** Memoranda and statements

There was sufficient documentary evidence to provide foundation for bank deposit slips' admissibility under business records exception to hearsay rule in action alleging that former judge had received payments from plaintiffs in underlying litigation to ghostwrite favorable orders, where judge's bank statements corroborated dates, amounts, and account numbers listed on deposit slips, and judge testified that he obtained slips directly from bank. Fed.Rules Evid.Rule 803(6), 28 U.S.C.A.

[92] **Evidence** Making of statement fact in issue

Attorney's statement that his clients had agreed to pay trial judge $500,000 from proceeds of judgment was not hearsay in action to bar enforcement of judgment on ground that it was obtained fraudulently, where statement was offered to prove that attorney made statement, which was relevant to show why judge thereafter did what he did.

[93] **Evidence** Conspirators and Persons Acting Together

Trial judge's statement to former judge that plaintiff in underlying litigation had told him that he would pay trial judge $500,000 from proceeds of favorable judgment was admissible as co-conspirator declaration in action to bar enforcement of judgment on ground that it was obtained fraudulently, where trial judge made statement to induce former judge to ghostwrite judgment in exchange for portion of that bribe. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Cases that cite this headnote

[94] **Conspiracy** Obstructing justice, bribery, and perjury

There can be no conspiracy to bribe because crime of bribery is one that necessarily requires concerted action of briber and bribee.

[95] **Evidence** Necessity that statement be made in pursuance of and during pendency of conspiracy
Evidence Existence of conspiracy or common purpose

Admission of statement as co-conspirator's non-hearsay declaration does not require that technical elements necessary to obtain conspiracy conviction all have been satisfied, only that statements were made in furtherance of some joint purpose. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[96] **Evidence** Effect of introducing part of document or record

Only evidence that is necessary to explain admitted portion, to place admitted portion in context, to avoid misleading jury, or to ensure fair and impartial understanding of admitted portion is admissible under rule of completeness. Fed.Rules Evid.Rule 106, 28 U.S.C.A.

[97] **Evidence** Effect of introducing part of document or record

Rule of completeness does not compel admission of otherwise inadmissible hearsay evidence. Fed.Rules Evid.Rule 106, 28 U.S.C.A.

[98] **Evidence** Certificates and affidavits

Deponents' declarations that were not consistent with their prior deposition testimony were not admissible for truth of matters asserted pursuant to residual hearsay exception; given divergence between what witnesses said under oath at their depositions and what they said under oath in their declarations, it was unclear that either was trustworthy. Fed.Rules Evid.Rule 807, 28 U.S.C.A.

[99] **Evidence** Failure to Call Witness

Where one party alone could produce material witness but fails to do so, or where party to action is, in effect, missing witness, inference that testimony would favor opposing party may be appropriate.

1 Cases that cite this headnote

[100] **Evidence** Witnesses equally within reach of the parties in general

If witness is available equally to both sides, failure to produce is open to inference against both parties or neither party.

[101] **Evidence** Failure to Call Witness

Where missing witness's testimony would be cumulative, adverse inference arising from failure to produce witness is not available.

2 Cases that cite this headnote

[102] **Evidence** Failure to Call Witness

Adverse missing witness inference is not warranted where controlling or related party makes missing witness available to its opponent, party seeking adverse inference equally could obtain missing witness's testimony, or party seeking adverse inference made no attempt to obtain witness's testimony.

1 Cases that cite this headnote

[103] **Evidence** Failure to Call Witness

Attorney's failure to call Ecuadorian local counsel as witnesses gave rise to inference that their testimony would have been adverse in action seeking to enjoin enforcement of judgment obtained in Republic of Ecuador on ground that it was procured through bribery and other deceptive means, where attorney had close personal relationships with local counsel, local counsel was counsel of record in Ecuadorian courts and held power of attorney from all plaintiffs in underlying action, all local counsel had previously traveled to United States in connection with case, and local counsel possessed material, non-cumulative information going to heart of case.

[104] **Evidence** Witnesses presently or formerly employed by parties failing to call them

Where employee who could give important testimony relative to issues in litigation is not present and his absence is unaccounted for by his employer, who is party to action, presumption arises that employee's testimony would be unfavorable to his employer.

[105] **Evidence** Witnesses presently or formerly employed by parties failing to call them

No adverse inference arose from petroleum company's failure to call employees of environmental testing firm that plaintiffs had hired in connection with environmental litigation against company in Republic of Ecuador as witnesses in company's action to enjoin enforcement of judgment entered in that action, even though company's settlement agreement with firm required employees to testify if so requested by company, and company included them on its witness list, where plaintiffs were aware that employees had revised their accounts of events, but made no effort to seek their testimony, and agreed at trial to receipt of employees' declarations for non-hearsay purposes.

Attorneys and Law Firms

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OPINION

LEWIS A. KAPLAN, District Judge.

[1-105] **Editor Note:** The paragraphs related to headnotes 1–105 are found on the supplemental pieces of this opinion on Westlaw. Part 1 is 2014 WL 815553; Part 2 is 2014 WL 815613; Part 3 is 2014 WL 815715; Part 4 is 2014 WL 815869 [Headnotes 1–2]; Part 5 is 2014 WL 815923 [Headnotes 3–51]; Part 6 is 2014 WL 815961 [Headnotes 52–87]; Part 7 is 2014 WL 816086 [Headnotes 88–105]

***383** *Introduction*

Steven Donziger, a New York City lawyer, led a group of American and Ecuadorian lawyers who brought an action in Ecuador (the "Lago Agrio" case) in the names of 47 plaintiffs (the "Lago Agrio Plaintiffs" or "LAPs"), on behalf of thousands of indigenous peoples of the Orienté region of Ecuador, against Chevron Corporation

("Chevron"). They claimed that Chevron was responsible for extensive environmental damage caused by oil activities of Texaco, Inc. ("Texaco"), that ended more than twenty years ago and long before Chevron acquired Texaco's stock.

After years of pressuring Chevron to settle by a variety of both legitimate and illegitimate means, Donziger and his ***384** clients obtained a multibillion dollar judgment (the "Judgment") in the Ecuadorian courts and now seek to enforce it around the world. Chevron then brought this action, contending among other things that the Judgment was procured by fraud. Following a full trial, it now seeks equitable relief against Donziger and the two of his Ecuadorian clients who defended this case in order to prevent any of them from profiting from the alleged fraud or from seeking to enforce the Judgment in the United States.

This case is extraordinary. The facts are many and sometimes complex. They include things that normally come only out of Hollywood—coded emails among Donziger and his colleagues describing their private interactions with and machinations directed at judges and a court appointed expert, their payments to a supposedly neutral expert out of a secret account, a lawyer who invited a film crew to innumerable private strategy meetings and even to *ex parte* meetings with judges, an Ecuadorian judge who claims to have written the multibillion dollar decision but who was so inexperienced and uncomfortable with civil cases that he had someone else (a former judge who had been removed from the bench) draft some civil decisions for him, an 18–year old typist who supposedly did Internet research in American, English, and French law for the same judge, who knew only Spanish, and much more. The evidence is voluminous. The transnational elements of the case make it sensitive and challenging. Nevertheless, the Court has had the benefit of a lengthy trial. It has heard 31 witnesses in person and considered deposition and/or other sworn or, in one instance, stipulated testimony of 37 others. It has considered thousands of exhibits. It has made its findings, which of necessity are lengthy and detailed.

Upon consideration of all of the evidence, including the credibility of the witnesses—though several of the most important declined to testify—the Court finds that Donziger began his involvement in this controversy with a desire to improve conditions in the area in which his Ecuadorian clients live. To be sure, he sought also to do well for himself while doing good for others, but there was nothing wrong with that. In the end, however, he and the Ecuadorian lawyers he led corrupted the Lago Agrio case. They submitted fraudulent evidence. They coerced one judge, first to use a court-appointed, supposedly impartial, "global expert" to make an overall damages assessment and, then, to appoint to that important role a man whom Donziger hand-picked and paid to "totally play ball" with the LAPs. They then paid a Colorado consulting firm secretly to write all or most of the global expert's report, falsely presented the report as the work of the court-appointed and supposedly impartial expert, and told half-truths or worse to U.S. courts in attempts to prevent exposure of that and other wrongdoing. Ultimately, the LAP team wrote the Lago Agrio court's Judgment themselves and promised $500,000 to the Ecuadorian judge to rule in their favor and sign their judgment. If ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it.

The defendants seek to avoid responsibility for their actions by emphasizing that the Lago Agrio case took place in Ecuador and by invoking the principle of comity. But that warrants no different conclusion.

Comity and respect for other nations are important. But comity does not command blind acquiescence in injustice, least of all acquiescence within the bounds of our own nation. Courts of equity long have granted relief against fraudulent judgments entered in other states and, though less frequently, ***385** other countries. Moreover, the United States has important interests here. The misconduct at issue was planned, supervised, financed and executed in important (but not all) respects by Americans in the United States in order to extract money from a U.S. victim.

That said, considerations of comity and the avoidance of any misunderstanding have shaped the relief sought here. Chevron no longer seeks, and this Court does not grant, an injunction barring enforcement of the Lago Agrio Judgment anywhere in the world. What this Court does do is to prevent Donziger and the two LAP Representatives, who are subject to this Court's personal jurisdiction, from profiting in any way from the egregious fraud that occurred here. That is quite a different matter. Indeed, the LAP Representatives' lawyer recently conceded before the Second Circuit that the defendants "would not have a problem" with "the alternative relief that [Chevron] would be seeking, such as enjoining the person who paid the bribe from benefitting from it," assuming that the judge was bribed.[1] Defendants thus have acknowledged the propriety of equitable relief to prevent individuals subject to the Court's jurisdiction from benefitting from misdeeds for which they are responsible. And while the Court does enjoin enforcement of the Judgment by these defendants in the United States, that limited injunction

raises no issues of comity or international relations. It is the prerogative of American courts to determine whether foreign judgments may be enforced in this country.

Donziger is intelligent, resourceful, and a master of public and media relations. An extensive public relations and media campaign has been part of his strategy from early days, and it continues. Among its objectives has been to shift the focus from the fraud on Chevron and the Lago Agrio court to the environmental harm that Donziger and the LAPs claim was done in the Orienté. Indeed, that was a principal focus of defendants' case at trial and of their post-trial briefing. But one should not be distracted from the issues actually presented in *this* case.

The Court assumes that there is pollution in the Orienté. On that assumption, Texaco and perhaps even Chevron—though it never drilled for oil in Ecuador—might bear some responsibility. In any case, improvement of conditions for the residents of the Orienté appears to be both desirable and overdue. But the defendants' effort to change the subject to the Orienté, understandable as it is as a tactic, misses the point of this case.

The issue here is not what happened in the Orienté more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. It instead is whether a court decision was procured by corrupt means, regardless of whether the cause was just. An innocent defendant is no more entitled to submit false evidence, to coopt and pay off a court-appointed expert, or to coerce or bribe a judge or jury than a guilty one. So even if Donziger and his clients had a just cause—and the Court expresses no opinion on that—they were not entitled to corrupt the process to achieve their goal.

Justice is not served by inflicting injustice. The ends do not justify the means. There is no "Robin Hood" defense to illegal and wrongful conduct. And the defendants' "this-is-the-way-it-is-done-in-Ecuador" ***386** excuses—actually a remarkable insult to the people of Ecuador—do not help them. The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador—and they knew it. Indeed, one Ecuadorian legal team member, in a moment of panicky candor, admitted that if documents exposing just part of what they had done were to come to light, "apart from destroying the proceeding, all of us, your attorneys, might go to jail."[2] It is time to face the facts.

Facts

I. The Background

The events at issue in this case took place in law offices in New York, Philadelphia, and elsewhere in the United States, a consulting firm in Colorado, a public relations firm in Washington, the Orienté, courthouses in Ecuador and all over the United States, the offices of a New York documentary film maker, news media throughout the world, and government offices in Ecuador and the United States, and other places. They involved an array of lawyers, financial backers, scientists, judges, celebrities, media consultants, non-governmental organizations, politicians, and law school interns. But despite the case's complex history, reach and its large cast of players, the events ultimately center on one man—Steven Donziger—and his team of Ecuadorian lawyers and U.S. and European backers.

We begin with the backdrop against which these events took place.

A. Texaco's Operations in Ecuador

In 1964, the Republic of Ecuador ("ROE") granted to a Gulf Oil subsidiary and to TexPet, an indirect subsidiary of Texaco, a concession to explore for and produce oil in the Orienté.[3] The Gulf–TexPet joint venture, of which TexPet was the sole operator, became known as the Consortium.[4] In 1973, however, Ecuador's state-owned oil company, now known as PetroEcuador, acquired a 25 percent interest in the Consortium, 12.5 percent from each of TexPet and Gulf.[5] Shortly thereafter, PetroEcuador acquired Gulf's remaining equity and thus became the majority owner of the Consortium. TexPet continued to hold a 37.5 percent interest.[6]

TexPet operated for the Consortium until June 1992, when the Concession expired. TexPet's 37.5 percent interest reverted to PetroEcuador, and TexPet began the process of winding down its operations.[7] In connection with the termination of TexPet's Ecuadorian operations, TexPet and Texaco in 1993 entered into a Memorandum of Understanding with the ROE that provided that TexPet would be released from any potential claim for environmental harm once TexPet performed an agreed-upon remediation in the area in which it had operated.[8] In the Spring of 1995, the parties executed a Settlement Agreement and Scope of Work agreement

***387** [9] (the "Settlement Agreement") that laid out specific tasks TexPet was required to complete before its remediation and wind down were complete, whereupon it would be entitled to a release.[10] From 1995 through 1998, ROE inspectors issued 52 *actas* in which they confirmed TexPet's completion of each task.[11] The final *acta*—the 52nd Certificate—was issued in September 1998 and stated that TexPet had complied with its obligations under the Settlement Agreement. The final release was signed on September 30, 1998.[12] It stated that TexPet had fully performed its obligations under the MOU and Settlement Agreement and that TexPet was released from all potential claims by the ROE and PetroEcuador.[13]

B. Aguinda

While TexPet was winding down its operations in Ecuador, a group of Ecuadorian plaintiffs brought a class action against Texaco in the Southern District of New York ("*Aguinda* ")[14] seeking billions of dollars of damages for alleged injury to the environment and health of the plaintiffs as well as certain equitable relief within Ecuador.[15] The principal lawyers for the plaintiffs were Cristobal Bonifaz, Joseph Kohn, and Steven Donziger.[16] As all three figured in the story that is at the heart of this case, we pause to identify them.

1. The Principal Plaintiffs' Lawyers in Aguinda

a. Cristobal Bonifaz

Cristobal Bonifaz, grandson of a former Ecuadorian president, practiced law in Amherst, Massachusetts in the early 1990s. His son attended law school with Steven Donziger.

***388** In 1993, Bonifaz accepted an invitation to travel to Ecuador to meet with residents of the Orienté concerning complaints about pollution in the region and the possibility of a lawsuit.[17] He took a small group of lawyers, including Donziger, and others with him.[18] In June of that year, Bonifaz entered into a retention agreement with various individuals who soon became plaintiffs in *Aguinda*.[19]

b. Steven Donziger

Donziger's interest in Latin America began when he worked as a journalist for the United Press International in Nicaragua from 1984 to 1987[20] during which he covered events in several Latin American countries.[21] He also became fluent in Spanish.[22]

After his return from Nicaragua, Donziger[23] graduated from Harvard Law School in 1991.[24] He then worked as a public defender[25] for two years before he accompanied Bonifaz on his trip to Ecuador.[26] While on that trip, Donziger traveled widely in the Napo Concession area and met Maria Aguinda, who later became the first-named plaintiff in *Aguinda*.[27]

Although Donziger's name appears on the *Aguinda* complaint, he was not a lead lawyer when it began. Nevertheless, he did much of the groundwork in Ecuador, took a "handful of trips" to the area from 1993 to 2002 "to meet with clients in the Amazon rainforest, to attend meetings of local community groups ..., and to take care of lawsuit-related issues."[28] During those trips and through case-related discovery from Texaco, Donziger made "significant headway on the factual development of the case."[29]

c. Joseph Kohn

Bonifaz knew that he needed an experienced trial lawyer to assist him. He needed money as well. He therefore got in touch with Joseph Kohn, a Philadelphia attorney and partner at Kohn, Swift & Graf, P.C. (the "Kohn firm" or "Kohn").[30] Kohn too was retained by the *Aguinda* plaintiffs.[31] Kohn and Bonifaz were co- ***389** lead counsel in *Aguinda* at its outset,[32] and Kohn provided much of the funding.[33]

2. Key Events During Aguinda

The details of *Aguinda* are largely unimportant at this stage but several points are significant.

a. Forum Non Conveniens—The Aguinda Plaintiffs Attack Ecuadorian Courts as Corrupt While Texaco Defends Them

Texaco sought dismissal of *Aguinda* on the grounds *inter alia* of *forum non conveniens* and the failure to join the ROE and PetroEcuador, which it argued were indispensable because (1) the requested equitable relief within Ecuador could not otherwise be ordered, and (2) PetroEcuador's own actions would be at issue in the case.[34] The *Aguinda* plaintiffs argued that New York was the appropriate forum because Texaco was headquartered here. They contended also that the case could not be brought in Ecuador because Ecuador did not permit class actions or pretrial discovery.[35]

On November 12, 1996, Judge Rakoff—to whom that case was assigned—dismissed the complaint on the grounds of *forum non conveniens* and international comity and because PetroEcuador and the ROE had not been joined as plaintiffs.[36] The plaintiffs appealed the ruling and persuaded the ROE to move to intervene in the case, a motion that Judge Rakoff denied.[37]

In 1998, the Court of Appeals reversed the dismissal of *Aguinda* on the ground that the district court had failed to obtain a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts.[38] It remanded with instructions to require "Texaco's consent to Ecuadoran jurisdiction ... [and to] independently reweigh the factors relevant to a *forum non conveniens* dismissal."[39]

Following remand, Texaco provided the missing commitment and then renewed its motion to dismiss on *forum non conveniens* grounds. As part of its argument that the case belonged in Ecuador and not the United States—and, as will be seen, a great irony—Texaco argued that Ecuador would be an adequate alternative forum because it had an independent judiciary that provided fair trials.[40] With equal irony, ***390** the plaintiffs contended that Ecuador would not be an adequate forum because the Ecuadorian judiciary was weak and corrupt and did not provide impartial tribunals.[41]

Judge Rakoff granted the motion and was affirmed on appeal.[42]

b. The Start of the LAPs' Alliance With the ROE—The LAPs Agree Not to Sue PetroEcuador or the ROE

A second point to be made about *Aguinda* is that it provided the impetus for an arrangement whereby the LAPs in substance granted PetroEcuador and the ROE immunity from suit in exchange for assistance in *Aguinda,* an alliance that has strengthened over time.

The *Aguinda* plaintiffs were concerned by Texaco's argument that the ROE was an indispensable party in view of the complaint's prayer for an equitable decree requiring environmental remediation in Ecuadorian territory. They obtained the ROE's agreement to seek to intervene in the case and to advise this Court that it consented to the "execution in its territory of any environmental cleanup measures that the [Southern District] Court may order [Texaco] to perform."[43] But there was a *quid pro quo.* The *Aguinda* plaintiffs gave the ROE and PetroEcuador a judgment reduction agreement to protect them against any award of contribution that Texaco might obtain against them.[44]

c. The Aguinda Plaintiffs Seek to Recuse, and Attack, Judge Rakoff

Aguinda was marked also by a challenge to Judge Rakoff's impartiality and an attack on his integrity.

After the reversal of Judge Rakoff's initial *forum non conveniens* dismissal, the plaintiffs moved to recuse him, claiming that his attendance at a seminar on environmental issues created an appearance of partiality because Texaco had contributed general funding to the organization that sponsored the seminar.[45] Judge Rakoff ***391** denied the motion. The Second Circuit then denied the *Aquinda* plaintiffs' mandamus petition, holding that no reasonable person knowledgeable of the facts would doubt Judge Rakoff's impartiality.[46] Some time later, Donziger—in a video recorded for possible use in a documentary film—attacked Judge Rakoff. He stated that Judge Rakoff "was corrupt too, brother. He was—totally biased against us."[47]

As will appear, these events foreshadowed what became a pattern by the LAP team of seeking to intimidate and

threaten judges by pressure tactics including *ad hominem* attacks.[48]

d. The Environmental Management Act is Passed in Ecuador

The pendency of Texaco's dismissal motion and then the risk that the Court of Appeals would affirm Judge Rakoff's initial *forum non conveniens* dismissal prompted other actions by the *Aguinda* plaintiffs' lawyers. As Bonifaz later suggested, "his team" had "worked with Ecuadorian legislators to draft a law similar to U.S. superfund law," in preparation "for a possible move from U.S. courts."[49] The legislation in question became Ecuador's Environmental Management Act of 1999 (the "EMA"),[50] which among other things created a private right of action for damages for the cost of remediation of environmental harms generally, as distinct from personal injuries or property damages to specific plaintiffs.[51]

e. Texaco Merges with a Chevron Subsidiary and Survives the Merger

The final event of note that occurred during *Aguinda* was the merger of a wholly owned subsidiary of Chevron with and into Texaco, with Texaco emerging as the surviving entity. Chevron thereby became the indirect owner of all of Texaco's common stock. Chevron, however, did not acquire any of Texaco's assets or assume any of its liabilities by operation of the merger.[52]

II. The Lago Agrio Litigation Begins

In May 2003, about one year after the Second Circuit affirmed the dismissal of *Aguinda,* the LAPs sued Chevron (but not Texaco) for damages and for remediation of environmental harm said to have been caused by Texaco.[53] The case was brought for the benefit of some 30,000 indigenous residents of the Concession area. Significantly, however, the complaint asked that any funds awarded to perform the requested remediation, plus an additional ten percent, be delivered to the Frente de la Defensa de la Amazonia (the "ADF") for use in performing any remediation ordered ***392** by the court.[54] Thus, the LAPs sought to have the ADF placed in complete control of any and all sums recovered. As will appear, this is significant because Donziger and some of his Ecuadorian associates controlled and still control the ADF.

The case initially was assigned to Judge Alberto Guerra Bastidas ("Guerra"), who then was the president of the Lago Agrio court[55] and who became an important witness at trial. Before turning to the events of the Lago Agrio proceedings, however, three subjects are important to an understanding of what transpired later: (1) Donziger's attitudes and beliefs concerning the Ecuadorian courts, (2) the many Ecuadorian judges who were assigned to the case for varying periods during the years of its existence, and (3) a brief description of the plaintiffs, their lawyers, and the structure of the LAPs' team. As someone once said, "you can't tell the players without a scorecard."

A. Donziger's Attitudes and Beliefs About the Ecuadorian Courts and the Conduct of Lawyers in Ecuador

Donziger's attitudes and beliefs about the capability, fairness, and integrity of the Ecuadorian legal system are no secret. During *Aguinda,* he argued strenuously that Ecuador was not an adequate forum because the Ecuadorian judiciary was weak and corrupt and did not provide impartial tribunals.[56] After the Lago Agrio case began, he made repeated statements—many on camera[57]—in which he amplified this view. For example:

- "They're all [*i.e.,* the Ecuadorian judges] corrupt! It's—it's their birthright to be corrupt."[58]
- "These judges are really not very bright—it is like a vocational job to them, they deal with resolving disputes at a very basic level[;] there is little or no intellectual component to the law."[59]
- "Uh, in a year from now, we're not comin' down here anymore. The case is over. All we're doin' is writing reports and preparing for final submissions of papers. And, really mobilizing the country, politically, so that no judge can rule against us and feel like he can get away with it in terms of his career."[60]
- "[T]his is not a legal case, this is a political battle that's being played out through a legal case and all the ***393** evidence is in. * * * So, what we need to do is get the politics in order in a country that doesn't favor people from the rainforest."[61]
- "It's incredible that a judge can—you can just walk

in his office, with all the media, and it's obvious what we're doing, and he doesn't have the power to say, 'get the fuck out of my office,' like at least to the press. I mean, I've never seen such utter weakness. It's the same kind of weakness that leads to corruption. * * * These people [*i.e.,* the judges] have no power. * * * They don't think they can do anything."[62]

• "You know, what ... just happened with this judge, um, is sort of sad to me because it represents the fact that the judicial system here is so utterly weak—like the only way you can secure a fair trial is if you do things like that, like go in and confront the judge with media around, and fight and yell and scream and make a scene, and, you know, that would never happen in the United States. That would never happen in any judicial system that had integrity. And it's that very weakness that, you know, let people do that. That is also—lets people corrupt the process."[63]

• [To a colleague] "Please prepare a detailed plan with the necessary steps to attack the judge through legal, institutional channels and through any other channel you can think of. Send it to me today."[64]

• "[I]t's a problem of institutional weakness in the judiciary, generally, and of this court, in particular. We have concluded that we need to do more, politically, to control the court, to pressure the court. We believe they make decisions based on who they fear the most, not based on what the laws should dictate. * * * [I]t's a critically important moment, because we want to send a message to the court that, 'don't fuck with us anymore—not now, and not—not later, and never.' "[65]

• "You can solve anything with politics as long as the judges are intelligent enough to understand the politics. [T]hey don't have to be intelligent enough to understand the law, just as long as they understand the politics."[66]

Though Donziger's statements are remarkably disrespectful to the judicial system he now so vehemently defends, it will be seen that they are not unlike President Correa's views of the Ecuadorian judiciary. The *Crude* outtakes depicted also Donziger's beliefs on the role of lawyers and evidence in litigation

• "I once worked for a lawyer who said something I've never forgotten. He said, 'Facts do not exist. Facts are created.' And ever since that day, I realized how the law works."[67]

***394** • "Science has to serve the law practice; the law practice doesn't serve science."[68]

• "[A]ll this bullshit about the law and facts but in the end of the day it is about brute force ..."[69]

• "[A]t the end of the day, this [*i.e.,* the lack of evidence on a key point] is all for the Court just a bunch of smoke and mirrors and bullshit. It really is."[70]

In considering these and other statements, not to mention Donziger's conduct, it is relevant to note that Donziger is a member of the New York Bar. His conduct, whether in the United States or in Ecuador, was subject in every respect to the New York rules governing the conduct of lawyers.[71]

Finally, it is relevant to note that Donziger and his Ecuadorian associates assumed that it would be impossible to obtain evidence of their actions. This 2007 exchange with Atossa Soltani, the head of Amazon Watch, a non-governmental organization ("NGO") supporter of Donziger and the LAPs, during a videotaped conversation about arguably questionable planned activities in Ecuador, is revealing

"SOLTANI: Do you guys know if anybody can, uh, subpoena these videos? That is a—how do you [unintelligible]

"DONZIGER: We don't have the power of subpoena in Ecuador."[72]

B. The Ecuadorian Judges

A total of six judges presided over the Lago Agrio Chevron case from the time it was filed in 2003 until the Judgment was issued in February 2011.[73] In general, the president of the Provincial Court of Nueva Loja—an election for which, it appears, was held every two years—was to preside over the case. When a new president was selected, the case would be transferred either to the newly-elected president, who would keep the case for two years or to another judge in the court, who would keep it for four months.[74] But the fact that six judges—two of whom presided over the case more than once—presided over the Lago Agrio case in the eight years it was pending reveals that the assignment system did not always work exactly as expected.

When the Lago Agrio case was filed in May 2003, Alberto Guerra was the president of the court and so the case was assigned to him.[75] Guerra's term as president ended in January 2004, and the case was reassigned to the newly-elected president, Judge Efraín Novillo.[76] Judge Novillo presided over the case for two years. When his term was up in January 2006, the case was transferred to Judge Germán Yánez.[77] Judge Yánez's term on the case ***395** lasted until October 2007, when Judge Novillo took over again.[78]

In August 2008, Judge Juan Nuñez became president and the Lago Agrio case was transferred to him.[79] Nuñez's term was cut short in September 2009, however, when he recused himself.[80] The case then fell to Nicolás Zambrano,[81] who first had joined the Lago Agrio court on July 30, 2008 directly from a career as a prosecutor[82] and whose term was four months because he was not the president of the court. The case then went to Judge Leonardo Ordóñez, who had just been elected president, in February 2010.[83] Although, as president, Judge Ordóñez was to have presided over the case for two years,[84] he was removed from the case when Chevron successfully moved to recuse him in 2010.[85]

Judge Zambrano took over again in October 2010[86] and issued the Judgment four months later.

C. The LAPs' Team

1. The American Lawyers

The lawyers for the *Aguinda* plaintiffs had laid groundwork for suing in Ecuador if the New York case were dismissed by working toward the enactment in Ecuador of the EMA. At the outset of the Ecuadorian case, the same three American lawyers—Bonifaz, Kohn, and Donziger—played the key roles, using Ecuadorian counsel, the first of whom was Dr. Alberto Wray, to appear of record. By the time the Lago Agrio case began, however, the respective roles of the American lawyers had changed.

Kohn, who had a lead role in the United States in *Aguinda,* had no ties to Ecuador and did not speak Spanish.[87] While he provided most of the funding for the Lago Agrio case and related public relations activities from its inception until 2009,[88] he had little direct role in the litigation. He mainly stayed abreast of some developments through Bonifaz and Donziger,[89] although, as discussed below, he sought unsuccessfully ***396** to become more involved when the case began to run into difficulty in 2009.

Bonifaz's role also changed. While he was involved in selecting and briefing the lead Ecuadorian counsel,[90] tensions subsequently arose between Bonifaz and Donziger. Bonifaz's role quickly faded, and he left the case in 2005 for reasons that are neither clear nor material.[91]

Although Bonifaz still was involved when the Ecuadorian lawsuit began, he no longer was in charge. Donziger had taken over. In 2006, Donziger wrote that he had been the "lead counsel on the [Lago Agrio] lawsuit for the last three years,"[92]—*i.e.,* since it began. He explained further that he was and had been:

> "at the epicenter of the legal, political, and media activity surrounding the case both in Ecuador and in the U.S. I have close ties with almost all of the important characters in the story, including Amazon indigenous leaders, high-ranking Ecuadorian government officials, the world's leading scientists who deal with oil remediation, environmental activists, and many of Chevron's key players."[93]

He stated that he was the individual who had put together and supervised the team that was pursing the case and related activities[94] and that his role was "to be the lawyer and manage the Ecuadorian legal team, while Kohn provide[d] overall guidance and money."[95] He described himself as the "lead lawyer in the class-action trial."[96]

There is no substantial doubt that Donziger was in charge of the important aspects of the Ecuadorian case. He referred to the Ecuadorian lawyers as his "local counsel."[97] They often referred to him as the "cabeza," or head, of the team.[98] ***397** From the time the case was filed in Lago Agrio until at least quite recently, and perhaps even until today, Donziger has supervised the Ecuadorian legal team, set deadlines, was involved in setting the lawyers' salaries,[99] reviewed their court filings, directed the legal strategy, and coordinated the work between the lawyers in Ecuador and the scientists, experts, lawyers, litigation funders, politicians, and media consultants throughout the world.[100] In addition, he communicates extensively ***398** with the press, and he has made tactical and strategic decisions.[101] He largely has controlled the money.[102] Hence, the Court finds that it has been Donziger who, from the very beginning of the Lago Agrio case, has called the important shots.[103] The main exception to this general conclusion for the period 2003–09, during which Kohn was the principal financial backer, was that Donziger on occasion sought Kohn's acquiescence with respect to activities that required additional funds.[104] As will appear, however, Donziger did not always tell Kohn the whole truth about what he was doing.

2. The ADF, Selva Viva, and Luis Yanza

Luis Yanza is Donziger's closest friend in Ecuador.[105] Although he is not a lawyer, he has been and remains a central figure in the LAP team. He has long served as "the coordinator of the case for the affected communities."[106] He has been paid throughout from funds raised to finance the case. Donziger even purchased a residence for him out of personal funds, though this expense ultimately was reimbursed to Donziger by the Kohn firm.[107]

***399** Yanza has been involved in some of the legal team's biggest strategic decisions, including, according to Donziger, the decision to replace the first Ecuadorian lead lawyer, Alberto Wray.[108] He was copied on nearly every important email sent among the Ecuadorian lawyers and Donziger, and has been the liaison between the lawyers and their clients. He serves also as a major point of contact between the LAP team and various Ecuadorian government officials including President Correa.[109]

Donziger and Yanza formed two entities that figure in the events that followed.

The first was the ADF, which was formed in 1993, shortly after the *Aguinda* complaint was filed, to support the case.[110] Yanza functions as its executive director and representative with respect to the Lago Agrio case.[111]

The second was Selva Viva CIA, Ltda. ("Selva Viva"), "an entity created under ... the corporate law of Ecuador that served as a funding vehicle [in the Lago Agrio] case ... to pay people in Ecuador who worked on the case."[112] It was founded in 2004, also by Yanza and at the direction of Donziger, who was and still may be its president. Yanza controls the Selva Viva bank accounts,[113] which have been used primarily as a "pass thr [ough] mechanism to administer the case funds...."[114] For many years, when the Ecuadorian team needed money, Yanza contacted Donziger and Donziger in turn requested the funds from Kohn. The Kohn firm then wired the money either directly to Selva Viva or to Donziger, who then passed it on to Selva Viva. It is undisputed that the ADF, which is controlled by Yanza and Donziger, controls Selva Viva.

The ADF, Yanza, and Selva Viva all are defaulted defendants in this case.[115]

3. The Ecuadorian Lawyers

When the Lago Agrio litigation commenced, the American lawyers—who were ***400** not licensed to practice law in Ecuador—hired Ecuadorian attorneys to represent the LAPs in court. The composition and leadership of the Ecuadorian legal team changed through the years—although, as will become evident, it always has been managed and overseen by Donziger.

Pablo Estenio Fajardo Mendoza ("Fajardo") graduated from law school in 2000 and, for a time, worked for the ADF helping residents of the Orienté bring claims against oil companies.[116] After the Lago Agrio complaint was filed in 2003, he became one of the junior lawyers on the Ecuadorian team. His role was relatively minor until Donziger recommended that he replace Dr. Wray,[117] which occurred in 2005.[118]

From then on, Fajardo has been the *procurador común*—lead counsel before the courts in Ecuador—for the LAPs.[119] And, as will be seen, Fajardo has represented the plaintiffs in court, filed briefs on their behalf, signed retention agreements with investment firms, and given interviews with the international press as their representative.[120] He has traveled to the United States a number of times in connection with the Lago Agrio case.[121]

Fajardo is a defendant in this case and, as is discussed below, appeared *pro se* in its early days.[122] He never answered the complaint, and a certificate of default has been entered against him.[123]

A number of other Ecuadorian lawyers has been involved in the Lago Agrio case on behalf of the LAPs. The most significant have been Alejandro Ponce Villacis ("Ponce"), Juan Pablo Sáenz, and Julio Prieto.

Yanza recruited Ponce, a lawyer based in Quito, shortly after the Lago Agrio case was filed to "provide advice on the strategy as well as draft pleadings" and consult on matters of Ecuadorian law.[124] Although Ponce was involved in "design[ing] the strategy of the case,"[125] he left the team in 2008 when he became a partner in his firm.[126]

***401** Juan Pablo Sáenz and Julio Prieto report to Donziger and Fajardo, who often have called upon them to research and answer questions of Ecuadorian law,[127] translate documents (Sáenz is fluent in English),[128] write briefs,[129] and handle daily litigation tasks.

4. The Assembly

In 2001, a grass roots organization called the Asamblea was formed in the Orienté.[130] Humberto Piaguaje, the current leader, explained that associations were formed in each oil field. Each association designated delegates to participate in a larger council, and leaders of each indigenous group and one representative of settlers in each province formed an executive committee.[131] The executive committee has met approximately once a month, often with members of the Ecuadorian plaintiffs' legal team.[132] Minutes of these meetings have been taken and kept since 2001.[133]

Although the Asamblea "existed informally as a de-facto organization" since 2001, it changed its name in 2012 to the Union of the Assembly of those Affected by Texaco ("UDAPT" or the "Assembly").[134] In each of its incarnations, it has worked closely with the ADF[135] in connection with the Lago Agrio case.

III. The Beginnings of Donziger's Pressure Campaign

A. Donziger's Strategy

Donziger's assumption of control over the litigation resulted in a fundamental change in approach. The new approach is a lens through which virtually everything that happened after the Lago Agrio case began in 2003 must be viewed.

***402** Donziger believed that the court of public opinion was as important as any other.[136] Once he took control of the case, the effort became "a campaign with various fronts active simultaneously," including the media and the U.S. and Ecuadorian political spheres.[137] He adopted an aggressive media strategy.

The importance of Donziger's media and public relations strategy is evident from the manner in which Donziger spent the millions of dollars that were obtained from investors.[138] He outlined the campaign in a memorandum he wrote to his team in late 2003. He explained that the team would initiate and/or utilize celebrities; non-governmental organization "pressure;" the "Ecuador government—executive, and Congress;" national, international, and Ecuadorian press; a "divestment campaign" in which the team would seek to convince institutional investors to sell Chevron stock, and even a criminal case in Ecuador in its effort to obtain money from Chevron.[139]

Just as important as the pressure campaign directed at Chevron was an analogous campaign directed at the Ecuadorian courts. As we have seen already, Donziger viewed the Ecuadorian courts as corrupt, weak and responsive to pressure—as institutions that, at best, "make decisions ***403** based on who they fear the most, not based on what the laws should dictate."[140] In a particularly revealing comment, made in his personal notebook, he wrote that "*the only way the court will respect us is if they fear us—and that the only way they will fear us is if they think we have ... control over their careers, their jobs, their reputations—that is to say, their ability to earn a livelihood.*"[141] "[I]n the end of the day," he said, "it is about brute force" rather than "all this bullshit about the law and facts."[142] As we shall see, he and his associates directly coerced at least one judge and mobilized demonstrations to intimidate others. And the object always included ratcheting the pressure up on Chevron in order to extract money from it.

This focus on the media had at least one unintended effect. Hoping to promote the LAPs' cause in the court of public opinion, Donziger in 2005 recruited a film maker to follow him and his team around in Ecuador and the United States, filming scenes for use in documentary. That film eventually become the documentary *Crude,* which prompted extensive U.S. discovery efforts by Chevron that led to the disclosure of outtakes from the film. Many of Donziger's statements on camera made to the *Crude* film makers, some of which are quite revealing, are in evidence in this case.

B. Donziger's Public Relations Team and NGO Allies

1. The Public Relations and Lobbying Team

As Donziger viewed (and views) his efforts to force Chevron into settlement as "a political-style campaign driven by a legal case,"[143] it is not surprising that he spent a significant part of the resources he raised for the Lago Agrio case on these efforts, and hired several public relations professionals and lobbyists with extensive political experience to work on the LAPs' behalf. He involved also, and at times financially contributed to, NGOs to support his efforts. These individuals and organizations often were mere mouthpieces, however.

Donziger at all times controlled the content and timing of the LAPs' public relations.

Until quite recently, Karen Hinton was the public face of the litigation's public relations efforts. She was the "United States press coordinator" and handled media relations efforts from May 2008 to March 2013.[144] During that period, Hinton issued press releases and blog posts to generate media interest in the case, selected materials to submit to public officials, responded to media inquiries,[145] and, eventually, handled media requests related to the discovery proceedings Chevron launched in the United States.[146] As Hinton understood it at the time of her retention, ***404** the objective of her communications efforts was to "facilitate the stated goal of pushing ChevronTexaco to settle the lawsuit in the near future."[147] Hinton did not have ultimate control over the content of her work, however. The substance of her press releases always was subject to Donziger's approval.[148]

Chris Lehane likewise worked to develop the LAPs' media and public relations strategy as an "advisor" to Donziger[149] using "strategies and tactics ... employed in political campaigns...."[150] After first discussing Donziger's objectives with him, Lehane proposed to Donziger a strategy to target shareholders, Congress, and "high level media" in order to "inflict[ ] real economic pain on the company" and "bring[ ] Chevron Texaco to the negotiation table."[151] The plan was to "fully leverage" events in Ecuador, with a view to "apply[ing] shareholder pressure on Chevron."[152] Donziger hired him, and, in exchange for his work on the case, arranged for Lehane to be given a percentage of any eventual monetary recovery.[153]

2. Amazon Watch

Another central player in Donziger's publicity campaign was Amazon Watch, an NGO that declares a dedication to protecting the rainforest and the indigenous groups that inhabit it.[154] Amazon Watch and various of its staff—including Atossa Soltani, its founder and executive director, and Mitchell Anderson, a "field consultant"—worked with Donziger and others on the LAP team to support and publicize the lawsuit and to pressure Chevron. To that end, the organization collaborated with the LAPs to lobby regulatory agencies and elected officials,[155] sought support ***405** among Chevron shareholders for a settlement,[156] and sought media attention through press releases.[157]

Although Amazon Watch's public materials did not bear Donziger's name, Donziger himself drafted many Amazon Watch materials related to the Lago Agrio litigation.[158] Donziger not only controlled the content of Amazon Watch press releases pertaining to the litigation,[159] he drafted also complaints that Amazon Watch submitted to the SEC[160] and memoranda to be sent to elected officials regarding Chevron.[161] Despite Donziger's authorship, the materials bore no outward indication of his involvement—documents drafted in whole or in substantial part by Donziger were sent on Amazon Watch letterhead and signed by Amazon Watch personnel.

In addition, in April 2005 Amazon Watch used funding from the LAPs[162] to launch a website that was a key conduit for Donziger's campaign.[163] Dubbed "ChevronToxico," the website posted information about the litigation as well as materials written by Donziger, Hinton, and others, some of which included deliberately misleading statements.

Hinton, Lehane, Soltani, and others at Amazon Watch became important figures in Donziger's pressure campaign against Chevron, and their names appear throughout this case. Among the campaign's first real tasks, however, was the use of a flawed $6 billion figure to attempt to convince Chevron that it was facing multibillion dollar exposure in Ecuador and that the time had come to settle.

***406** *C. The Pressure Begins—The LAPs' First Scientist and the $6 Billion "Drive By" Damages Estimate*

Soon after the complaint was filed in Lago Agrio in 2003, Donziger hired David Russell, an environmental engineer,[164] to generate an initial cost estimate for remediation of the Concession area.[165] Among the purposes of the estimate was to subject Chevron to the threat of a very large recovery.[166]

In the fall of 2003, at Donziger's direction, Russell went to the Orienté to work on his damages estimate.[167] There are three notable points about this estimate.

First, Russell visited only about 45 of the hundreds of oil pits in the region, and based his calculations on an extrapolation of what he observed at those sites.[168] But he did not analyze any soil or water samples at any of the sites he visited.[169] And his visits to some of those sites, he

acknowledged at trial, were no more searching than driving past them at 40 or 50 miles per hour.[170]

Second, Russell testified, and the Court finds, that Donziger instructed him to make certain assumptions in calculating costs.[171] Among them was the assumption that Texaco was fully liable for all of the contamination in the region, even that caused by PetroEcuador[172] after it took over operation of the Consortium properties when TexPet left in 1992.

Third, as the report itself made clear, Russell's "cost projections [w]ere very rough."[173] He testified that this was due to "the amount of unknowns and the lack of information [he] had with regard to not only levels of contamination but the extent of those levels of contamination."[174] And he informed Donziger and other members of the LAP team as early as December 2004 that his estimates were "best guesses based upon a week of looking at the sites, without any scientific data," and encouraged the team not to "rush to judgment" based on a "guesstimate."[175] He was entirely candid at trial on the consequences of this lack of data—the quantities he used in generating the $6 billion figure were, he said, were "SWAG," an acronym for a "scientific wild ass guess."[176]

***407** *D. Donziger Touts Russell's "SWAG" and Other Misleading Descriptions of Conditions in the Orienté to Put Pressure on Chevron*

Russell's $6 billion SWAG figure quickly became a key weapon in Donziger's effort to exert pressure on Chevron and convince the company—and the world—that the damages in the Orienté were substantial and the threat of an enormous judgment against it was real. As we shall see, Donziger and his public relations operation avidly used Russell's $6 billion figure in the media to generate leverage despite the fact that they knew that it could not withstand serious analysis.

David Russell left the LAP team in early 2005 because, among other reasons, the LAP team owed him money and refused to pay it.[177] By that time he had made explicit to Donziger that his cost estimate had been "wildly inaccurate and that it should not be used."[178] But that did not stop Donziger and his public relations team from using the number, over Russell's protests, to pressure Chevron through the media.[179]

E. False and Misleading Representations to Incite Governmental Action Against Chevron

The press was not the only intended audience for Russell's disavowed $6 billion figure and other false and misleading comparisons. Donziger and his public relations team employed both in efforts to instigate action and put pressure on Chevron from federal and state officials and agencies. One aim was to create the perception that the litigation threatened serious harm to the company, was material to Chevron's bottom line, and would result in a lower share price and lower profits for Chevron shareholders. In Lehane's words, "the Ecuadorian Amazon ChevronTexaco project can be reduced, in the end, to a single strategic imperative: 'Bringing ChevronTexaco to the negotiation table by inflicting real economic pain on the company.' "[180]

***408** To that end, Donziger in late 2005 drafted a letter[181] that ultimately was sent by Amazon Watch to the Securities and Exchange Commission ("SEC"). The letter "request[ed] that [it] open an investigation into the Chevron Corporation (CVX) for violating SEC regulations governing disclosure obligations...."[182] The letter promoted Russell's SWAG remediation estimate, stating that "[o]ne environmental remediation expert estimated that a basic clean-up would cost at least $6 billion"[183] despite the fact that Donziger knew when he wrote it that Russell had told him that it was wildly inaccurate.[184] The letter asserted also that Chevron had "creat [ed] toxic contamination over 30 times larger than the Exxon Valdez"[185] and decried Chevron's alleged failure to disclose its "potential liability" to its shareholders.[186] He used the same figure, despite subsequent confirmation that it was exaggerated, in later testimony before a Congressional commission on human rights, and in press releases.[187]

***409** The day after the SEC letter was sent, Donziger wrote to Soltani of Amazon Watch: "[n]ow that the SEC ltr is filed, it is key we come up with a coherent strategy to build pressure for the April shareholder's [sic] meeting."[188] Donziger called on Amazon Watch and others—including Chevron shareholders (whom Amazon Watch was to address at an upcoming shareholder meeting)—to send letters to the SEC calling for investigation into Chevron's conduct in Ecuador.[189] Donziger suggested that Amazon Watch "seek a meeting with [SEC chairman Christopher] Cox or one of his deputies" in order "to press for them to open a real investigation."[190] He insisted that Amazon Watch could "get a lot of legs out of this if it is exploited with a little follow-up" and emphasized that the "key ... to [the] strategy ... is to keep this alive and active so it is hanging over their heads as long as possible, and so it can be used

to get other shareholders to write their own letters."[191]

By the end of February 2006, Russell had sent his first cease and desist emails to Donziger and Amazon Watch.[192] Donziger emailed Soltani to suggest that they send "the SEC letter in ASAP, making [the] slight change that another report will be coming with a multi-billion damage figure, without disavowing or mentioning Russell's report."[193]

Donziger's efforts to incite an SEC investigation did not amount to much. After meeting with an SEC investigator, he wrote to his team that the investigator thought that "the probability of a negative judgment [in the Lago Agrio litigation] was so attenuated that they [SEC staff] did not think it [*i.e.,* the possible $6 billion exposure] was material yet."[194] But while Donziger admitted that he "sort of fe[lt] [that the investigation he sought was] bogus," he insisted that he would "keep feeding them [the SEC] stuff" as long as the SEC was willing to continue talking with them.[195] This was not the only time Donziger and his public relations team would reach out to the SEC in an effort to gain leverage over Chevron.[196]

***410** *F. Donziger's Attempt to Justify His Continued Use of Russell's Disavowed Estimate is Unpersuasive*

Donziger attempted at trial to justify his continued use of Russell's disavowed estimate by explaining that he believed in its validity and, indeed, thought at the time that the actual remediation figure was much higher than $6 billion. He testified that he had a "more detailed cost assessment from [the] Ecuadorian technical team" that had calculated the remediation cost to be over $15 billion as well as estimates by a "junior lawyer" that the "remediation proposal [would] come in at about $20 billion."[197] That these estimates were so much higher than $6 billion, Donziger claimed, satisfied him that it was acceptable to continue using Russell's cost estimate notwithstanding the fact that Russell demanded repeatedly that he stop doing so. But Donziger's claim is far fetched and the Court finds that Donziger in fact never believed it. The only estimates of which there was any evidence were prepared under Donziger's direction by junior lawyers who worked for him.[198] As Donziger acknowledged, their purpose was to "make media/court/CVX [Chevron] itself start thinking in terms of billions"[199] and potentially to use the figure to pique the SEC's interest in the litigation.[200]
***411** There is no evidence of any competent study during this time period by any qualified person that supports Donziger's claim.

We have touched here only on part of Donziger's earliest efforts beyond the litigation itself, which have continued unabated for years since. We shall touch on other examples later. But we turn now to the Lago Agrio case itself, which already had begun.

IV. The First Phase of the Lago Agrio Case—The Judicial Inspections

A. The Process

Judge Guerra opened the evidentiary phase of the Lago Agrio litigation on October 21, 2003.[201] It began with the parties submitting requests for the types and scope of evidence that the Lago Agrio judge should consider. Adolfo Callejas—Chevron's local counsel in Ecuador—explained that:

> "Under Ecuadorian civil procedure, the parties must submit all of their evidentiary requests in a defined period; in the case of summary verbal proceedings, that period is six days. While all of the evidence does not have to be provided within that time frame, all requests for then-existent documents, witness testimony, expert assessments, judicial inspections of a place or thing, and other proof must be requested by both parties by the statutory deadline.... My legal team and I submitted a number of evidentiary requests on Chevron's behalf during the initial six-day evidentiary period, as did the lawyers for the Lago Agrio Plaintiffs. Although there were numerous requests for documents and for witness testimony from both sides, the bulk of the requests were for judicial inspections of a total of 122 sites, including well sites and production stations, in the former Concession area and nearby oilfields."[202]

Guerra granted both sides' evidentiary requests.[203]

Each side identified a technical expert to negotiate the procedures that would govern the judicial inspection process. Sara McMillen, Chevron's lead scientist on the Lago Agrio case,[204] assumed this role for Chevron, while David Russell, who then still was working for Donziger, took the lead on behalf of the LAPs.[205] The parties ultimately agreed upon and submitted to the court a sampling and analysis plan.[206]

> "For most of the judicial inspections, experts were nominated by each side. At each judicial inspection site, these nominated experts took samples under the supervision of the judge at that site, sent their samples

> to a laboratory for testing and analysis, and then each submitted a written report of his or her findings and conclusions to the Ecuadorian Court. The Ecuadorian court also appointed a third set of experts, known as the Settling Experts, who were to resolve any disputes between each sides' experts reports and findings. The Settling Experts attended the judicial inspections."[207]

It is relevant to note that the Lago Agrio court formally appointed the party-nominated ***412** experts, but each nominating party paid or provided the funds to pay the experts it nominated. The parties were to share any compensation and expenses of settling experts, each side to submit its half to the court, which then would pay it to the settling expert.[208]

At each judicial inspection, the party that requested the inspection was to present any arguments it had concerning the site. The opposing party would rebut.[209] Each side was to have the right also to request that the court include relevant documentation or other evidence in the record. Following each side's oral presentation, the court itself inspected the site, "registering comments and observations and allowing the parties and the experts to identify the areas where they intended to take samples."[210] The court's secretary was to transcribe the proceedings at the inspection sites, and the transcript of the proceedings—including a list of all the documents presented at the inspection—was to be finalized and signed by the parties.[211] The finalized document was called an *acta,* and was to be made part of the official court record. The documents within the record, which of course included many papers in addition to the *actas,* were grouped into *cuerpos,* or books, each of which contained about 100 pages of material.[212]

Following the inspections, each party's experts were to submit their reports, to which the opposing party's expert would have an opportunity to respond.[213] If the settling experts had been called upon to resolve conflicting reports produced by the party-nominated experts, the settling experts' results would be included as well.[214] The parties' nominated experts' reports, rebuttal reports, and any reports by settling experts were to be submitted to the court and made part of the record.

The first judicial inspection took place on August 18, 2004.[215] As will appear, the process of inspecting 122 sites moved very slowly and never ultimately was completed.

B. The LAPs' Judicial Inspection Experts

Russell was in charge of choosing the plaintiffs' experts.[216] He "created budgets for the scientific investigation, purchased equipment, hired, trained, managed, and paid members of the Ecuadorian plaintiffs' field team, and hired and interfaced with the plaintiffs' outside laboratories."[217]

C. The Calmbacher Episode

The first judicial inspection expert that Russell and Donziger hired, in the summer of 2004, was Dr. Charles Calmbacher, an industrial hygienist who previously had worked with Russell on other projects.[218] Calmbacher was instructed to inspect and write the reports for the LAPs with respect to the first four judicial inspection ***413** sites.[219] He traveled to Ecuador four times to meet with the plaintiffs' team and participate in those inspections.[220]

Calmbacher became ill on his last trip and returned to the United States before he completed his reports.[221] Before he left, he gave the plaintiffs' team his unfinished drafts, but continued working on them from the United States.[222] When Calmbacher was unable to finish the drafts within the deadlines Donziger set, Donziger fired him.[223] Even after he was fired, however, Calmbacher insisted to Donziger that he would still be the one to "write the Perito [expert] reports" because he needed to "comply with [his] obligation to the court and to maintain [his] professional integrity with the Ecuadorian court."[224] He wrote to Donziger and Russell:

> "It also has been stressed to me that it is highly unusual for a perito [expert] to allow others to contribute to the writing of a report. Comments or review is acceptable, but the perito's opinion and findings are final. I therefore have and feel no obligation to allow your team of textile engineers and associated cron[i]es to review or edit my reports. I am assured, as perito of the court, that I am completely within my rights to write and submit my report independent of whose who have nominated me for appointment as perito. My sole obligation is to tell the truth, as I see it, to the court, no matter the consequences for either party."[225]

Calmbacher finished two of the reports and sent them to the LAP lawyers in Ecuador.[226] The reports were edited and reformatted by them and sent back to Calmbacher for his signature.[227] Calmbacher agreed with the conclusions reached by the reformatted and edited reports and told the plaintiffs' team that he "had no problem signing [them] because that's what [he] felt."[228] But those reports were not the reports that the LAP team eventually filed.

Calmbacher testified that:

"[w]hat happened after that ... was they asked me to initial some [blank] papers on the corner so [the report] could be printed on that because it had to be initialed. I said, no, I don't think so. David [Russell] implored ... me to do that, that it was honest, it was fair, it was okay. So I did it. I think it was about 30 pages. And I FedEx'd it down ... I overnighted it. That was the last I've heard on the project.
I have not been contacted or anything else."[229]

***414** On February 14 and March 8, 2005, respectively, the LAP team submitted to the Lago Agrio court what purported to be the reports of their nominated expert for the judicial inspections of the Shushufindi 48 and Sacha 94 sites.[230] They bore the signatures and initials of, and purported to have been written by, Dr. Calmbacher.[231] The reports found that "highly toxic chemicals" contaminated the area and that TexPet's remediation was "inadequate or insufficient."[232] When shown these reports at a deposition several years later, however, Dr. Calmbacher testified: "I did not reach these conclusions and I did not write this report."[233] He never concluded that TexPet had failed to remediate any site[234] or that any site posed a health or environmental risk.[235] Thus, someone on the LAP team used the blank pages Calmbacher had initialed and his signature pages to submit over his name two reports that contained conclusions he did not reach.

There clearly have been tensions between Calmbacher and Donziger. The reasons for those tensions, and for the ultimate split between the two, are not clear, and their accounts differ. Donziger contends that he fired Calmbacher because he missed deadlines for his two reports and displayed "other [unspecified] unprofessional conduct."[236] Calmbacher admits that Donziger was frustrated that his reports were late, but contends also that he at times disagreed with members of the LAPs' team on the format of the reports and that he voiced his concerns to the LAP team and "probably ruffled feathers."[237] Nevertheless, the Court sees no sufficient basis to conclude that any ill feeling that Calmbacher may have harbored colored his testimony with respect to reports filed in his name on the Shushufindi 48 and Sacha 94 sites. It credits Dr. Calmbacher's testimony that those reports were not the reports he wrote and did not reflect his views. This means that someone on the LAP Ecuadorian legal team revised his draft reports, printed them on the blank pages that Dr. Calmbacher initialed, and filed them with knowledge of the falsity.

The judicial inspections continued despite Dr. Calmbacher's departure, and the LAP team hired other experts to take his place. But their troubles in this sphere did not end.

D. The LAP Lawyers Halt Testing for BTEX and GRO Because it Is Yielding Unhelpful Results

As noted previously, among the problems that faced the LAP team in the Lago Agrio case is that PetroEcuador had operated in the Concession area from 1992, when TexPet left Ecuador, forward and, in addition, had been a member of the Consortium earlier. The LAPs already had entered into an agreement with the ROE and PetroEcuador pursuant to which they were obliged to reduce the amount of any ***415** judgment they might obtain against Texaco by the amount of any contribution judgment that Texaco might obtain against the ROE and PetroEcuador. Moreover, the prospect of proof that PetroEcuador, an ROE owned entity, was responsible for substantial pollution in the Orienté would not have been viewed favorably by the ROE. The LAPs therefore had an interest in obtaining a judgment that Chevron was entirely responsible for any and all pollution liability and remediation responsibility.

In late 2004, Russell met in New York with Donziger, Bonifaz, Wray, and perhaps others to discuss the LAPs' strategy for the remaining judicial inspections.[238] Russell reported that "the fact that [they were] finding BTEX, which is benzene, toluene, ethylbenzene, and xylene; and GRO, which is gasoline range organics," in the samples they were testing from the Concession area was "much more indicative of contamination from PetroEcuador rather than Texaco because these compounds are volatile and degrade quickly in hot, wet, warm environment such as in the jungle."[239] As Texaco had not operated in the Concession area since 1992, it was highly unlikely that any BTEX and GRO that ever had been attributable to Texaco's operations still would have been present.[240] PetroEcuador's continuing operations probably were the cause.

According to Russell, whom the Court found to be a credible witness, the "senior lawyers"—Donziger, Bonifaz and Wray—requested that the LAP team stop testing for BTEX and GRO because testing for these compounds "would be counterproductive to the case because it argues for more recent contamination and that implies PetroEcuador rather than Texaco."[241] Accordingly, Russell and his team "stopped analyzing for those compounds [and] started instead substituting a less reliable measure which was total petroleum hydrocarbons," or TPH.[242] The methods the team used to test for TPH, however, were unable to distinguish between TPH attributable to recent activity and activity

that occurred a considerable period earlier.[243] Moreover, they were subject to a further problem, namely that "TPH methods currently in use can show up naturally occurring compounds as an indication of petroleum, so give you a false positive."[244]

***416** *E. Sacha–53 and the "Independent" Monitors—Donziger, in His Words, Goes Over to the "Dark Side" and Makes a "Bargain With the Devil"*

As mentioned, the court appointed several "settling experts" at the beginning of the judicial inspection process, whose job it was to resolve any conflicts between the parties' nominated inspection experts' reports. "The decision to request a settling report was solely in the Court's discretion," and it ordered only one such report before the LAPs' judicial inspections were terminated—that of the Sacha–53 well site.[245]

The Sacha–53 site was important for the LAPs because, as Donziger explained to his colleagues in a contemporaneous email, it was a "Texaco 'remediated site' "—*i.e.,* a site that Texaco had remediated pursuant to its agreement with the ROE as a prerequisite to obtaining the release discussed previously—"so [, in Donziger's words, it would provide] the first definitive scientific proof in the case to put the lie to their claim they remediated."[246] But Donziger soon learned that the settling experts' conclusions with respect to Sacha–53 would not be favorable to the LAPs. So Donziger sought to provide an outwardly credible criticism of the anticipated settling expert report in order to undermine its conclusions.

In late 2005, Donziger met Ramiro Fernando Reyes Cisneros ("Reyes"), a petroleum and environmental engineer in Ecuador,[247] at a cocktail party for the launch of a book Reyes had published on oil in the Amazon.[248] Also present was Gustavo Pinto, the president of the Association of Geological, Mining, Petroleum and Environmental Engineers ("CIGMYP") of Ecuador.[249] At Donziger's request, Reyes and Pinto met with Donziger and Fausto Peñafiel—then a consultant for the LAP team—on the following day to discuss the Lago Agrio case.[250]

Donziger and Pñafiel outlined the judicial inspection and settling expert process for Reyes and Pinto and told them that "[t]he settling experts were going to issue a report on the judicial inspection of Sacha 53."[251] "Donziger proposed the idea of bringing in an 'independent institution' to monitor the work of the settling experts."[252] He wanted the independent monitors to make "recommendations" concerning the inspections to the judge presiding over the Lago Agrio case.[253] He inquired whether CIGMYP would perform that function.[254] He informed Pinto and Reyes that the LAP team would pay them for that work. His "initial wish was ... to ***417** have the association's monitorship be oriented to show that the results that were being obtained were favorable ... to the plaintiffs."[255]

On November 18, 2006, Donziger reached a secret understanding with Pinto and Reyes pursuant to which he would pay them to "monitor" the settling expert report on Sacha–53. Donziger wrote about the meeting in his notebook:

> "Deal with Gustavo Pinto—*feel like I have gone over to the dark side.* First meeting like that I was not eaten alive. Made modest offer, plus bonus. *Agreed to keep it between us, no written agreement.* Independent monitoring."[256]

Lest there be any doubt, Donziger admitted at a deposition that the "modest offer" he made was of money[257] and that the reference to an agreement "to keep it between us" meant that the fact that Pinto and Reyes would be working for the LAPs was to be kept confidential,[258] including from the judge.[259] He conceded also that it was "possible" that the "modest offer" agreed upon was $50,000, although he professed not to recall the amount.[260]

A week later, the same four men met again and finalized the deal. They agreed that Pinto and Reyes would lead the "independent monitorship" and would be paid a fee plus a potential bonus if the plaintiffs won the case.[261] "There never existed a formal contract between CIGMYP, Pinto, [Reyes], Donziger, or Peñafiel, and all the participants in the meeting agreed that payment by plaintiffs to CIGMYP, to Pinto and to [Reyes] for this monitorship would remain secret."[262] Secrecy was essential because Donziger and the LAP team knew that an appearance of independence and neutrality was essential in order for the expected efforts of Pinto and Reyes to be taken seriously by Chevron and the court.[263]

In fact, the agreement was for Reyes and Pinto to work covertly for the LAP team and to keep their relationship with the LAPs secret from the judge.[264] And Donziger well understood that the arrangement was improper. He wrote in his notebook on February 6:

> "Talked to Gustavo this morning about the [settling expert] report. I keep thinking we pay them so little, and they know the court's peritos [experts] make so much, why will they want to keep doing this for us?

> *This was my one bargain with the devil,* but we can't win with the devil b/c they can always pay more. Really frustrating, feel really ***418** boxed in."[265]

Nonetheless, the deal and, as Donziger recorded, the secret payment were made. He wrote in his notebook: "50 k came today—meet on roof to plan payment [to] [Pinto]. Luis [Yanza] has his doubts; I explained we are not paying for time, but for value. Juan came later to collect the [money]."[266] Juan was a member of the LAP team (likely Juan Pablo Sáenz) and was used to deliver the money to Pinto because Pinto "didn't want to be paid directly."[267]

Pinto and Reyes met with the settling experts a week after they made the deal with Donziger.[268] They "discussed the expert report on the inspection of Sacha 53, which the [settling experts] had been working on, and ... asked when the[ ] [settling experts] could provide the monitors a draft of the report. They never did, at least not to [Reyes]. The meeting ... was basically to review the technical aspects of the report the settling experts were preparing on Sacha 53."[269] Although Reyes and Pinto never received an advance draft of the report, they knew from these discussions what the report would conclude. And they conveyed that information to Donziger and the LAP team.

In order for their "monitorship" to have the desired effect, Reyes and Pinto had to be appointed by the court. They therefore wrote a letter to Judge Germán Yánez, then the judge presiding over the Chevron case, detailing their credentials and their proposed role.[270] They did not, however, disclose that they were being paid by the LAPs' team.[271]

Judge Yánez did not respond to the letter, so Pinto and Reyes went to meet with him in his office.[272] Before doing so, they showed Donziger an advance copy of the comments on the settling experts' work that they intended to make to the judge.[273] When they met with the judge, they explained the need for the monitorship and expressed their desire to become involved in the case. But the judge "did not express any interest in what [they] were telling him about the case."[274]

To jump slightly ahead for a moment, the settling experts' report was published in February 2006.[275] It concluded—consistent with the fears that led Donziger to the "independent monitorship" scheme—that Texaco had fully remediated the Sacha–53 site. Donziger characterized the report as "disastrous" for the LAPs' team.[276] He instructed Reyes and Pinto to prepare a ***419** report that "established that the findings of the settling experts' report on Sacha 53 were wrong, that they lacked objectivity and were biased toward Chevron, and therefore the report should be discounted."[277] The report that Pinto and Reyes drafted, however, did not reach those conclusions. Instead, they concluded that, while the settling experts had "failed to strictly follow their judicial mandate" and that some of the data submitted by both parties had deficiencies, "the report contained enough information for the Court to make its own ruling."[278] Donziger was extremely disappointed in what he called Reyes' and Pinto's "tepid" response and instructed them not to file it with the court.[279]

The Reyes–Pinto arrangement suggests that Donziger and his team were worried that the evidence would not support their claim, at least to the extent they had hoped. The one settling expert report that was in the process of completion concerned a site they expected would expose what Donziger characterized as Texaco's "lie," but he learned it would reach the opposite conclusion. When the likelihood that the report would reach that opposite conclusion became known, Donziger—in his own words—went over "to the dark side"[280] by recruiting and paying new experts to pose as "independent monitors" and to criticize the settling experts' conclusions to the court without disclosing that the LAPs were paying them. Moreover, it must be noted that Donziger did not address—much less offer any innocent explanation of—these events, either in his written direct testimony or on the witness stand.

In the end, Donziger's arrangement with Reyes and Pinto—his first "bargain with the devil"[281]—ultimately did not work out for him. The judge was not interested and the report Reyes and Pinto wrote did not meet Donziger's expectations. But it was not his last such bargain. By this time the LAPs were up to something new, which, if it succeeded, would reduce the risk of unwanted results from the many uncompleted judicial inspections.

F. The Termination of the LAPs' Remaining Judicial Inspections and the Genesis of the Global Assessment

Extensive evidence demonstrates that Donziger and the rest of his team concluded that Dr. Wray had made a terrible mistake in committing to judicial inspections of so many sites.[282] They were costly and took a great deal of time.[283] Moreover, ***420** as the unfolding Sacha–53 crisis demonstrated, they were risky—the party-nominated experts could disagree, and the settling experts might agree with Chevron. For these reasons, the LAPs on January 27, 2006—shortly before the publication of the Sacha–53 settling expert report—moved to eliminate 26 of the remaining judicial inspections that the LAPs had

requested, ostensibly because they were unnecessary.[284] The judge then presiding swiftly denied the motion.[285]

The LAPs responded by filing several motions challenging the court's decision, initiated a press campaign that questioned the judge's handling of the case and accusing him of bias in favor of Chevron, and began to organize several demonstrations outside the courthouse to protest his rulings.[286] The point of all of this, as Donziger wrote in his journal, was that the LAPs:

> "need a massive protest on the court, and only after that should we talk to the judge about what he needs to do. The judge needs to fear us for this to move how it needs to move, and right now there is no fear, no price to pay for not making these key decisions."[287]

So the issue of reducing the LAPs' judicial inspections continued to percolate through the spring of 2006. Moreover, a new ingredient entered the LAPs' internal discussions of the issue—the idea not only of dropping all of the remaining LAP judicial inspections, but of substituting a single, supposedly impartial, global expert.

The idea of a global expert did not immediately persuade Donziger. On May 31, 2006, he wrote in his notebook:

> "Yesterday we had a 5–hour [meeting] and it was extremely intense and frustrating. Went through options on Global [Expert]—had Plans A through E, and I realized how difficult this aspect of the case is going to be. *Bottom line problem is we will have no control over the [expert], who will be appointed by the judge. Pablo and our legal team keep insisting that the solution is for the judge to appoint someone who is favorable to us, but I don't trust this approach so far.*"[288]

In other words, he was concerned that he perhaps could not control a single global expert. He worried that such an expert would not be "willing to do work that holds oil companies accountable. ... Which gets back to my point that we need a foreigner as the expert for the global. No Ec[uadorian] is going to come through and hold them accountable for billions—it is just not going to happen.... *Without that insurance, I just don't see how we can go forward with the global [expert].*"[289]

1. The LAPs Coerce the Judge to Cancel the LAPs' Remaining Judicial Inspections

The LAP team, in Donziger's words, often "talk[ed] to the judge about what he needs to do" in private.[290]

In July 2006, the LAPs filed another motion, this time seeking to relinquish all ***421** of their remaining inspections, not just the 26 they in January had sought to eliminate.[291] Donziger wrote in his notebook that:

> "Our issues first and foremost are whether the judge will accept the renuncia of the inspections. If this happens—and Pablo thinks it will, but I and Aaron [Marr Page] think he is overoptimistic—then we have to face the prospect of more of the wasteful, time-consuming, and expensive inspections. [sic] If it doesn't happen, then we are in all-out war with the judge to get him removed."[292]

But the "all-out war" to remove the judge proved unnecessary.

Donziger and the LAP team knew that Judge Yánez was in a weakened state. He recently had been accused of "trading jobs for sex in the court"[293] and was worried about his reputation and perhaps career. They were determined to use that to their advantage. As Donziger wrote in his notebook at the time, Fajardo informed Donziger that

> "there is the feeling in the court that we are behind the [sexual harassment] complaint[ ] against Yánez ..., which we are not, even though we have much to complain about, which is sort of ironic. I [*i.e.,* Donziger] asked if this theory in the court hurt or helped us, and both Pablo and Luis said it helped us. *At which pt I launched into my familiar lecture about how the only way the court will respect us is if they fear us—and that the only way they will fear us is if they think we have ... control over their careers, their jobs, their reputations—that is to say, their ability to earn a livelihood.*"[294]

So the LAP team "wrote up a complaint against Yánez, but never filed it, while letting him know we might file it if he does not adhere to the law and what we need."[295] Donziger explained in an email to Kohn that Fajardo then met with the judge, who "said he is going to accept our request to withdraw the rest of the inspections save the four we still want to do.... The judge also ... wants to forestall the filing of a complaint against him by us, which we have prepared but not yet filed."[296]

***422** Faced with this coercion,[297] Judge Yánez granted the request to cancel the LAPs' remaining judicial inspections. Donziger and Fajardo succeeded also in convincing the judge that he should "fear" the LAP team.[298] After Judge Yánez issued the order, Donziger on September 13, 2006, wrote that the judge "told Luis

[Yanza] that we needed to back him now as he fights for survival on the court. So instead of a strong judge who sees the validity of the case, we now might have a weak judge who wants to rule correctly [*i.e.,* for the LAPs] for all the wrong, personal reasons. Need to get going on the inspections (looking for [expert]) and [global expert].”[299]

This last statement—that Donziger recognized his “[n]eed to get going on the inspections (looking for [expert]) and [global expert]”—demonstrates that his earlier misgivings about a global expert had been overcome and that Donziger was looking for an expert to appoint to that pivotal role. The explanation for this change of heart is plain. Donziger’s “[b]ottom line problem [about pursuing a global expert idea had been that] we will have no control over the [expert], who will be appointed by the judge.”[300] But the coercion of Judge Yánez eliminated that “bottom line problem.” Donziger had found himself with “a weak judge who wants to rule correctly for all the wrong, personal reasons,”[301] among them the fear that the LAPs would file their judicial misconduct complaint against him at a time when he least could withstand it. Donziger therefore expected to be able to select and to control the global expert. That is exactly what then took place.

2. Donziger Chooses Cabrera to be the Global Expert

With these pieces in place, Donziger and the LAP team moved on to finding a compliant global expert. The idea was that the global expert—just like the “monitoring” experts, Reyes and Pinto, who ultimately had not been appointed—in fact would work for the LAPs but would appear to be independent and neutral. This required Donziger to find someone who, in Donziger’s own words, would “totally play ball with” him.[302]

Donziger began quietly vetting candidates to fill the post.[303] Initially, the lead candidate for the job was Reyes,[304] with whom Donziger already was acquainted from the Sacha–53 episode.

> “[ ] Donziger, [ ] Fajardo, and [ ] Yanza together ... explained to [Reyes] that having a single expert to carry out a global assessment was important to the plaintiffs because they acknowledged that the judicial inspection process had not yielded data to support their claims of contamination. They also said they believed it would be easier to manage a single expert than many.”[305]

***423** Donziger met with Reyes in December 2006 “to do a hard vet.”[306] Before settling on Reyes as the global expert, Donziger was determined to ensure that Reyes would “*totally play ball with us and let us take the lead while projecting the image that he is working for the court.*”[307] He needed also to persuade Reyes to take the assignment. So Donziger told Reyes “that if he did this he likely would never work in the oil industry again in Ecuador, at least for an American company, but that he could be a national hero and *have a job the rest of his life being involved in the clean-up.*”[308] And he reminded Reyes that, as the global expert, he would “need ... to state that Chevron was the only party responsible for environmental damages and the harm to the local community.”[309]

Donziger’s statement to Reyes that he would “have a job the rest of his life being involved in the clean-up” warrants emphasis. The Lago Agrio complaint identified the ADF, which is controlled by Donziger and Yanza, as the entity to which the LAPs wanted any recovery money paid.[310] Thus, in promising Reyes that he would “have a job the rest of his life being involved in the clean-up” if he took the assignment and gave the LAPs what they wanted, Donziger promised something that he expected to be able to deliver—long-term, remunerative employment paid for by the ADF.

While Donziger was vetting Reyes, Fajardo and Yanza met with Judge Yánez to get him to appoint Reyes as the global expert. But Judge Yánez was troubled because he felt “bound by an agreement Wray made with Callejas [Chevron’s local counsel] in the first inspection to use [experts] already appointed by the court.”[311] This would have excluded Reyes. In consequence, the LAP team believed that the choice would be between José Echeverria and Richard Cabrera Stalin Vega (“Cabrera”), both of whom previously had been designated as settling experts.[312] Of the two, Donziger’s choice was Cabrera. Donziger wrote:

> “Richard [Cabrera] served in the last inspection, and he was found by Fernando Reyes, who has turned out to be a good friend of the case. Richard showed some surprising independence, telling the judge quietly that Texaco’s sampling was bullshit. The question is, do we push for Reyes himself or Richard? At first, I thought the idea Reyes would not be the [expert] was a case killer. I simply am loathe to spend much more money on the case not knowing if we can get a damage claim before the court, which essentially would prevent us from winning the case before a decision can even be made. I trust Reyes; I don’t know Richard even though he looks promising. So I met ***424** Richard with Reyes

> on Sat afternoon in the Hotel Quito, one of my endless series of meetings. He is a humble man, not very sophisticated, but he seemed smart and under-stated—maybe the perfect foil for Chevron, but there is no way to know for sure so there is risk. Reyes thin[k]s we should go with Richard, and we can help him."[313]

Accordingly, Donziger, Cabrera, Reyes, and other LAP lawyers met to discuss the possibility of Cabrera being appointed global expert.[314]

On February 27, 2007, Donziger, Yanza, and Fajardo met with Cabrera and Reyes to do another "hard vet" of Cabrera and to give him the "hard sell." Just as he had done with Reyes, Donziger, again in his own words, "did the build up about the importance of the case, what it means for history, how we can do something that we will always be remembered for, what it would mean for the country and world, etc."[315] This sort of encouragement, Donziger noted "always works at the opportune moment."[316] But that, the Court finds, is not all he said. The quoted entry from his notebook summarized "the build up" he gave Cabrera in terms almost identical to the summary he wrote of his "build up" to Reyes. It is logical to infer, and the Court finds, that Donziger made the same implicit promise of lifetime work on the remediation to Cabrera that he had made previously to Reyes. In any case, Cabrera agreed to the plan.

Meanwhile, the LAP team continued to meet *ex parte* with Judge Yánez[317] to have him appoint their new choice, Cabrera, as the global expert. By February, the LAPs were "100% sure the judge would app[oin]t Richard [Cabrera] and not Echeverria."[318] On March 19, 2007, the judge announced the appointment.[319] But Donziger and the LAP team were so sure of Cabrera's appointment that they proceeded on the basis that Cabrera would be appointed even before the appointment was announced and Cabrera sworn in.

***425** *V. The Second Phase of the Lago Agrio Case—The Cabrera "Global Expert" Report*

A. The LAPs Secretly Plan the Cabrera Report—The March 3 and 4, 2007 Meetings

Donziger, Fajardo, and Yanza called the entire LAP team together for a meeting on March 3, 2007.[320] This included several American technical experts with whom Donziger had been consulting—Charlie Champ, Dick Kamp, and Ann Maest,[321] a scientist at E–Tech, an organization that was working with the LAPs[322] and who worked also for the Boulder, Colorado-based environmental consulting firm, Stratus Consulting ("Stratus").[323] The purpose of the meeting, as will appear in more detail, was to plan the global expert report. So sure were Donziger and Fajardo of Cabrera's appointment that the supposedly independent and impartial Cabrera, as well as Fernando Reyes, were present.

Donziger explained the importance of the meeting to the *Crude* camera even before the meeting began:

> "Today is ... a very important day 'cause we're meeting with ... *our* team of Ecuadorian technical people and *our* American consultants ... to figure out how to ... pull all that information together for the final report *we're gonna submit to the court,* that is gonna ask for damages that'll very likely be in the multiple billions of dollars."[324]

Thus, Donziger in an unguarded moment,[325] acknowledged that the report ultimately submitted would be the product of the LAPs and their "team of Ecuadorian technical people and ... American consultants."

Parts of the meeting were recorded by the film makers. Yanza began by introducing the participants and setting out the general agenda.[326] He introduced Cabrera to the full team for the first time.[327] Fajardo set forth the plan for the final phase of the evidentiary period, explaining that, while Cabrera was likely to be appointed the global expert, "the work isn't going to be the expert[']s. All of us bear the burden."[328] Maest then asked whether "the final report [was] going to be prepared only by the expert?"[329] Fajardo responded, "what the expert is going to do is state his criteria, alright? And sign the report ***426** and review it. But all of us, all together, have to contribute to the report."[330] Maest commented, "But .. not Chevron," which provoked laughter.[331] The video clips of the meeting ended with Donziger commenting, they could "jack this thing up to $30 billion in one day."[332]

Reyes—who had been Mr. Donziger's first choice for appointment as global expert—testified that:

> "At the meeting, Mr. Fajardo, Mr. Yanza and Mr. Donziger dropped any pretense that Mr. Cabrera would act independently in writing an expert report that would be technically sound and executed according to professional standards. On the contrary, it was obvious that the plaintiffs had already predetermined the findings of the global assessment, that they themselves would write a report that would support their claim for billions of dollars against Chevron and would simply put Mr. Cabrera's name on it. The purpose of the

> meeting was to establish all the conditions for controlling and managing the expert's work, in secret, in accordance to the plaintiffs' interests."[333]

The next day, Donziger met over lunch with some of his American experts to discuss the work plan.[334] The meeting, parts of which also were taped, confirmed that Donziger and the LAPs would go far to control the process and conceal their involvement from Chevron and the court. At one point, one of the experts commented, "I know we have to be totally transparent with Chevron, and show them what we're doing," to which Donziger responded "[n]o, no .... they will find out ... [but] not in the moment...."[335] Maest replied, "Yeah, we don't have to give them our plan.... I don't think, do we?" and Donziger answered "[w]ell, it's a little unclear.... No one's ever done this before.... This is so crazy.... *Our goal is that [Chevron] do[es]n't know shit* ... and that's why they're so panicked by this."[336] Another expert commented that "having [Cabrera] there yesterday, in retrospect, was totally bizarre."[337] Donziger quickly told him not to talk about that and told the film crew "that was off the record...."[338] Thus, right from the start, Donziger evidenced his intent that the intimate relationship he had forged with Cabrera would not be allowed to see the light of day.

The group discussed also the existing data. When Maest noted that "right now all the reports are saying it's just at the pits and the stations and nothing has spread anywhere at all," Donziger replied, "That's not true. The reports are saying the ground water is contaminated because we've taken samples from ground water."[339] Maest responded, "[t]hat's just ***427** right under the pits," to which Donziger responded:

> "Yeah, but, that is evidence.... *Hold on a second, you know, this is Ecuador, okay ... You can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want. Sorry, but it's true* .... Okay. Therefore, if we take our existing evidence on groundwater contamination which admittedly is right below the source.... And wanted to extrapolate based on nothing other than, our, um, theory that it is, they all, we average out to going 300 meters in a radius, depending on the ... gradient. We can do it. We can do it. And we can get money for it.... And if we had no more money to do more work, we would do that. You know what I'm saying? ... *And it wouldn't really matter that much.... Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win.*"[340]

Following the March 3–4 meetings, the LAPs wrote the work plan that supposedly was to be done by Cabrera. On March 21, 2007, Fajardo sent the initial draft to Donziger for his approval.[341] It laid out all of the required tasks including such things as the selection of sites to be studied, field work, drafting of the report, and its submission to the court. It assigned responsibility for each item, in most cases to members of the LAP team or their hired consultants. Cabrera was allotted responsibility for relatively little. The drafting of the report was assigned to "[t]he Expert with the support team," the latter being a reference to the LAP personnel. Review of the initial draft of the report was to be done by the "Legal team," meaning the LAP lawyers. And following the final item on the list, submission to the court, the LAPs wrote, "Everyone silent," the point of course being that no one was to disclose the control over and overwhelming participation in the process by the LAP team. Indeed, Donziger admitted on cross-examination that he instructed all those associated with the preparation of the Cabrera Report to keep their work highly confidential.[342]

Before Cabrera officially was sworn in, however, the LAP team faced another possible hitch in its plan. Fajardo learned that Judge Yánez was considering appointing two global experts—one for Chevron and one for the LAPs. The LAP team was very concerned—they had worked hard to have the judge appoint the expert they had vetted and chosen and who would "totally play ball" with them. Fajardo reported Judge Yánez's plan to Donziger and others in an email titled "Code Orange." He wrote: "What is new is that in view of the other restaurant's challenge, the cook has the idea of putting in another waiter, to be on the other side. This is troublesome. I suggest we activate alarms, contacts, strategies, pressures in order to avoid this happening. It is necessary to do it urgently." ***428** [343] Fajardo wrote that the "Lago Agrio messenger is waiting until this afternoon to meet with the cook, to hear his position."[344] Donziger testified in a deposition that the LAP team used code names "to prevent any reader of those documents from knowing exactly who it was [he] w[as] talking about...."[345] He admitted at trial that the "cook" referred to the judge; the waiter referred to Cabrera; and the "other restaurant" referred to Chevron.[346]

Not surprisingly in light of the position in which Donziger, Fajardo, and others had put Judge Yánez, the "messenger"—most likely Fajardo—caused Judge Yánez to drop the idea of appointing two experts. And they took additional steps to control his activities.

On April 17, 2007, Luis Yanza wrote to Donziger: "We have met with Richard [Cabrera] and everything is under control. We gave him some money in advance."[347]

Shortly thereafter, the LAP team set up a new, "secret" bank account through which they surreptitiously could pay the supposedly independent expert.[348] As Yanza once explained to Donziger, the purpose of the secret account was for Donziger and Kohn to "send ... money to the secret account to give it to the Wuao."[349] The "wuao" or "wao" was another code name the LAP team created to refer to Cabrera.[350] As we shall see, Donziger and Yanza later put that secret account to considerable use.

Having secured Cabrera's selection and his agreement to cooperate with them, the LAP lawyers likely believed that they had paved their path to victory. But their problems were not over.

B. Donziger, Fajardo, and Yanza Put Together an "Army," Cabrera is Sworn in, and the LAP Team Prepares His Work Plan

Cabrera was selected in April 2007, but he had not been sworn in by June. The field work had not yet begun. Donziger and his colleagues feared their plan was in danger.

Donziger and Fajardo visited Judge Yánez on June 4, 2007, to inquire why the swearing in was taking so long and to encourage him to allow the expert to get to work in the field. Remarkably, the audio of this *ex parte* meeting with the judge was recorded by the *Crude* camera crew.[351]

Very early in the meeting, Donziger said to the judge: "Let's speak frankly. What do we do to start" the process with Cabrera?[352] The judge replied that it "is already about to start," but that Chevron had filed "two books" of "suggestions" and issues regarding the process by which Cabrera's field work was to be carried out, ***429** and the judge needed to rule on them.[353] One such "suggestion" was that Chevron lawyers be permitted to attend Cabrera's inspections. Donziger replied that "we are fine with that."[354] Judge Yánez responded: "Yes, but the only thing that must be made clear is ... the expert is appointed by the court."[355] There must be "parameters so that he can—this is going to be done right, isn't it? And the situation can't be made too creative. Yes, because, I know that tomorrow you'll leave but I'll still be here, right?"[356] Donziger assured Judge Yánez that he, Donziger, would not "desert" the judge, and stressed that the judge could not let Chevron's complaints about the expert or threats to appeal Judge Yánez's ruling delay the swearing in any further.[357]

Donziger and Fajardo left the meeting frustrated with the delay and worried that Judge Yánez was slipping away from their control. They discussed the need to pressure the judge to swear in Cabrera and get the process going. Donziger said: "To me, this is already a matter of combat ... I think we actually have to put an army together...."[358] Fajardo agreed: "We have to have demonstrations, have protests. I think that has to be done right now...."[359] He continued: "*the idea is to teach a lesson to this judge and to the next one. I mean, teach the court a lesson. A message to the court.*"[360]

The next day, Donziger met with Yanza and Atossa Soltani of Amazon Watch and explained the situation:

> "I think that, analyzing the outlook of this case, we are losing strength with the court. Uhm, this case has pretty much been asleep for five months. It's weird. I mean, *we got—we were getting, like, everything, for a while, that we wanted. You know, we got the cancellation of the inspections. You know, we we're getting the peritaje global, the final phase.* But then, like, suddenly everything was in place and he won't swear in the *perito,* which is needed to start the hundred and-twenty day period. It's been, like, weeks and weeks and weeks of delays. You know, after sort of analyzing the situation, we believe that the judge is trying to stall the case until the end of the year, until the new guy comes in ... So, you know—but it goes way beyond the problem of any individual judge, 'cause it's possible the next person could come in and ... and not want to deal with it and do the same. You know, it's a problem of institutional weakness in the judiciary, generally, and of this court, in particular. *We have concluded that we need to do more, politically, to control the court, to pressure the court. We believe they make decisions based on who they fear the most, not based on what the laws should dictate.* So, what we want to do is take over the court with a massive protest that we haven't done since the first day of the trial, back in October of 2003."[361]

He added that the protest would occur during the last week in June and emphasized ***430** that "it's a critically important moment, because *we want to send a message to the court that, 'don't fuck with us anymore—not now, and not—not later, and never.... [N]o one fears us right now. And, until they fear us, we're not gonna win this case.* I'm convinced."[362] Indeed, on June 13, 2007, he suggested that Fajardo and Yanza "inform the judge now that we're going to have the big march and maybe *ask for his recusal during that march so that he'll get scared now.*"[363]

As it turned out, the June 4 visit to Judge Yánez by Donziger and Fajardo quickly had its desired effect, and Donziger's fears as to whether Cabrera would be sworn in

and thus authorized to begin his work as global expert proved short-lived. Cabrera was sworn in on June 13, 2007.[364] At his swearing-in, Cabrera promised to execute his duties "faithfully and in accordance with science, technology and the law and with complete impartiality and independence vis-a-vis the parties."[365]

Roughly two weeks later, Cabrera submitted what purported to be his work plan to the court.[366] While this was more abbreviated than the detailed March 21 plan initially prepared by the LAP team, it too in fact had been written by the LAP team.[367] It listed categories of experts who would assist in collecting samples in the field and analyzing data[368]—all of whom secretly would be named by the LAP team.[369]

C. The Field Work

Shortly before Cabrera was sworn in, Donziger and Fajardo had discussed the need to "scale up" the "battle" once that occurred by "organiz[ing] pressure demonstrations at the court and [providing] vigilance" to "protect" the expert.[370] They proceeded with the plan once Cabrera was sworn in. They decided that a "pressure demonstration" would take place the day Cabrera was set to begin "his" work in the field.

On June 26, 2007, Donziger emailed the producer and cameraman of the *Crude* documentary to fill them in on the plan. He wrote that "Richard [Cabrera] the new expert [would be] tak[ing] sampling [during the following week] for the first time in Lago, and a ton of people will be there to protect him from the Chevron lawyers...."[371] He suggested that the crew "film us getting ready for the big march. The march will be the biggest in the history ***431** of the [ADF] ... [yo]u can capture the main characters (me, Pablo, Luis) early in the morning Tuesday greeting the communities as they travel to lago from the hinterlands...."[372] And he noted that "[t]he other thing that would be good to capture is our private 'army' which has been very effective. Yesterday they followed a Texaco lawyer into the judge's chambers and had a confrontation. This is a critical part of our strategy that is allowing the case to go forward ..."[373]

The demonstration occurred on July 3, 2007, and culminated with a speech by Yanza.[374] Cabrera began his site inspections the following day, surrounded by Donziger's "army."[375] Over the next three months, Cabrera visited sites and collected samples.[376]

Chevron was skeptical of Cabrera from the day he was named. It thought him unqualified and that he lacked relevant experience, and it voiced its concerns to the court.[377] Chevron's lawyers became even more suspicious when Cabrera took samples at various sites because they observed what seemed to them to be collaboration and familiarity between Cabrera—the supposedly independent global expert—and the LAP team.[378] In addition, "unlike the Lago Agrio Plaintiffs' representatives, Chevron lawyers and ... technical team members were often blocked from observing up close Cabrera's inspections."[379] Thus, "[t]hroughout Mr. Cabrera's proposed appointment, swearing in, field work and the ultimate submission of his reports, Chevron repeatedly petitioned the Court to address its concerns over Cabrera's lack of impartiality and independence and his suspected collusion with the Lago Agrio Plaintiffs' representatives."[380] The Lago Agrio court never intervened.[381] It merely reminded Cabrera "that he is an auxiliary to the Court for purposes of providing to the process and to the Court scientific elements for determining the truth" and asserted that "[t]he transparency of the expert's work will be ensured."[382]

Chevron had reason to be suspicious of Cabrera's field work, which was anything but transparent. Among other things, Donziger later admitted that the LAP team "had [also] been involved in Mr. Cabrera's site selection" and his "sampling protocols."[383] Indeed, he conceded that he could not recall a single site Cabrera sampled that the LAPs had not "recommended" to him.[384] Nor was that all.

1. The LAP Team Pays Cabrera to Ensure that He Would "Totally Play Ball"

The LAP team paid Cabrera. Some of the payments they made to him were official, court-approved payments made through the court process, which worked ***432** like this: on several occasions, Cabrera filed a letter with the court, requesting payment for work he performed or was about to perform.[385] The court approved the amount, and ordered the LAPs, who had requested the global expert, to pay it. The LAP team then wrote Cabrera a check for that amount, which was filed with the court and then given to Cabrera.[386]

But the court-approved payments were not the only ones the LAPs made to Cabrera. They paid him also outside the court process. And they began paying him even before he had begun to perform his duties.

After Cabrera was named as the global expert but before he was officially sworn in, the LAPs agreed to set up a new, "secret" bank account through which they surreptitiously would pay Cabrera.[387] Yanza and Donziger began the process of opening the secret account in June 2007. Yanza informed Donziger that "[t]o open the account we need at least 2 thousand dollars. Due to the urgency, I suggest that amount (or more, 5 or 10 thousand) be sent to my personal account and I will transfer it to the new secret account."[388] Donziger responded "I'm not sure it should be your account. [A]re you sure?"[389] Yanza assured Donziger that "the first transfer is just to open the other account. Once we have the other account I'll immediately transfer all the money to that account and we start operating with that account."[390] He later made clear that he would open the secret account in someone else's name.[391]

The LAP team ultimately decided to repurpose a preexisting account the ADF held at Banco Pichincha to serve as the secret account.[392] Between August 2007 ***433** and February 2009, Donziger had Kohn make three separate payments totaling $120,000 via wire transfer to the secret account.[393] A large portion of this money was paid to Cabrera via direct account-to-account transfers at Banco Pichincha.[394] For example, on August 9, 2007, Yanza sent Donziger an email in which he included the account information for the secret account and wrote that "[Kohn] ha[s] to deposit 50k [into the secret account] so we can pay the advances to the consultants so they will start their work as soon as possible. I hope it is deposited by Wednesday at the latest. I'll be in touch that day to arrange all of this with Huao."[395] Six days later, Kohn transferred $50,000 into the secret account.[396] Two days after that, $33,000 was transferred to Cabrera from the secret account.[397] And on September 12, 2007, Yanza emailed Donziger stating that he "need[ed] 50,000 more by Monday at the latest."[398] He followed up on that request five days later, telling Donziger: "I hope you make that deposit right away because I offered to give the Wao another advance tomorrow and I don't want to look bad."[399] That same day, Kohn transferred $49,998 into the secret account.[400] And on February 8, 2008, Yanza emailed Donziger and asked for a transfer to the secret account, stating "[h]opefully, [Kohn] transfers 25."[401] Later that day, Donziger emailed Kohn, asking him to deposit $20,000 into the Frente's secret account.[402] Kohn transferred the money to the secret account four days later.[403]

Defendants have contended that the secret payments they made to Cabrera were "advanced funds to cover expenses incurred for work performed so that his work would not stop."[404] And Donziger testified at trial that the secret account was "to pay [Cabrera] for work performed outside of the court process due to the paralysis that existed in the court...."[405] He maintained also that such payments ***434** were "appropriate" under Ecuadorian law.[406]

In fact, experts are prohibited under Ecuadorian law from "requir[ing] or receiv[ing] anything of value, whether directly or indirectly, from the parties in the case ... since their fees must be established in advance by the competent judge."[407] The attempt to justify their payments to Cabrera outside the court process—that is, without an application by Cabrera to the court followed by court approval followed by payment—as necessary "to keep the process going" is not persuasive. While such advances might have been both understandable, if irregular, had they been made openly and in response to proven delays by the court in acting on payment requests, there is no persuasive evidence of either. Defendants' expert, moreover, testified that secret payments to Cabrera without the knowledge of the court to alter the result of the expert's report would have been crimes under Ecuadorian law.[408] Indeed, the Ecuadorian Criminal Code provides that "[a]nyone who bribes a[n] ... expert ... or who knowingly uses false ... experts in a court proceeding ... will be punished as guilty of false testimony or perjury."[409]

All of the circumstances—including the fact that a court-approved payment process existed but that the LAP team secretly paid Cabrera outside of that process, used a secret account to do so, worried in emails about whether any of the money should go through Yanza's personal account even temporarily, and used code names as they did it—indicate that the secret payments were illegal or at least improper,[410] that the LAP team knew that, and that they attempted to conceal their payments. Whatever else these payments may have included, if anything, at least ***435** part of them were made as part of even more extensive efforts to ensure that Cabrera "would totally play ball with" the LAPs and with other U.S. consultants whom the LAPs had hired to draft the report Cabrera would file under his name.

2. The LAP Team Provides Cabrera with Administrative "Support" and Controls his Field Work

The LAPs provided Cabrera more than payments from the secret account. Three days before Cabrera began his field work, Fajardo sent an email to Donziger and Yanza,

informing them that Cabrera that morning had called him "about a little mistake in the contract, [and] he seemed a bit upset...."[411] Fajardo suggested that Donziger get in touch with Cabrera

> "to offer some Support, which ... should be the following:
>
> 1. That we help him get an office, if he hasn't yet, we shouldn't let him go through that hassle, it is our obligation to help him. Leaving him alone would be irresponsible of us, we could give him someone to help him, he'll feel better.
>
> 2. I recommend that Julio [Prieto]'s girlfriend be his assistant, I think she's a really bright girl, *and since she's Julio's girlfriend, there would be no problems,* she knows something about law and could help him in many aspects, ***plus we'd have this situation more or less controlled ....***
> 3. Even though it's not our obligation, but I think it's our duty to help him get insurance. We must understand that he has no structure and we do. I think that he now needs to get to the heart of his work...."[412]

Donziger replied that he was "on it."[413]

Donziger and Fajardo believed that supporting Cabrera in every way was necessary to maintaining the "control" over him upon which Donziger insisted. So they entered into a contract with Cabrera, provided him with a secretary (Prieto's girlfriend), obtained life insurance for him,[414] and provided other support. To ensure that Cabrera continued to cooperate with them, they needed to make clear that they supported him. And their "support" was not limited only to administrative matters. They also supported and controlled his work in the field.

Shortly after Cabrera began his inspections, he filed a letter with the Lago Agrio court in which he complained that Chevron's representatives had interfered with his first inspection at the sampling site and were "insulting [Cabrera], trying to affect [his] reputation, dignity, and impartiality."[415] He wrote that, in the future, "[i]f upon arriving at a site or well that [he] need[ed] to sample [he] f[ou]nd alterations ... [he] reserve[d] the right to replace that and all tampered sites with other sites that have not been altered, without the new sites having to be on the list that was provided in the work plan."[416]

Read in concert with the LAP team's internal correspondence, Cabrera's letter ***436** to the court—in which he "reserve[d] the right" to visit new sites and collect new data—was meant to lay the groundwork for the LAP team's maintenance of control over Cabrera's field work. Indeed, on July 17, 2007, Donziger sent an email to Yanza and Fajardo, the subject of which was "Ideas for meeting with Richard [Cabrera]."[417] He wrote:

"These are the [l]atest ideas:

> 1) That we think that *Richard* should suspend his work in the field and we should not pay the team until after the recess. *We just need to tell the team and Texaco that he's going to start all over after the recess so there is nothing strange, everything appears normal.*
>
> 2) When I get there, we'll re analyze the work and budget with *Richard.* And we'll adjust with a much smaller team. My tendency is to stop *Richard* from working much more in the field ... or, if he continues doing it, *he should continue under the most strict control with an extremely limited number of samples ... And we'll change the focus of the data at our offices.*
> 3) It is key to have deadlines to receive drafts from all the consultants, such as the biologists, the water man, and so on. Personally, I don't want to wait for the 'final' product to determine if the work is useful or not, or we will be screwed because they will ask for even more money to make the changes if we are not properly informed of everything during the process."[418]

Donziger's email underscores the fact that the LAP team had chosen the sites which Cabrera was to visit and, when the team's funds began to run low, sought to limit the number of sites even further. All the while, the LAPs knew that—for the samples he did collect—they could simply "change the focus of the data at [their] offices."

The "team" to which Donziger referred included Stratus and other consultants and scientists who were hired to perform technical work supposedly to have been done by Cabrera.[419] One of those consultants was Uhl, Baron, Rana & Associates, Inc. ("UBR"), an environmental consulting firm Kohn and Donziger had hired and paid to develop a potable water report.[420] As will be seen, the report UBR prepared ultimately became an appendix to the Cabrera Report.[421] It was attributed to Juan Villao Yepez, an employee of UBR, who was identified as a supposedly independent expert on Cabrera's supposedly independent technical team.[422] The fact that the LAP team had hired and was paying UBR was not disclosed to the Lago Agrio court.

The authorship of the Cabrera Report and its appendices will be discussed more ***437** fully below. The importance of Donziger's July 17, 2007 email for present purposes is that it shows that the LAP team worried about how they could continue to pay the team of U.S. environmental

consultants they had assembled and hired to perform Cabrera's work for him. And the team worried also about maintaining control over the sites Cabrera inspected, the samples he took, and the data the samples produced. So five days after Cabrera sent the letter to the court stating that he reserved the right to visit new sites and collect new data,[423] Donziger informed Fajardo that Cabrera should collect an extremely limited number of samples and that (1) the focus of the data could be "change[d] ... at [the LAPs'] offices" and (2) the data ultimately would be analyzed and summarized by the consultants the LAPs were paying to prepare Cabrera's report.[424] This two-pronged attack enabled the LAP team to get what it wanted—fewer testing sites, lower costs, and control over the samples and results they elicited—while allowing Cabrera to blame the need for changes to his work plan on Chevron.

Donziger noted also in his July 17, 2007 email to Fajardo that the LAPs' hired consultants needed to be required to submit their drafts to the LAP team early on. Donziger wanted control over the consultants' reports from their inception. He did not want to risk waiting until their work was "final" and ready to be included in the report to discover that it ultimately was not "useful" to the LAPs.

D. Donziger Attempts to Deceive Judge Sand About Cabrera's Independence

During this period, a case entitled *Republic of Ecuador v. ChevronTexaco Corp.*[425] was pending in this Court before Honorable Leonard B. Sand. The details of that case are not particularly germane here. One, however, is significant because it provides further evidence of Donziger's (1) awareness that the LAPs' control over Cabrera and their extensive participation in the activities with which he was charged, as a supposedly independent expert, were wrongful, and (2) determination to maintain the false appearance that Cabrera was independent when he most certainly was not.

In mid-September 2007, the ROE and PetroEcuador were due to submit supplemental papers in support of a motion to dismiss Chevron's counterclaims and to renew their own motion for summary judgment. Donziger had been given by the ROE's lawyers a draft of a declaration proposed for signature by Mark Quarles ***438** and submission to Judge Sand. Quarles was one of the outside consultants hired by the LAPs to, among other things, work on the global expert report supposedly done by Cabrera. Paragraph 5 subpart 3 of the draft read as follows:

> "3. In the event Chevron or the Plaintiffs had been allowed to participate in developing Cabrera's sampling strategy and selection of sites/methods, a degree of biasness [sic] would have been introduced into the sampling plan. Given that Chevron and the Plaintiff were not involved in the workplan preparation, Cabrera's plan should represent no bias."[426]

On the evening of September 16, 2007, Donziger emailed the draft declaration to Quarles with Donziger's comments and requested Quarles to revise the declaration accordingly.[427] Donziger's proposal with respect to paragraph 5, subpart 3, was as follows (with the original draft in normal type and Donziger's comments and requested changes in boldface):

> "3. **[I would delete para in favor of the following language, if true: Mr. Cabrera has at all times acted independently from both the plaintiffs and the defendant. At no time has Mr. Cabrera entertained suggestions or even met with plaintiffs or their representatives regarding his current work plan.**
>
> [In the event Chevron or the Plaintiffs had been allowed to participate in developing Cabrera's sampling strategy and selection of sites/methods, a degree of biasness would have been introduced into the sampling plan. Given that Chevron and the Plaintiff were not involved in the workplan preparation, Cabrera's plan should represent no bias.—**would delete para]**"[428]

The foregoing demonstrates that Donziger did not want Quarles to say that participation by either side in Cabrera's sampling strategy or site or method selection would have introduced bias into the process. So he suggested to Quarles that he assert, "if true," that Cabrera neither had entertained suggestions from nor even met with the LAPs regarding his work plan. But Donziger by this time knew that the statements he proposed that Quarles make in his declaration would have been false. Among other things, Donziger had been at the March 3, 2007 meeting with Cabrera and others at which the LAPs laid out the plan they had prepared. Donziger knew also that the LAPs controlled Cabrera's site selections and that Cabrera in all other respects was "totally playing ball" with the LAPs. His inclusion of the words "if true" were nothing more than a misguided attempt to cover himself, should the blatant inaccuracy of the declaration itself ever be discovered, by permitting him to assert that he had relied on Quarles and that the falsity of the declaration had not been Donziger's fault.

The subparagraph that Donziger wanted changed was altered before the Quarles declaration was filed on the following day, September 17, 2007. The final version (which, with renumbering of certain paragraphs, appeared as subparagraph 1 of paragraph 7) was this:

> "1. Mr. Cabrera and his team have acted independently from both the ***439** plaintiffs and the defendant at the three (3) Phase II inspections that were witnessed on September 6–7, 2007. In fact, armed guards were present to accompany Cabrera and his team and to prevent plaintiff and defendant personnel from interfering with the execution of the sampling plan."[429]

Thus, Quarles was not prepared to go as far as Donziger wished, either because he knew that Donziger's assertions were false or because he knew that he lacked personal knowledge sufficient to justify him in saying what Donziger proposed.

In any case, the Quarles declaration as filed was intended by Donziger to convey the idea that Cabrera was working independently of the plaintiffs. It did so to some extent, though not to the degree Donziger wished. Even its limited message was inaccurate, and Donziger knew it. In fact, Quarles testified that if he had known that the LAPs had drafted Cabrera's work plan and that Cabrera had worked directly with the plaintiffs, he would not have signed even the modified declaration.[430]

E. Stratus Secretly Writes Most of the Report

Ann Maest was a significant figure in the ensuing events. She first met Donziger and the LAP team in 2006, and eventually suggested that Donziger speak to Stratus' leadership to discuss retaining the firm in connection with the Cabrera Report.[431] Donziger then met with Stratus' president, Josh Lipton, Maest, Stratus' executive vice president and chief financial officer Douglas Beltman, and other Stratus personnel in Boulder, Colorado in April 2007.[432] Donziger explained the history of the Lago Agrio litigation and the status of the evidentiary phase of the case.[433] He explained also what he envisioned Stratus' role would be.[434] He said that he needed Stratus' help preparing the damages claim and explained that, while the LAP team had already done some testing in the field and had produced a tentative remediation plan, it was "spotty" and needed "to be significantly beefed up."[435]

Stratus entered into a retention agreement ***440** with Kohn on August 20, 2007.[436] The agreement specified that Stratus would "provide regular updates on the progress of our work with Mr. Steven Donziger via phone or email."[437] Doug Beltman was identified as the Stratus project manager and officer-in-charge of the firm's "Ecuador Project."[438]

Throughout the rest of 2007 and early 2008, Beltman, Maest, and others at Stratus consulted with Donziger and worked on preparing the damages assessment.[439] Donziger and Stratus personnel exchanged hundreds of emails regarding draft outlines of the Cabrera Report as well as schedules for the drafting, review, analysis, translation, and completion of the annexes.[440] But it is clear that Donziger had the final word on every annex and every piece of the report[441]—even in arriving at the actual damages figures.[442]

Based on data given to them by Donziger and the LAP team, their visits to Ecuador, and their own analyses, Beltman, Maest and their team at Stratus wrote the bulk of the Cabrera Report. As Donziger later admitted, much later, after Stratus had come clean about its involvement, it was "the general idea" "that Stratus would draft the report in a form that it could be submitted directly to the Ecuadorian court by Mr. Cabrera."[443] In January 2008, Beltman sent a first draft of an outline of the Cabrera Report to Donziger and Maest for their comments.[444] In February ***441** 2008—six weeks before Cabrera's report was to be filed—Maest and Beltman traveled to Ecuador to meet with Cabrera, Donziger, and other members of the LAPs' team.[445] Beltman wrote to the Stratus team in Boulder that

> "The project is at a key point right now. We have to write, over the next 2 to 3 weeks, probably the single most important technical document for the case. The document will pull together all of the work over the last 15 or so years on the case and make recommendations for the court to consider in making its judgment. We (the case attorneys, the case team in Quito, and Stratus) have put together a very ambitious outline for this report. The people in the Quito office are working on some parts, and we're working on others."[446]

The report to which he referred, of course, was the one that Cabrera would submit to the Lago Agrio court. At Donziger's direction, Stratus wrote its portions in the first person as though they were written by Cabrera.[447] Beltman emailed that draft to Donziger on February 27, 2008,[448] and continued to work on it through March.[449] Other members of the Stratus team worked at Beltman's direction and drafted portions of the annexes that would accompany Cabrera's report,[450] often collaborating with members of the LAPs' Ecuadorian team in doing so.[451] All of the portions of the report that Stratus prepared were in English, were written in Cabrera's voice, and later were

translated into Spanish for submission to the court.[452]

Beltman, Maest, and others at Stratus continued to provide comments on and material for the Summary Report and the annexes to Donziger and the LAP team up to March 30, 2008, two days before it was to be filed.[453] On that day, Beltman provided ***442** comments to Donziger on a draft damages table to be used in the Summary Report.[454] The table set the total estimated damages at $16.3 billion.[455]

The last draft of the Cabrera Report was saved on the morning of March 30, 2008.[456] Beltman, who was in Ecuador at the time, later recalled seeing the Report and annexes "boxed and packed up in the offices of the plaintiffs' lawyers in Ecuador ... the day before the report was filed."[457] On April 1, 2008, Donziger downloaded the final version of the report from a secret email account Fajardo had created for him.[458]

Later that day, Cabrera—accompanied by the LAPs, their supporters, and members of the press[459]—walked into the Lago Agrio court and filed the report he claimed to have written.[460] It consisted of an executive summary and 21 annexes and set the amount of damages at $16.3 billion.[461] It stated that "[t]his report was prepared by the Expert Richard Stalin Cabrera Vega for purposes of providing professional technical assistance to the Nueva Loja Superior Court of Justice ..."[462]

We now know, and Donziger eventually admitted,[463] that the Cabrera Report was not written by Cabrera. It was written almost entirely by Stratus and others working at the direction of Stratus and Donziger. Indeed, all of the damage amounts in the Cabrera Report came verbatim from Stratus' drafts.[464] And the annexes drafted by Stratus or its subcontractors were falsely attributed to experts ***443** on Cabrera's purportedly independent team, who had been selected by Donziger and the LAP team.[465] But, while Donziger reviewed and commented on every aspect of the Cabrera Report and its annexes before they were filed, there is no evidence that Cabrera himself ever did.

Immediately after the Cabrera Report was filed, Donziger, Fajardo, and their team began trumpeting it to the press as the work of an independent, court-appointed expert who had conducted his work with the assistance of an independent team of scientists. The ADF issued a press release on April 2—which Donziger had prepared before the Cabrera Report was filed—titled "Court Expert Smacks Chevron with Up To $16 billion in Damages for Polluting Indigenous Lands in Amazon."[466] Another release stated that "an *independent* expert has proposed that Chevron pay a minimum of $7 billion and up to $16 billion.... Cabrera, the court appointee who is a respected geologist and environmental consultant, was assisted by a team of technical specialists."[467] And another stated that the "expert report [ ] was prepared with the help of 15 scientists under the supervision of [an] Ecuadorian environmental consultant."[468]

Two weeks after the report was filed, Fajardo gave a press conference, with Donziger at his side, in which he stated that "what scares Chevron the most, is that this *independent, court-appointed expert, who doesn't ... respond to either side of the case* has determined that to repair this damage it will be between seven billion and sixteen billion dollars."[469] Donziger and the plaintiffs' team falsely stressed Cabrera's "independen[ce]"[470] to maximize the leverage on Chevron, although they well knew that the claim of independence was a lie.

F. Stratus Criticizes its Own Report to Enhance the False Image of Cabrera's Independence

Stratus' work was not complete the day the Cabrera Report was filed. Donziger and his team knew that Chevron would respond to the Report and that they would need to defend it. So the day after it was filed, Beltman emailed Donziger with a list of items that Stratus would be working on moving forward. Among the items he listed was to "lin[e] up some experts to review and defend the report," to "prepare [the plaintiffs'] comments on Cabrera report to submit to the court," and to "write report on Cabrera's report as response to Chevron's anticipated report on Cabrera's report."[471] Thus, having written the bulk of the Cabrera Report, Stratus began preparing to (1) respond to it on behalf of the LAPs as if the Cabrera Report actually had been written by Cabrera,[472] and (2) ***444** write a response for Cabrera to issue to anticipated Chevron criticisms of the report that Stratus secretly had written. The plan was to maximize the deception.

The goal for the LAP team's response was to create the impression that it was dissatisfied with the Report and that Cabrera had not gone far enough in assessing damages—notwithstanding the fact that the LAP team, including Stratus, itself had written it. Fajardo wrote to the team the day after the Report was filed:

> "Several international agencies have called me. I have told them the following, among other things:
>
> a. According to my cursory reading of the report: I think it is a good report, but it is incomplete. For

> example, the cost of groundwater clean up is not economically quantified. It does not determine what Texaco should pay for the [e]ffect on the culture of the indigenous peoples, it includes an item for recovery, but there is no item for sanctions. It does not include an estimate of the financial damage caused to the economy of rural residents, and it does not say what should be done so rural residents can recover a decent life.
>
> b. For these reasons, the plaintiffs are waiting for the judge to give us the report, we will analyze it in depth, and we will ask the Expert to complete this report, which does not meet our expectations ...
>
> c. The report is a step toward justice, but we are not happy because of what's missing.
>
> .... I think it is good to maintain a uniform line, *PLEASE, WE ARE NOT HAPPY* ..."[473]

On September 15, 2008, Chevron responded to the Cabrera Report. It challenged its findings, asked that the court strike the Report in its entirety and sought a hearing on errors the Report allegedly contained.[474] It questioned also Cabrera's independence and accused Cabrera of working improperly with the LAP team.

The LAPs filed their comments—which had been written by Stratus and other members of the LAP team—on September 16, 2008, the day after Chevron's response was filed.[475] Although the comments largely endorsed Cabrera, they noted that he "did not consider more documentary information in his report"[476] and claimed that his "omissions" "broadly favor[ed] the interest of [Chevron]."[477]

This appearance of dissatisfaction with the Cabrera Report was important because it supported the false pretense that Cabrera had acted independently. It also provided a basis upon which Cabrera later could admit errors in his initial report and increase his damages assessment. Indeed, the LAP team already was preparing Cabrera's supplemental filings.

On October 7, 2008, Cabrera wrote to the Court:

> ***445** "President, I am an honest man with nothing to hide, and my conduct as an expert in this case has been as professional, impartial and objective as possible, as can be seen from my expert report. The fact that neither of the two parties is fully satisfied with my report is clear evidence of my impartiality. I am therefore perfectly willing to appear before the Superior Court of Justice and answer questions or provide whatever is necessary to remove any doubts on the work carried out with a multidisciplinary and honest team.... I was appointed as expert by the President of the Superior Court of Justice of Nueva Loja; I do not take orders from either of the parties to the lawsuit.... This means, President, that I am not, nor will I be, subject to the views or whims of either of the parties; I act in accordance with rulings by the judge, with the law and with my principles."[478]

This of course was blatantly false and misleading. Moreover, the assertion that "neither of the two parties is fully satisfied with" the Report corroborates the conclusion that the response to the report that Stratus wrote on the LAPs' behalf—that is, Stratus' criticism of its own work product that had been submitted over Cabrera's name—was intended to feed the false impression that Cabrera had been independent. That was a key part of Donziger's strategy.

In November 2008, Cabrera submitted a supplemental report, in which he purportedly responded to the comments and questions submitted by the LAPs. The supplemental report acknowledged certain omissions and added another $11 billion to the initial damages assessment in the Cabrera Report.[479] This report, just like the one it was supplementing, had been written by Stratus and the LAP team.[480]

Cabrera in February 2009 issued also a response to Chevron's petition. He wrote:

> "Your Honor, I don't know how long I will have to keep responding to the same requests from the parties.... [M]y opinion and my clarifications are clear; they are based on field and bibliographic research, statistical analyses, laboratory analyses, and scientific commentaries which are serious, objective, and deeply impartial.... *The entire expert investigation procedure was completed by me personally.*"[481]

Again, Cabrera did not disclose Stratus' and the LAP team's role in drafting the Cabrera Report and its supplement.[482]

***446** In the last analysis, the facts concerning the Cabrera Report are crystal clear. The remaining LAP judicial inspections were cancelled, the global expert proposal adopted, and Cabrera appointed in consequence of the coercion of and pressure placed upon Judge Yánez. As Donziger admitted in a *Crude* outtake, Judge Yánez "never would have done [that] had we not really pushed him."[483]

Cabrera was not even remotely independent. He was recruited by Donziger. He was paid under the table out of a secret account above and beyond the legitimate

court-approved payments. He was promised work on the remediation for life if the LAPs won. The LAPs gave him an office and life insurance, as well as a secretary who was a girlfriend of one of the LAP team members. Stratus and, to some extent others, wrote the overwhelming bulk of his report and his responses to Chevron's objections, as well as to the deceitful comments Stratus had written on its own report. And, in accordance with Donziger's plan to ratchet up the pressure on Chevron with a supposedly independent recommendation that Chevron be hit with a multibillion dollar judgment, he repeatedly lied to the court concerning his independence and his supposed authorship of the report.

G. Donziger's Explanation

The foregoing facts were not seriously disputed at trial. None of Fajardo, Yanza, nor Cabrera—all of whom were centrally involved—submitted to a deposition or testified at trial. Donziger, however, over time has attempted to avoid responsibility in a variety of ways including denial followed by various explanations, justifications and evasions in efforts to portray these events in a benign light. None has merit.

As will be seen, Donziger initially attempted to keep his and his confederates' role in the Cabrera episode and Report secret—even from some of his co-counsel—and vehemently denied any accusation that the LAPs had been involved in drafting the Cabrera Report. By late 2010, however, the truth of the Report's authorship had been revealed to such a degree that Donziger no longer could deny ***447** it. So he began to offer a new explanation: Stratus wrote the bulk of the report, he acknowledged, but that was acceptable under Ecuadorian law. He testified at trial: "Although I often have been confused about the issues involved,[484] I now believe the process used to create the executive summary of the Cabrera report was fundamentally consistent with Ecuador law, custom and practice as it was occurring in the *Aguinda* case. Certainly, I never understood that any actions I took or of which I was aware at the time were impermissible in Ecuador."[485]

Donziger's belated admission and explanation is incomplete and unpersuasive. It does not square with the facts. He does not explain why, for example, he went to such great lengths to keep the firm's involvement secret if he believed Stratus' drafting of the Cabrera Report was permissible. Nor does he (nor can he) square his statement that the "process used to create" the report was consistent with Ecuadorian law, custom and practice with the fact that the Lago Agrio court on multiple occasions instructed Cabrera to conduct his work impartially and independently of the parties.[486]

Nor is Donziger's explanation consistent with the fact that Cabrera himself—most likely at the direction of the LAP team—wrote to the court several times to deny any coordination with the LAPs. On July 23, 2007, in response to objections by Chevron, Cabrera wrote to the court: "I should clarify that I do not have any relation or agreements with the plaintiff, and it seems to me to be an insult against me that I should be linked with the attorneys of the plaintiffs."[487] In October of that year, he wrote again: "I have performed my work with absolute impartiality, honesty, transparency and professionalism. I reject the descriptions or attacks that have been leveled against me alleging that I am biased toward one of the parties, and I also reject the unfounded accusations that I am performing my work surreptitiously. That is completely untrue."[488] Later that month, he wrote again: "I can only confirm my commitment to continue my work with absolute impartiality, honesty and transparency."[489]

Indeed, the LAPs' lawyers themselves, in responding to Chevron's objections in Ecuador concerning Cabrera's independence, ***448** wrote that the objections were "based completely on the baseless concept of a 'conspiracy' of which there is no evidence, for this reason the [objection] is completely unfounded and must be rejected as well as sanctioned given that it was lodged for the sole purpose of damaging the Lago Agrio Plaintiffs' case and tarnishing the good name of the distinguished Superior Court of Nueva Loja."[490] Donziger does not explain why his legal team dissembled to the court about their arrangement with Cabrera if there was nothing wrong with it.[491]

The Court rejects Donziger's excuses entirely. He knew at all times that his actions were wrongful and illegal.

VI. The Pressure Campaign Continues—The LAP Team Turns Up the Heat By Pressing for Indictment of Former Texaco Lawyers.

While all this was going on, political events in Ecuador took place that came to have major implications for the Lago Agrio case. The background begins with the fact that the LAPs had been concerned from the very outset of the Lago Agrio case with the possibility that the release signed by the ROE in its final agreement with Texaco would wipe out or prejudice the LAPs' claim. So in 2003, the LAPs began pressing for a criminal prosecution of Texaco lawyers based on alleged fraud in connection with

the release and the conclusion of the Texaco–ROE relationship. Their purpose was plain—to force Chevron to settle the lawsuit. As Donziger wrote in his personal notebook on October 4, 2005:

> "Idea to pressure the company, get major press in U.S. ... and compel the Ec govt to act against the company legally to nullify the remediation contract."[492]

He emphasized two days later that:

> "[t]he key issue is criminal case. Can we get that going? What does it mean? I really want to consolidate control with contract before going down a road that I think *could force them to the table for a possible settlement.*"[493]

The LAPs initially did not have much success. The Prosecutor General in 2006 issued a report requesting the dismissal of the charges of falsification of documents, stating that he had found no evidence to ***449** support them.[494] Around the same time, the prosecutor issued a report finding no improper conduct on the part of Pallares and Reis Veiga, the Texaco lawyers, and requested dismissal of the investigation.[495] Despite the prosecutors' requests, however, Ecuador's highest court did not terminate the investigations.[496]

The court's action coincided with a political development in Ecuador—the 2006 election of Rafael Correa as president. President Correa's influence over the judiciary is described elsewhere. For present purposes, however, Donziger explained the fundamental change that the election had worked. The LAPs had "gone basically from a situation where we couldn't get in the door to meet many of these people in these positions [in the government] to one where they're actually asking us to come and asking what they can do ...."[497] The LAPs "ha[d] connections" with the new administration, Donziger said. "[T]hey love us and they want to help us...."[498]

In March 2007, President Correa met with Yanza, Ponce, and others and offered "all the endorsement of the National Government to the Assembly of Affected by the oil company Texaco."[499] The following day, the media agent for the LAP team who was present for the meeting reported to Donziger that:

> "THE PREZ WAS VERY UPSET AT TEXACO. HE ASKED THE ATTORNEY GENERAL TO DO EVERYTHING NECESSARY TO WIN THE TRIAL AND THE ARBITRATION IN THE U.S.... THIS SATURDAY HE WILL REPORT ON THE MATTER ON NATIONAL TELEVISION, OFFICIALLY NOW. AT THAT TIME HE WILL CLARIFY SEVERAL POINTS IN ORDER NOT TO HURT U.S. IN THE TRIAL."[500]

In a further note, the LAPs' media agent wrote that President Correa "GAVE U.S. FABULOUS SUPPORT. *HE EVEN SAID THAT HE WOULD CALL THE JUDGE.*"[501] Fajardo and Prieto met with ROE officials the following week and asked for assistance in providing President Correa with a basis for reopening the "investigation for ... the responsible parties."[502]

A month later, President Correa boarded a helicopter with Yanza, Fajardo, and others and toured the Lago Agrio oil ***450** fields.[503] He issued a press release that same day calling upon the "District Attorney of Ecuador to allow a criminal case to be heard against the Petroecuador officers who approved the" Final Release.[504] Donziger, who was in Colorado meeting with Stratus, noticed that President Correa had not mentioned the Texaco lawyers in his statement and reflected that it might be the right moment "to ask for the head of Pérez–Pallares [a Texaco lawyer who had been involved in Texaco's agreements with the ROE]—given what the President said."[505] He explained that the President was "basically calling for the heads of government officials that signed off on the remediation, and he's totally with us."[506]

President Correa took to the radio on April 28, 2007, denouncing the "homeland-selling" lawyers defending Chevron–Texaco, "who for a few dollars are capable of selling souls, homeland, family, etc," and calling for criminal prosecution of anyone who had signed the "shameless" Final Release.[507]

Fajardo met with President Correa again in June 2007. He reported that the president had informed him that "the current ... Prosecutor General ... is ... a little nervous. Because, since the political forces of the National Congress have changed ... he is afraid of being removed.... So, the President thinks that if we put in a little effort at the Public Prosecutors' office, the Attorney General will yield, and will re-open that investigation into the fraud of ... the contract between Texaco and the Ecuadorian Government."[508]

Notwithstanding the pressure from the LAPs and President Correa, the Prosecutor General refused to re-open the case. But his refusal cost him dearly. He immediately was removed from office and replaced by Dr. Washington Pesántez—President Correa's college roommate and the district prosecutor who previously had recommended the dismissal of the criminal charges twice before.[509] Several months later, however, and following a meeting with Fajardo, Pesántez agreed to reopen the criminal case.[510] Fajardo reported to Donziger on March 11, 2008: "I have an appointment with the Prosecutor

tomorrow morning, we are insisting that he reopen the criminal investigation against Texaco for the remediation."[511] And a few weeks after that, Fajardo wrote to Donziger and members the Ecuadorian LAP team: "We received an email from Esperanza [M]artinez, Alberto Acosta's advisor .... [i]t says 'on March 25, 2008, the investigation was reopened, with the objective of gathering new and sufficient information, if applicable, filing a criminal action.'.... This is urgent ... let's get in ***451** all possible evidence.... If things work out, our buddy Ricardo could go to jail...."[512]

While the LAPs were the driving force behind the criminal case, Donziger instructed his team to deny any involvement in it—and to tell the ROE officials to do the same. He wrote to the LAP team in August 2008: "We [must] explain to all the ministers and to Correa that they shouldn't say ANYTHING publicly about the case except that the government has nothing to do with it. That is key."[513] And a month later he instructed Fajardo that:

> "The party line when the media or anyone else asks about the Prosecutor's case should be: 'The criminal case against Chevron's lawyers and against public officials is not our battle. We are totally focused on winning the civil case, which has nothing to do with what the *Prosecutor* does....' DON'T GET IN THE BATTLE—THIS IS VERY IMPORTANT IF WE SAY THAT WE AGREE WITH THE PROSECUTOR'S OFFICE, IT COULD BE USED TO UNDERMINE THE INTERESTS OF OUR CLIENTS IN THE US."[514]

Donziger perhaps sought to keep the team's involvement secret for an additional reason as well—he realized it could harm him personally. He later wrote to his team in a different context that "[i]n the US, threatening to file a criminal case to get an advantage in a civil case is considered a violation of ethical rules of the profession."[515]

Over the ensuing years, President Correa's support for the LAP team grew more vocal. And while we jump ahead of developments in the lawsuit itself, it is useful to complete the tale of the attempted criminal prosecution of Texaco lawyers before returning to the civil litigation.

On July 4, 2009, President Correa stated in his weekly presidential radio address that he "really loathe[d] the multinationals.... Chevron–Texaco would never dare do in the United States what it did in Ecuador."[516] A few months later he stated in a radio broadcast: "Of course I want our indigenous friends to win."[517]

On April 29, 2010, the Prosecutor General's office issued an opinion formally accusing Reis Veiga and Pérez–Pallares of the crime of *falsedad ideologica*.[518] The opinion cited, among other things, the Cabrera Report as evidence of Texaco's contamination.[519] Nevertheless, on June 1, 2011, the First Criminal Division of the National Court of Justice in Ecuador formally dismissed the charges.[520]

***452** President Correa's alliance with the LAPs and animosity toward Chevron did not go away with the dismissal of the criminal charges. He since has publicly attacked Chevron in multiple press releases, television and radio broadcasts, speeches, and presentations throughout the world.[521] He has referred to Chevron's attorneys as "homeland-selling lawyers."[522] He has labeled Chevron an "enemy of the court."[523] After the Judgment was issued, he praised it has an "historic" ruling[524] And, as will be seen, President Correa's support for the LAP team has been used to benefit defendants in this case as well.

VII. The Third Phase of the Lago Agrio Case—2009–2010: Evidence of the Cabrera Fraud Begins to Come Out, Kohn Leaves the Case, New Financing Is Found, and the Case Proceeds in Lago Agrio

Up to this point, this opinion has proceeded more or less chronologically. In 2009, however, important sequences of events, each with its own relevant chronology, began taking place. In order better to explain the facts, this section addresses the important sequences, each in its own chronological order. But it is important to bear in mind that everything that went on during this period—in Ecuador, the United States, and elsewhere—was interrelated.

A. Donziger's Assumption that What Happens in Ecuador, Stays in Ecuador

Relatively early in the Lago Agrio case, Donziger made a critical assumption. He assumed that Chevron never would be able to obtain evidence of what transpired in Ecuador. Evidence that he thought so appears in a June 2006 exchange he had with Atossa Soltani, head of Amazon Watch, that was recorded by the *Crude* film makers.

On that occasion, Donziger and Yanza—with the cameras recording every word—related to Soltani their plans for

creating what they called a private army, ostensibly to protect the court against corruption, a euphemism for surrounding the court with LAP supporters to pressure it to do what they wished. For present purposes, however the important part of the conversation was this exchange between Soltani and Donziger:

> "SOLTANI: Do you guys know if anybody can, uh, subpoena these videos? That is a—how do you [unintelligible]
>
> DONZIGER: We don't have the power of subpoena in Ecuador.
>
> SOLTANI: What about U.S.? These guys ... [referring to the film makers]
>
> DONZIGER: An army—it's not an armed army—it's a group of people to watch over the court ...
>
> ***453** SOLTANI: I just want you to know—I just want you to know that it's—it's illegal to conspire to break the law."

Following a round of laughter, Donziger responded that "[n]o law's been conspired to be broken."[525]

Donziger's belief that Chevron would not be able to obtain discovery from Ecuador has proved true to a large extent. Indeed, defendants repeatedly have refused to produce documents from Ecuador, claiming that Ecuadorian law prevents them from doing so. And this in serious respects has impeded Chevron's efforts to litigate its case. But the assumption that what happens in Ecuador, stays in Ecuador fails to the extent that one hires an American film crew to capture many of his litigation-related moves over the course of three years in Ecuador and the United States. And it did not account for the fact that certain of the important players in this case—most notably the *Crude* film makers, Stratus, and Donziger himself—were U.S. residents and therefore subject to U.S. rules of discovery.

Beginning in 2009, Chevron began obtaining subpoenas under 28 U.S.C. § 1782 to require production of documents and testimony from persons in the United States who had relevant evidence. Thus, while defendants did not produce meaningful discovery from Ecuador, Chevron obtained some evidence of what transpired there.

B. The Release of Crude

The documentary film called *Crude* was made because Donziger in 2005 recruited film maker Joe Berlinger to portray the LAPs' case against Chevron.[526] The film featured Donziger quite prominently. Donziger provided Berlinger, cameraman Mike Bonfiglio, and other crew members expansive access to himself, his team and some of its activities for nearly the next three years.[527] The ultimate product, *Crude,* first was released in January 2009.[528]

The *Crude* team's independence from Donziger and the LAPs' lawyers—to the extent there was any at all—was limited.[529] For one thing, Donziger recruited the film's main source of funding: his former ***454** classmate Russell DeLeon.[530] As Donziger wrote: "R[u]ss is funding the case. Russ is funding the movie. And Russ wants to fund more cases and more movies."[531] Through his creation and sole ownership of a production company called Crude Investment, Inc., DeLeon contributed approximately 60 percent of the film's total funding.[532]

Nonetheless, just as they had done with Cabrera, Donziger and his team attempted to create the appearance that the film was independent, while they controlled or influenced its content from behind the scenes. Ironically, this ultimately contributed to the "outing" of their true role with respect to Cabrera.

In December 2008—one month before *Crude* first was exhibited—Donziger received a director's cut of the film.[533] One scene showed Dr. Carlos Beristain—a member of Cabrera's supposedly neutral staff—working directly with the LAPs and their lawyers, including Donziger. Donziger requested that Berlinger delete the Beristain images and other material.[534] Fajardo made the same request to Bonfiglio, emphasizing that if the scene with Beristain were left in the film, "the entire case will simply fall apart on us.... Those two guys [Beristain and Adolfo Maldonado, another supposed neutral] must not appear in the documentary at all! Please, remove them from it. It really isn't much, but it can complicate the entire case for us."[535]

Berlinger and Bonfiglio initially did not comply, and the film—with the Beristain scene—was shown at a film festival.[536] But Fajardo persisted, again imploring Berlinger and Bonfiglio to "remove the images" of Beristain "before the film is shown more widely, and before it is sold to a distribution company."[537] He explained that the images were "*so serious that we could lose everything* ...."[538] Berlinger ultimately removed the Beristain images from the scene, and they were not included in the version released on DVD.[539] They were left, however, in the version of the film that streamed over

Netflix. Someone at Chevron noticed.

The deleted images seemed to Chevron to confirm its suspicion that Cabrera had been neither neutral nor independent. Parenthetically, the attempt to have them removed evidenced the Donziger and Fajardo's awareness that their relationship with Cabrera and his staff had been improper and, indeed, could prove fatal to the Lago Agrio case. As Fajardo wrote, "we could lose everything."

***455** *C. The Section 1782 Proceedings*

1. The Section 1782 Action Against Stratus—Denver Counsel Withdraw and Donziger and Fajardo Seek to Obstruct Justice Before the Federal Court

In December 2009, Chevron brought a Section 1782 proceeding against Stratus and related individuals in the District of Colorado.[540] It argued that discovery was appropriate because similarities between the Cabrera Report and documents published by people working with Stratus, as well as documents produced by Stratus in a mediation proceeding, suggested that Stratus had written all or at least part of the Cabrera Report.[541] It contended that it was entitled to discovery to determine the degree to which that in fact was so as well as the LAPs' involvement in the process.[542]

Realizing that disclosure of Stratus' documents would reveal the LAP team's relationship with Cabrera, the LAPs' lawyers immediately sought to (1) prevent Chevron from obtaining discovery from Stratus, and (2) minimize the effects of any discovery that it might obtain.

a. Donziger Retains U.S. Counsel to Represent the LAPs in Denver

Shortly after Chevron filed the Colorado Section 1782 action against Stratus, Donziger retained attorneys John McDermott of Denver firm Brownstein Hyatt Faber Schreck, LLP, and Jeffrey Shinder of the New York City-based Constantine Cannon firm as counsel for the LAPs to oppose the Section 1782 petition.[543] Donziger assured them that Cabrera had been an "independent" "court-appointed Special Master."[544] And Shinder, whom Donziger sought to interest also in the much larger engagement of seeking to enforce the Ecuadorian judgment that the LAPs already expected, testified that:

> "the purported independence of the expert [Cabrera] was important in our [*i.e.,* his and Donziger's] conversations. It was of obvious significance. It was of significance to me in evaluating the possibility of being enforcement counsel that the process had integrity and it was the kind of process that would withstand scrutiny should we take that judgment and try to enforce it in an American court, and that the expert was supposedly independent and had done a review of the evidence that had procedural integrity was consequential and something we discussed."[545]

So, before agreeing to represent the LAPs, Shinder wanted to know if anything Chevron had alleged in its Section 1782 application was true. He met with Donziger in New York City in January 2010 to discuss the proceeding and his potential retention.

***456** Shinder observed that Donziger was "worried, borderline sort of panicked over" the 1782 proceeding.[546] Shinder asked him:

> "[']Steven, what am I going to find?['] I need access to the facts. [Donziger] denied [Chevron's] allegations. And the facts as he portrayed them to me were that Chevron was trumping up this allegation that Stratus had essentially ghostwritten the Cabrera report by sort of drawing improper inferences from materials that had been properly submitted to Mr. Cabrera through the process in Ecuador, that Cabrera had independently taken in those materials, and independently chose to incorporate them into his report.... I had been told that there was no, quote unquote, relationship between Stratus and Mr. Cabrera. That to the extent there were any similarities between the Cabrera report and work that Stratus had done, that that was the result of Mr. Cabrera's independent judgment...."[547]

A few weeks after their New York meeting, Donziger sent Shinder a list of "responses to allegations that Chevron was making against the Lago Agrio plaintiffs and in, particular, Cabrera and his report."[548] The list contained several purported responses to what Donziger called Chevron's "misrepresentations" about the Cabrera Report:[549]

> "Fact: The Amazon Defense Coalition (ADC) [*i.e.,* the ADF] has never made *any* payments to Dr. Cabrera, or any other court official, beyond what has been required by court under Ecuadorian procedural rules to satisfy the costs of the trial....

> Fact: The Cabrera report is an independent review and assessment of the voluminous evidence in the case. Some small analyses provided by the parties through regular court procedures were adopted by Cabrera after his own independent assessment determined they were technically sound and consistent with the evidence. This process is entirely proper, routine, and consistent with the practice of judges and experts in the United States and other countries....
>
> Fact: Representatives of the ADC never conducted Dr. Cabrera's field work or prepared samples for him. During the course of Dr. Cabrera's site assessments both sides were allowed to observe his work and suggest places for his team to sample for evidence of contamination...."[550]

These assertions were false or misleading. The LAPs did pay Cabrera outside the court process via the ADF secret account.[551] Cabrera was not independent. And the LAP team, through Stratus, performed all or much of "his" work. But Shinder did not know any of that at the time. He relied on Donziger's representations that Cabrera had been independent and neutral. He did, however, ask Donziger ***457** about the "small analyses" that apparently had been provided to Cabrera by the parties.[552] Donziger told him that the LAPs had provided to Cabrera "approximately 3,000–plus pages of documents ... [c]onsistent with the process that had been set up, that the court had approved, both parties had an opportunity to submit materials to Cabrera, and the plaintiffs had properly availed themselves of that opportunity and sent 3,000–plus pages to Cabrera."[553] Shinder requested that Donziger provide those materials to him. He never did.[554]

b. Beltman Discloses the Truth to Shinder—Denver Counsel Withdraw

Nonetheless, relying on Donziger's representations about Cabrera's independence and the propriety of the Report, Shinder entered into a retention agreement with Donziger and the LAPs and set to work.[555] He soon set up a day of meetings in Colorado with individual Stratus personnel, the last of which was with Doug Beltman.[556] Shinder testified that the interview with Beltman was scheduled to last two hours, and he

> "need[ed] every minute of the two hours to interview him. I had sort of accumulated some sense during the day, although it was incomplete, and certainly paled in comparison with what I heard from Mr. Beltman, that Stratus's involvement in the Cabrera report was much deeper and much more problematic than had been characterized to me. I approached the interview in a way, I wanted to maintain a kind of collegial, conversational tone so Mr. Beltman and I could develop a good rapport, which I think was achieved. I asked him a lot of detailed follow-ups, contextual follow-ups on things, a lot of questions about his time in Ecuador, how he met Mr. Cabrera, Stratus's work in terms of what they were doing on the case. And over time and the climax, if you will, it was about an hour and 45 minutes in, it became a very forthcoming interview, and about an hour and 45 minutes in *he essentially, quite explicitly ... admitted to having written significant portions of the Cabrera report.*"[557]

And once "the truth came out ... there were additional ... lurid details that [Beltman] admitted to, such as Stratus had essentially ... ghostwritten the Cabrera report, then Stratus acting as experts for the plaintiffs wrote comments to their own work, and then wrote the Cabrera report's responses to their own comments."[558] Beltman told Shinder that "everything he did was sort of under the instruction and supervision of Mr. Donziger and the lawyers ***458** who were handling the case."[559]

The following day, Shinder spoke with his firm's ethics counsel and one of the managing partners. They "agreed that the firm could not continue to represent Mr. Donziger and the Lago Agrio plaintiffs."[560] Shinder immediately called Donziger and informed him that the firm had decided to withdraw.[561] He told Donziger that he "thought that to the extent there was an underlying case to be made regarding the environmental damage in Ecuador, that the conduct that I learned had irretrievably wounded it, that it could not rely on the Cabrera report since it was not independent, and I was not his lawyer anymore, so I wasn't going to counsel him on what, if anything, to do to try to fix the situation, but it bothered me, and it still bothers me, that we'll never know whether or not there was a case to be made against Chevron."[562]

Donziger fully understood the significance of Beltman's revelations given the falsehoods Donziger and his LAP team repeatedly had told about Cabrera and his report. The very next day he wrote a second of his infrequent memos to "file" that purported to describe the recent withdrawals of counsel.[563] Indeed, a few weeks ***459** later, Donziger drafted a letter to "fellow counsel," which he apparently never sent, in which he acknowledged that:

> "The traditional Ecuadorian law perspective (which will be asserted by Chevron) would hold that the level of collaboration between one party and the expert is problematic and improper in that all court-appointed

> experts in Ecuador should be independent. By working so closely with our local counsel and Stratus, Cabrera violated his duties to the court. Under this perspective, treating Cabrera like a U.S.-style expert as we did [and even that is questionable] will be seen as a violation of local court rules. Whether the court will see these facts as no big deal, improper, some sort of procedural defect that can be corrected, or (as the [Chevron] lawyers will surely assert) a fraud is uncertain. Our side believes we can weather the storm with good advocacy in both the court and the media, in Ecuador and in the U.S. However, it was not lost on us that our local counsel seemed concerned about how the information would land in Ecuador and what impact it would have on the case, and to them personally. They fully expect that Chevron would refer the information to the national prosecutor for action."[564]

But he once again tried to justify his actions by referring to another perspective that allegedly had been offered by unidentified "local counsel," viz.:

> "that given the customs and practices of the *Aguinda* case, nothing improper happened. The information in the Cabrera report is sound, and is consistent with the high quality of work that Stratus has done as a world class environmental consultancy. As you know, all of the court appointed experts in the judicial inspections have been working closely with the parties in one form or another for several years with full knowledge of the court, and Cabrera was no different. Chevron's experts, including U.S. citizens appointed by the judge at Chevron's request were working with Chevron's counsel. Even though Cabrera was not an expert put forth by the parties, given that the plaintiffs unilaterally sought the global expert report and are paying him, that Chevron boycotted the process, and that the court ordered the parties to turn over materials to Cabrera and otherwise assist him then the role of local counsel and Stratus was well within our rights and custom under the rules and practices of the *Aguinda* case as they had evolved since its inception almost seven years ago."[565]

And this indeed was essentially the position that Donziger took at trial, where he argued that his belief in the second "perspective" justified the LAP team's actions with respect to Cabrera. He contended also that, while he was unsure at the time, he now believes "the process used to create the executive summary of the Cabrera ***460** report was fundamentally consistent with Ecuador law...."[566]

Donziger's attempt to cover himself in his memo by reference to "another perspective," and his comparable position at this trial, are fabrications and unpersuasive even in their own terms. They are fabrications because he received no alternative perspective from local counsel, identified or otherwise.[567] They are fabrications because no "customs and practices of the *Aguinda* case," even if there had been any comparable practices, could have justified what was done with Cabrera. If similar things were done with comparable experts, they all were wrongful; their acceptability did not improve with the volume of misconduct. They are fabrications because there were no comparable practices. Yes, lawyers work with their own experts, both here and probably in Ecuador. That is accepted because everyone knows that party-nominated experts are selected and paid by their clients. That built-in bias is above board and considered in evaluating the testimony of party-paid experts.[568] But Cabrera was a court-appointed expert, sworn to be independent and impartial. And Donziger fully understood that Cabrera was neither independent nor impartial—Donziger was personally responsible for making sure that he was neither and for having him paid under the table, above and beyond the open, court-approved payments. Moreover, it was Donziger who decided to ghostwrite the Cabrera Report using his own paid consultants and to hide and misrepresent the facts concerning the Cabrera–Stratus–LAP relationship.

In sum, Donziger knew at every step that what he and the LAP team did with Cabrera was wrong, deceptive, and illegal.

c. Fajardo Submits a Misleading Affidavit in Denver and Elsewhere

The District of Colorado granted Chevron's Section 1782 application for the issuance of a subpoena on March 4, 2010.[569] The LAP team, realizing that production by Stratus was extremely likely in view of that ruling, was anxious to "minimize the effects" of the court-ordered production of Stratus' documents.[570] In one of those blinding rays of candor that can occur even ***461** in clouds of lies, Prieto, one of the LAPs' lawyers in Ecuador, wrote to Donziger, Fajardo, and others on March 30, 2010 as follows:

> "Today Pablo [Fajardo] and Luis [Yanza] were kind enough to tell us what was going on in Denver, and the fact that certainly ALL will be made public, including correspondence.... Apparently this is normal in the U.S. and there is no risk there, but *the problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your*

> *attorneys, might go to jail), and we are not willing to minimize our concern and to sit to wait for whatever happens. For us it is NOT acceptable for the correspondence, the e-mails, between* Stratus and Juanpa [Sáenz] and myself to be divulged."[571]

Thus, Prieto recognized that the disclosure of Stratus' documents would reveal what actually had gone on between Cabrera and the LAPs, that this disclosure would "destroy[ ] the [Lago Agrio] proceeding," and that "all of us, your attorneys, might go to jail." Nor was he alone in this view—Brian Parker, then an intern at the Selva Viva office, was told by other lawyers working on the case that the Cabrera Report "would be worth zilch" and that Donziger "might get in trouble or lose his license."[572] So Prieto implored Donziger and Fajardo to prevent the disclosure of the emails between Stratus, Sáenz and himself.[573]

Prieto had reason to worry. Less than a month after the District of Colorado granted Chevron's Section 1782 application against Stratus, Chevron filed a 1782 application against Berlinger (the "*Crude* 1782"), seeking the issuance of subpoenas for the outtakes from the *Crude* film.[574] More will be said on the *Crude* 1782 below. For present purposes it is important to note only that, even with production from Stratus imminent, this filing created the added possibility that Chevron would obtain footage of Cabrera and members of his team working directly with members of the LAP team.

The LAP team quickly developed a plan to "cleanse" the Cabrera Report in Ecuador—that is, to provide an alternative evidentiary basis for the Lago Agrio case against the possibility that the Cabrera Report would be stricken or discredited or be relied upon as evidence of fraud in a foreign court where the LAPs would seek enforcement of any favorable judgment. The idea was to have a new expert or experts repackage, or cleanse, the Cabrera Report. But the LAPs needed to delay the Section 1782 proceeding in Denver as long as possible in order to do that. So, a month after the District of Colorado granted Chevron's Section 1782 petition, the LAPs filed a motion for a protective order with respect to the subpoena. They claimed that the subpoenaed documents and testimony were protected from disclosure by the attorney-client privilege and work product protection.[575] The motion later was supported by a declaration of Pablo Fajardo (the "Fajardo Declaration"). ***462** [576]

The Fajardo Declaration purported to explain to the Denver court what had happened with the Cabrera Report and that it was acceptable under Ecuadorian law. The LAPs' American lawyers debated what the affidavit should reveal and whether Fajardo should be the one to sign it. When a lawyer from Patton Boggs—a firm that had been brought on by the LAPs in early 2010 and the involvement of which will be discussed more fully below—circulated a draft of the affidavit to Donziger and other lawyers on May 3, 2010, one lawyer from Emery Celli Brinckerhoff & Abady, LLC, which also represented the LAPs, responded:

> "I don't quite get the purpose of this affidavit. Pablo mentions one document submission [to Cabrera] but not the other. *If he's submitting an affidavit about what happened, why omit the most important part?* It seems misleading at best. *I just don't see how he can sign an aff. that documents his submissions to Cabrera without mentioning that he sent documents that originated from Stratus which is the one thing the judge is going to want to know.... [And] I wouldn't emphasize too much that Cabrera was independent and court-appointed. Once [Fajardo] says that in an American court, we'll never be able to back off from it.*"[577]

Another LAP American lawyer expressed his concern that Fajardo might "be subject to deposition[.] This is why we struggled with who would sign the declaration. If Steve [Donziger] signs, he will most certainly be deposed. Same for any other counsel in the US. We figured that with [Fajardo], they likely would not slow down the process by deposing him."[578]

The Fajardo Declaration that ultimately was filed gave an anodyne description of the process by which the judicial inspections had been terminated, the global expert proposal adopted, and Cabrera in particular selected. It stated that "[i]n addition to the information collected from the vast amount of field inspections he performed, Mr. Cabrera was also free to consider materials submitted to him by the parties. Both plaintiffs and Chevron were asked to supply Mr. Cabrera with documents."[579] It stated also that "to the extent that Mr. Cabrera put into his report any of the information that [Fajardo] supplied to him, it would be viewable by Chevron or any other member of the public that reviewed Mr. Cabrera's Report."[580]

The Fajardo Declaration was highly misleading. It failed to mention that Fajardo, with Donziger's approval, had threatened the judge with a misconduct complaint unless the judge agreed to their demands to cancel the LAPs' remaining judicial inspections. And while it acknowledged that the LAPs had "delivered materials to Mr. Cabrera,"[581] it did not mention the March 3, 2007 meeting at which the LAPs laid out the plan for Cabrera's Report and indicated, in Cabrera's presence, that the work would be done by them. Nor did it reveal that Stratus and the LAPs' counsel in fact had written most of the Cabrera Report. In other words, it ***463** omitted what the Emery

Celli lawyer said was "the most important part"—that Fajardo "sent documents that originated from Stratus."[582] The declaration similarly neglected to report that the LAPS "chang[ed] the focus of [Cabrera's] data at [their] offices."[583] And it, of course, failed to disclose that the LAPs had made secret payments to Cabrera outside the court process.

Notwithstanding the Fajardo Declaration, the District of Colorado denied the LAPs' motion for a protective order and ordered Stratus to turn over its documents.[584] Following the ruling, however, the LAP team—including Donziger—brainstormed ways to delay further the production of Stratus' documents and, realizing that production was inevitable, to mitigate its effects. One of the LAPs' American lawyers sent an email to the LAP team emphasizing that "Stratus will be under a court order to produce all materials it gave Cabrera. Stratus will not risk a contempt motion, it will comply. Unless we want the Stratus/Cabrera revelation to come out in CO, which seems like the worst possible place, we need to make our submission in Ecuador and fast."[585] Another lawyer responded, "[w]hat about the following? Appeal; move for stay; if we win with [the District of Colorado] great; if we lose, we produce whatever we want (narrow read); [Gibson Dunn] complains and then we move for clarification. If we lose again, we think about another appeal."[586] In other words, delay.

The "submission in Ecuador" to which the lawyer referred was a petition the American legal team had been drafting and planned to file—in Fajardo's name—in the Lago Agrio court (the "Fajardo Petition").[587] The Fajardo Petition, which Donziger characterized as a "very general and admittedly less than adequate statement,"[588] was filed with the Lago Agrio court on June 21, 2010.[589] It informed the court that the LAPs had made submissions to Cabrera but did not "confess to having authored specific portions of the report."[590] It conceded, however, that the LAPs had given Cabrera "proposed factual findings and economic valuations of the environmental and other damages Texpet's practices and contamination caused."[591]

It thus went farther than the Fajardo Declaration filed in Denver. But that too was deceptive. There was no disclosure of the fact that Cabrera was handpicked by Donziger because he would cooperate with the LAPs, that the report was planned and written by the LAPs and Stratus, and that Cabrera "play [ed] ball" by simply affixing his name to it, acting all the while under the false pretense—fostered by the ***464** LAPs—that the report was Cabrera's independent work.

Nonetheless, the LAPs later told U.S. courts that, in filing the Fajardo Petition, they had "fully disclosed" their relationship with Cabrera. The LAPs filed the Petition twice in this Court and once in the Second Circuit.[592]

2. The New York 1782 Proceedings—Berlinger and Donziger

Following the start of the Stratus 1782 proceeding, Chevron brought two more Section 1782 actions in New York.

The first was against Berlinger. It sought, among other things, production of the out takes—the video shot in connection with the making of *Crude* that was not included in the film.[593] That discovery was ordered and the decision affirmed by the Court of Appeals.[594] The record here contains important evidence from those out takes, which were contemporary recordings of the words and deeds of Donziger and his allies both in Ecuador and in the United States.

The other Section 1782 proceeding brought in New York was against Donziger. It sought to compel production of documentary evidence and testimony. Although Donziger and the LAPs resisted fiercely, this Court ordered the requested discovery, and the Court of Appeals affirmed.[595] Donziger was obliged to produce a trove of documents and emails relating to the Lago Agrio case and to give a deposition. Much of the evidence in this case was obtained in that proceeding.

3. The LAP Team Sought to Deceive This Court in the Berlinger 1782 Proceeding

The LAPs filed the misleading Fajardo Declaration in fifteen Section 1782 proceedings in courts across the United States, including this one.[596] But perhaps their first act of deception in this Court occurred in April 2010, when Chevron sought discovery from Berlinger.

As noted, Chevron filed the *Crude* 1782 petition on April 9, 2010. Five days later, Donziger prepared his draft letter to "fellow counsel," in which he admitted that the LAP team's contacts with Cabrera violated the "traditional Ecuadorian law perspective."[597] Despite this admission by Donziger, his co-counsel offered a completely different

explanation to this Court.

On April 23, 2010, the LAP team filed its opposition to the *Crude* 1782, describing the Beristain meeting with Donziger as an "innocuous meeting, which is of no relevance to anything...."[598] This, of course, was untrue. As discussed, Fajardo had emailed Berlinger and Bonfiglio shortly after the film first was exhibited, explaining that the presence of the images of Beristain and Maldonado were "so serious that we can lose everything"[599] and that Beristain "must not appear in the documentary ***465** at all" or "the entire case will simply fall apart on us."[600] But at a hearing on April 30, 2010, counsel for the LAPs repeated this falsehood. He told the Court that Chevron's application for production of the out takes was "frivolous" because the meeting with Beristain was "unimportant," akin to a group of New York lawyers attending a party together.[601]

Notwithstanding the LAPs' misrepresentations, the Court granted Chevron's application for discovery from Berlinger on May 6, 2010 and was affirmed on appeal. Berlinger produced 600 hours of raw footage to Chevron. The out takes included footage of the LAP team's March 3 meeting with Cabrera, scenes of the LAPs' representatives—including Donziger—meeting *ex parte* with Ecuadorian judges[602] and lengthy statements by Donziger in which he expressed his highly critical view of the Ecuadorian judicial system. Some of these scenes have been discussed already and some will be mentioned below. It is important to note here, however, that the revelation of these scenes came at around the same time Stratus began producing documents to Chevron. Donziger and his co-counsel knew by then that they could no longer deny what had happened with Cabrera, and they knew they had to figure out a way to salvage their case.

But before we get to that, there is another story that must be told. The full extent of the LAPs' contacts with Cabrera threatened to surface even before the Section 1782 applications were filed. And Chevron's allegations were causing serious strife within the LAP team between those who always were aware of the truth underlying the Cabrera Report (Donziger, Fajardo, Yanza, and others) and those who intentionally were kept in the dark, most significantly, Joseph Kohn.

D. Donziger Deceives Kohn, Refuses His Demand for an Investigation of the Facts With Respect to Cabrera, and Precipitates a Final Break

As far as Donziger was concerned, Kohn's role in the Lago Agrio case was to pay for it. Kohn largely acquiesced for years; he was not involved in the day-to-day decisions and actions and relied on Donziger to keep him apprised of important events. Donziger, however, was selective with what he told Kohn and when he told him, and he actively misled him in important respects. This led to a break in relations and is important for several reasons.

First, Donziger misled Kohn, his financial backer and supposed co-counsel, concerning the Cabrera Report and related matters. This demonstrates his full awareness that what transpired between and among Donziger, the LAP Ecuadorian lawyers, Cabrera and Stratus had been highly improper. It is further evidence that Donziger's claim that he believed otherwise is untrue.

Second, the manner in which Donziger dealt with Kohn further confirms that Donziger was in entire control of the Lago Agrio case and all related activities.

Third, the break in relations between Donziger and Kohn resulted in the loss of Donziger's principal financial backer and led to the search for another. That search ***466** in turn quite possibly resulted in still further deception of a financing source and led to the appearance on the scene of Patton Boggs LLP.

1. Donziger Misrepresented to and Concealed From Kohn Important Information Regarding Cabrera and Stratus

As discussed previously, Donziger and Kohn formally retained Stratus in the spring of 2007.[603] Kohn, in accordance with the Stratus contract, understood "that materials prepared by Stratus on behalf of the Ecuadoran plaintiffs would be 'for submittal to the court,' on the record, and that the global damages expert would then review and consider whether to accept, or reject, or rely upon in some way any or all of Stratus's findings in his own report."[604] But he was kept in the dark about most of what was important regarding Cabrera—the LAPs' role in selecting him, securing his appointment, and ensuring that he would cooperate with them—and about Stratus' true role.

Kohn and Donziger did agree in the spring of 2006 that "it would be best to limit or end the judicial inspections and move onto the second evidence-gathering phase of the litigation: the global damages expert report and final submissions."[605] But Donziger did not tell Kohn that

Donziger and "his Ecuadoran co-counsel vetted candidates to be the global damages expert prior to the court ordering the end of judicial inspections and the beginning of the court expert phase of trial. [Kohn] was not aware that Fernando Reyes was one of the candidates Mr. Donziger and his Ecuadoran co-counsel vetted. [He] was not aware that Fernando Reyes suggested to Mr. Donziger that he choose Mr. Cabrera to be the court expert."[606]

Nor did Donziger inform Kohn that Donziger, the Ecuadorian LAP lawyers, and their U.S. technical consultants met with Cabrera on March 3, 2007 to plan out Cabrera's "work."[607] He was not told that Stratus actually was writing the report to be submitted under Cabrera's name.[608] Indeed, Kohn believed—based on statements by Donziger—that "at all times, the Ecuadoran plaintiffs' consultants' materials were being submitted publicly to the Ecuadoran court through a proper, legal process consistent with Ecuadoran law."[609]

Kohn did learn that, "[e]ven before the Cabrera Report was filed in 2008, Chevron representatives began suggesting that Mr. Cabrera was not an independent expert. [Kohn] raised these allegations with Mr. Donziger on several occasions. [But] Mr. Donziger consistently denied [that] there was anything improper in connection with Mr. Cabrera, or that there was any basis for Chevron's allegations that Mr. Cabrera was not independent."[610]

After the Cabrera Report was filed, Donziger continued to deceive Kohn regarding Stratus' role and the propriety of the LAP team's collaboration with Cabrera. ***467** In the days following the issuance of the Report, Donziger sent to Kohn several press releases, some in draft form, all of which referred to Cabrera as an "independent" expert."[611] And while Kohn was aware that Cabrera filed a second, supplemental report that increased his damages estimate by $11 billion, Donziger did not disclose to Kohn that Stratus had written the supplemental report.[612]

2. Donziger Deceives Kohn About the "Secret" Account

While he was misleading Kohn about the Cabrera operation, Donziger and other members of the LAP team continued to pump him for money. "[B]etween June 2005 and November 2009, KSG [the Kohn firm] made approximately 51 separate wire transfers from [its] U.S. bank account to [Selva Viva's primary account at] Banco Pichincha ... in amounts ranging from $10,000 to $100,000."[613] In 2007, however, Donziger began referring in emails to Kohn to a second account at Banco Pichincha.[614] He asked Kohn to transfer money into this second account on three occasions in 2007 and 2008.[615] When Kohn's assistant asked Donziger why he wanted the money transferred to a new account, Donziger explained that it was because the payments involved "separate case-related piece[s] of work that [are] being run by the Frente [*i.e.,* the ADF].... This separate account will be used for [the] same purpose under the same control of the Frente and Yanza, and will be accounted for the same way with receipts."[616]

We now know that this second account had a special purpose. It was the "secret" account the LAPs set up in order surreptitiously to pay Cabrera outside the court process.[617] But Donziger did not tell Kohn that—in fact, he led Kohn to believe that Cabrera was being "paid directly by the court ... as is customary and required in Ecuador."[618] Thus, "[i]n accordance with ... instructions from Mr. Donziger, [Kohn] wire transferred $120,000 total from its U.S. bank account to this second account in Ecuador on August 15, 2007 ($50,000), September 17, 2007 ($50,000), and February 12, 2008 ($20,000)."[619] As noted, $33,000 of that money was transferred directly from the secret account into Cabrera's account without Kohn's knowledge just before Cabrera formally was named.[620]

3. Donziger Refuses to Cooperate With Kohn's Demand for an Investigation Independent of Donziger

By late 2008, Kohn was worried about the likelihood of obtaining a judgment in the plaintiffs' favor and of enforcing such a judgment if it were obtained. Chevron's ***468** allegations concerning the Cabrera Report were surfacing.[621] As will be detailed below, Chevron had begun to allege that the judge presiding over the Lago Agrio case had been caught on video accepting a bribe.[622] And, despite prior assurances from Donziger that a judgment would issue in Ecuador by 2006 or 2007,[623] the case seemed to "be dragging on indefinitely."[624] Kohn attempted to take a more active role.[625]

Donziger "rebuffed these efforts."[626] He "refused to provide [Kohn] with copies of his files, including all the court filings [Kohn] had requested; he cancelled or postponed meetings at the last minute; and generally he refused to substantively engage with [the Kohn firm]."[627]

He repeatedly attempted to "prevent [Kohn lawyers] from meeting with members of the Ecuadoran legal team by first delaying or rescheduling meetings, and then ultimately stating [that Kohn lawyers] were not allowed to speak directly with the Ecuadoran legal team."[628] When Kohn in early 2009 suggested a meeting with the Ecuadorian legal team to discuss the final brief the LAPs would submit to the Lago Agrio court, Donziger "kept putting it off and even became irate when a lawyer in [the Kohn] firm ... communicated with Mr. Sáenz directly."[629] Sáenz "appeared to acquiesce to this control, telling" the Kohn firm "Steven is our point of contact, so please coordinate with him about the best way to proceed."[630] And in a memorandum to Kohn and others at his firm, Donziger made clear that he was the boss and that the Kohn firm would not be allowed to step on his toes:

> "It is critical that you understand the larger context of how this effort is being managed and thereby understand how [the Kohn firm] can best add value. The legal and political 'space' around this case in both Ecuador and the U.S. has been intricately constructed over the last several years by those involved on a fulltime basis. The process is managed by myself, Pablo Fajardo, and Luis Yanza. All of us work on this on a full-time basis and we speak among ourselves frequently. We also manage [t]he client relationships and in my case I have raised significant funds for both the case in chief and ancillary activities. *All activities from [the Kohn firm] must be coordinated through this process, which in practice means coordinated through me.*
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> * * *
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> Given this context, the 'value added' of the [Kohn] team needs to be focused on discrete tasks within the existing structure, not overall management of this complex, delicate, intricate and multi-cultural process. The learning curve at this point is way too great to even start down that road.... That said, your input and thoughts are valued and I have no doubt your contributions can be immense if you are willing to work within this structure and complete tasks (such as legal research, draft reports) by specific ***469** deadlines and be real about what you can and cannot do. *But be clear: I am not going to consult with each of you on each and every aspect of this effort, unless you want to come work out of my office on a fulltime basis, which I am sure you would rather not do ....*"[631]

Kohn and other lawyers at his firm repeatedly expressed their frustration among themselves and to Donziger at his refusal to provide them with information about what was going on in Ecuador, or to allow them to be meaningful participants in the decision-making process. This frustration eventually led to Kohn's withdrawal from the case. But there was another event in particular that precipitated the withdrawal.

Kohn was becoming aware of Chevron's allegations concerning the LAPs' contacts with Cabrera.[632] Fearing that their case was in jeopardy, Kohn proposed to Donziger that they retain an American lawyer to conduct an investigation, on behalf of the LAPs but independent of Donziger and the LAPs' Ecuadorian team, into "Chevron's allegations of misconduct by the Ecuadoran plaintiffs' team," including the Cabrera Report.[633] He suggested Kenneth Trujillo—a Spanish-speaking former Assistant United States Attorney and former City Solicitor of Philadelphia,[634] to "make inquiries into what knowledge members of the [LAP] legal team ... may have of improprieties involving the judge and/or government or ruling party officials, as well as with respect to allegations leveled by Chevron Corporation, the defendant in that litigation, of improper contacts between members of *Aguinda* legal team and various Ecuadorian judges, court-appointed experts, or government officials."[635]

Kohn testified that Donziger initially appeared receptive to the idea of hiring an independent investigator and that he, Donziger, and Trujillo participated in at least one conference call to discuss Trujillo's possible engagement.[636] A few days later, however, Donziger emailed Kohn to say that he did not think going forward with an investigation was a good idea.[637] Donziger wrote:

> "I talked to Pablo and Luis about your idea of hiring the former prosecutor for the purposes you described. There is a consensus such a move would be adverse to the client's interests and unwise for a host of reasons. *Neither I, nor the legal team in Quito, will cooperate with such an investigation nor continue working with a firm that insists on doing such an investigation.* I can explain details when we talk. If you go forward with retaining somebody for this purpose, please notify me immediately so I can notify the clients."[638]

***470** Kohn did not go forward with retaining Trujillo because he knew that an investigation would be ineffective without Donziger and the Ecuadorian legal team's cooperation.[639]

Squabbles occur among co-counsel for all sorts of reasons and that they rarely are subjects of interest or concern to courts. This one, however, was different. Donziger blocked Kohn's efforts to become more involved, and especially blocked the suggestion that a lawyer independent of Donziger and the LAP Ecuadorian lawyers look into what really had happened with Cabrera and other alleged improprieties, in order to conceal to the

extent possible the truth about what had taken place. The Court finds these events probative of Donziger's consciousness of guilt.

4. Kohn Cuts Off Funding

Two months after Donziger rejected Kohn's proposal for the Trujillo investigation, Kohn informed Donziger that he no longer would pay Donziger's monthly expenses for his work on the Lago Agrio case.[640] Donziger responded that Kohn had no role on the case other than to pay for it.[641] Kohn replied that, although he previously had

> "requested you to adjust your requested monthly figure several times since the work in Ecuador was reduced and more time was spent here ... you did not. Since then you have continued to send us expenses for all travel, meals, staff and anything else without any thought. In terms of the legal work on the case, you have consistently tried to exclude us from discussions, meetings etc, including preventing meetings with the lawyers in Ecuador we have been requesting for many months."[642]

Kohn stated also that he had "consistently said [he was] willing to discuss proposals for other funding."[643] He had even identified and spoken with firms that were willing to come in and help on a "lawyerly and businesslike basis."[644] But Donziger repeatedly declined to respond to Kohn's offer. Kohn wrote: "I conclude you are not interested in doing so because you perceive them as our friends who you could not control, or would not simply take orders from you."[645]

On November 10, 2009, Kohn wrote to Fajardo and Yanza regarding the possibility of further settlement negotiations with Chevron.[646] He argued that settlement discussions were advisable and that a settlement of $700 million would "provide for ***471** virtually 100% clean-up" of the Orienté, as well as funds for other projects.[647] Fajardo and Yanza replied that they did not wish to engage in settlement discussions at that time. They stated that "all budget and strategy decisions must be made by Mr. Donziger."[648] They also "raised certain issues about slowness in [Kohn's] payment of certain bills over time, or that [Kohn] had not funded certain things or met certain commitments."[649]

Kohn responded on November 19, 2009, that "[t]he working relationship between [him] and ... Steven ha[d] steadily deteriorated over the past years" and that Kohn had "paid all necessary litigation expenses, as well as many wasteful and unnecessary expenses incurred due to Steven's extravagance and decisions."[650] He explained that:

> "[B]y far, the largest single component of the 'budget' is Steven's demand for fees and expenses, and there, in my opinion, lies the root of the current problem, and the reason why this current crisis arises.... At the same time as we have spent enormous sums of money on the case, Steven has denied us access to documents, information and the legal team, despite our repeated requests. He has made it impossible for us to effectively discharge our duty as attorneys and has interfered with the attorney-client relationship."[651]

Kohn concluded by stating that "unless or until such agreements are reached, [Kohn] considers that due to Steven's influence and interference, there is no longer an attorney-client relationship with our firm and we will withdraw from any further representation related to the case and notify the vendors and other appropriate entities of that fact."[652]

Several months later, Kohn spoke with Jeffrey Shinder by telephone. Shinder explained to Kohn that he had withdrawn from representing the LAPs in the Denver Section 1782 proceeding against Stratus and his reasons for doing so.[653] Shortly thereafter, Kohn met with Donziger—at Donziger's request—in New York.[654] Donziger asked Kohn if he was "interested in joining a [new] committee of lawyers representing the Ecuadoran plaintiffs."[655] Kohn replied that he had spoken with Shinder about the LAPs' contacts with Cabrera and that he "would not discuss anything with [Donziger] unless he—and anyone of the Ecuadoran team that had contact with Mr. Cabrera—'came clean' about what happened with Mr. Cabrera."[656] Donziger admitted to Kohn that "someone on the Ecuadoran team 'may' have provided 'some' documentation to Mr. Cabrera, and if it came out, it could be embarrassing for the Ecuadoran plaintiffs' team."[657]

On April 13, 2010, Kohn wrote to Fajardo and Sáenz, informing them that he had become aware of "very disturbing recent events related to the case taking place in ***472** the U.S."[658] Because "Steven stopped providing [Kohn] with information, consulting with [Kohn], or following any of [Kohn's] advice," he was reaching out to the Ecuadorian lawyers directly.[659] Kohn noted, among other things, that:

> "Steven ... hired other firms to deal with the depositions of Stratus. He informed me last week, without providing any details or facts, that the information

> Stratus may provide will be damaging to the case and highly embarrassing. We have no knowledge of what he is talking about except what Steven has now reluctantly told us: that it involves communications with Cabrer[ ]a, something that surprised us and that we find quite disturbing if true. This conduct—the contacts with Cabrer[ ]a (if they took place), and the failure to properly oppose or prepare for these depositions, has and will cause severe damage to the case."[660]

Accordingly, Kohn informed the lawyers that Donziger and possibly others needed to withdraw in order to salvage the case.[661] Moreover, the LAPs' Ecuadorian legal team, he asserted, needed to open their files to the Kohn firm and allow themselves to be interviewed by an independent attorney.[662]

Later in April 2010—and after the Colorado district court had granted Chevron's Section 1782 application with respect to the Stratus documents, but before any documents had been produced—Kohn met in Philadelphia with Fajardo, Yanza, and Humberto Piaguaje at the Ecuadorians' request.[663] Kohn asked them about their interactions with Cabrera. Fajardo responded that they had provided documents to Cabrera in accordance with a court order and that Chevron's allegations were false.[664] A few days later, on May 3, 2010, Kohn received an unsolicited email from Fajardo, in which he clarified that he "did not mention [one] detail" regarding "the information [the LAPs] shared regarding the process in Ecuador."[665] Fajardo wrote that "[b]ased on the same order of the judge, by which we submitted information to Expert Cabrera, we proceeded to submit a packet of information, mainly the input of Stratus, around the middle of March 2008."[666] Fajardo assured Kohn that "there is no illegality in the process of delivering information."[667] This email, quite interestingly, preceded the filing of Fajardo's misleading declaration in the Stratus litigation in Denver by only two days.[668]

On July 29, 2010, Kohn received a letter from representatives of the LAPs purporting to terminate their attorney-client relationship with the Kohn firm.[669]

After evidence of the Cabrera fraud and other events began to emerge from Section 1782 proceedings, Kohn "disavowed any financial interest in the Ecuadoran judgment." ***473** [670] Kohn testified at trial: "I relied on Mr. Donziger to tell me the truth about what was going on in the Ecuadoran litigation ... and I now know that Mr. Donziger did not tell me the truth. It is now clear to me that Mr. Donziger deceived and defrauded me, and that, as a result, we continued to pay millions of dollars to that litigation that we never would have paid had we known the truth."[671]

5. Defendants' Response to Kohn's Testimony

Donziger for the most part failed to respond to Kohn's testimony. He did not offer any explanation for why he had not provided Kohn with accurate information concerning Cabrera, Stratus, himself, and the Ecuadorian LAP lawyers. His questions to Kohn at trial suggested that Kohn could and should have taken steps to obtain information concerning Ecuadorian law from sources other than Donziger, such as hiring an Ecuadorian law expert to investigate the Cabrera Report.[672] Thus, Donziger appeared to argue that Kohn's failure to learn the truth of what happened in Ecuador and whether it was proper under Ecuadorian law was his own fault.

That of course is understandable in view of the fact that litigation by Kohn to recover the money he advanced to Donziger is quite possible.[673] And it is not this Court's function to decide the merits of any such claim here. But it is its duty to find the facts to the extent they are material to *this* case. And it finds that Donziger's arguments, to the extent they are material here, are not persuasive.

Kohn *had* proposed hiring such an expert in 2009, Kenneth Trujillo, but Donziger and the Ecuadorian lawyers were unwilling to allow him to conduct a meaningful investigation.[674] Moreover, whether or not Kohn sought independently to verify the limited information he received from Donziger does not change the fact that Donziger misrepresented to him vital facts about the case in Ecuador. And when Kohn did try to find out what had gone on, Donziger prevented him from doing so because, the Court finds, Donziger understood full well that what he and his associates had done was wrong.

The LAPs called one witness whose testimony differed slightly from Kohn's on certain points. Humberto Piaguaje, the "executive coordinator of the asamblea,"[675] testified that Fajardo, Yanza, and Piaguaje, during their April 2010 Philadelphia meeting with Kohn, asserted that there were "decisions that [Kohn] made that were above the interests of the members of the assembly for the struggle that they were involved in."[676] According to Piaguaje, the Assembly subsequently decided to terminate Kohn "[b]ecause he did not abide by some of the things that had been suggested at the meeting."[677]

Thus, through Piaguaje's testimony, defendants appear to suggest that Kohn was fired because he was taking actions that the LAPs had not ratified and because he would not abide by his clients' wishes. But they fail to mention a single action Kohn took of which they did not approve ***474** (besides his decision to stop funding the case). And they fail to explain how what they describe as their decision to fire him changes the fact that Kohn repeatedly was lied to about Cabrera and other important events. Accordingly, the Court does not credit Piaguaje's claim.

E. The Search for New Funding—Patton Boggs, the Invictus Strategy, and Burford

By the end of 2009, Kohn no longer was supporting the lawsuit and the LAPs were in financial difficulty. Although Donziger had secured a $500,000 investment from Russell DeLeon in June 2009,[678] he knew that much more would be needed to keep the case going. Moreover, the LAP team's internal emails make clear that they expected to obtain a large judgment soon—a timetable that proved inaccurate—and Donziger knew he would need substantial U.S. legal help to mount a credible enforcement threat. The story of how he found it is important. It led to the refinement of the enforcement strategy that the LAP team planned to follow to collect the Judgment.

1. Patton Boggs Is Retained, Develops the Enforcement Strategy, and Obtains Funding from Burford

As of late 2009, Donziger's plan for enforcement of the judgment he expected shortly to obtain was simple—to seek enforcement in the United States. That is what he then told Jeffrey Shinder, whom he considered hiring to run the enforcement effort.[679] But around the same time, he began working with H5, a litigation services firm in New York, to secure financing.[680] In November 2009—the same month in which Kohn officially informed Donziger he no longer would finance the Lago Agrio case—Nicolas Economou of H5[681] reached out to Burford Capital LLC ("Burford") "to solicit investment capital for international judgment enforcement activities in connection with the Lago Agrio litigation."[682] Economou introduced Burford to Donziger, who "described himself [to Burford] as the lead U.S. lawyer for the LAPs and also the overall strategist behind the Litigation."[683] Burford "rapidly made it clear that [the Lago Agrio case] was outside its usual investment parameters and that Burford could only even consider the matter if highly regarded U.S. litigation counsel were involved."[684]

So Donziger—with the assistance of Economou and Burford—expanded the search for "highly regarded U.S. litigation counsel." In January 2010, Economou and Burford chief executive Christopher Bogart had a meeting with Donziger, James ***475** Tyrrell, a senior partner of Patton Boggs, and Eric Westenberger, another partner at the firm.[685] In early February, Patton Boggs proposed to Donziger a "multi jurisdictional strategy" for "expeditiously delivering the Aguinda Plaintiffs [LAPs] their due recovery."[686] The proposal called for attacking Chevron "on multiple fronts—in the United States and abroad." And the point of the multi-front strategy was explicit:

> "[S]wift recovery is of paramount importance ... A thoughtfully crafted, multi-front approach, not only increases the odds of obtaining expedient and significant recovery, it also serves the related purpose of keeping Chevron on its heels."[687]

The point of the multi-front strategy thus was to leverage the expense, risks, and burden to Chevron of defending itself in multiple jurisdictions to achieve a swift recovery, most likely by precipitating a settlement.

Before the month of February was out, Patton Boggs "had secured a leading role in the [l]itigation, with Jim Tyrrell as the lead partner."[688] "Burford thus began more significant diligence and commenced commercial negotiations over investment terms."[689]

Patton Boggs quickly became heavily involved in the Lago Agrio litigation, both in the United States and in Ecuador. By July 2010, it had "assist[ed] Ecuadorian counsel in sustaining and prosecuting plaintiffs' claims against [Chevron] in Ecuador, and defend[ed] multiple ancillary 28 U.S.C. § 1782 actions across six U.S. jurisdictions."[690] It also had "drafted ... briefs filed in both U.S. Courts and the Lago Agrio Court, performed a sizeable document review in connection with the Colorado § 1782 proceedings [against Stratus]" (although PB did not appear formally in that action), and led efforts to retain Ecuadorian law experts.[691]

In conducting its due diligence, Burford largely relied on Patton Boggs to keep it apprised of events in the litigation, to assess the merits of the LAPs' case, and to come up with a coherent enforcement strategy that would be undertaken once the LAPs received a judgment in their

favor. Moreover, "it was agreed [with Burford during its due diligence] that Patton Boggs would provide its analysis on ... [a] judgment enforcement strategy to Burford, and that Burford would not try independently to perform that work, although Burford remained in close and active contact with Tyrrell and ... Westenberger about their work."[692]

The enforcement strategy was key to inducing Burford to invest in the case. So Patton Boggs prepared a document setting forth the LAPs' plan, a document that was entitled "Invictus" and that has become known as the "Invictus Memo."[693] The Invictus Memo found favor with Burford, which was not surprising in light of the fact that Burford had "a special relationship ***476** with and respect for Jim [Tyrrell] and Patton Boggs...."[694] In September 2010, Burford's investment committee approved the investment and a funding agreement was signed,[695] pursuant to which Burford was to invest a total of $15 million in three separate tranches—$4 million on November 1, 2010,[696] and two subsequent tranches each of $5.5 million. In return, Burford was given a 5.545 percent interest the Judgment, less certain costs and expenses.[697]

2. The Invictus Strategy

The Invictus strategy is significant not only because Burford relied on it in approving the investment, but because the LAP team has been carrying it out since the Judgment was rendered in 2011.

Invictus built on the LAPs' previous intention to seek to enforce the anticipated favorable judgment in the United States and the Patton Boggs proposal to Donziger. It set out a plan to enforce it "quickly, if not immediately, on multiple enforcement fronts—in the United States and abroad."[698] It noted that "[o]btaining recognition of an Ecuadorian judgment in the United States is undoubtedly the most desirable outcome."[699] But Invictus recognized also that enforcement in the United States could prove difficult. It emphasized that "Patton Boggs' current and former representation of numerous, geographically diverse foreign governments means that barriers to judgment recognition in a given country may not necessarily preclude enforcement there."[700] It further elaborated that "Patton Boggs [would] use its political connections and strategic alliances to ascertain which nations' governments are not beholden to Chevron, so as to minimize the prospect of adverse governmental interference in the enforcement process."[701] And it touted the benefits of what it called a "keystone" strategy. It explained that:

> "proceeding as an initial matter in a jurisdiction housing the highest concentration of Chevron's domestic assets would offer certain obvious advantages, including efficiency. Nonetheless, it is more important for Plaintiffs to proceed *initially* in a jurisdiction that promises the most favorable law and practical circumstances. To that end, Plaintiffs' Team will identify and potentially target certain 'keystone' nations—that is, nations that enjoy reciprocity, or, better yet, are part of a judgment recognition treaty—with nations that serve as the locus for greater Chevron assets. For instance, while enforcing western judgments in the Middle East is notoriously challenging, certain countries in that region have entered into relevant treaties with European nations. If the Aguinda Plaintiffs are able to obtain conversion of the judgment in one of those European nations, this *may* open the door to enforcement in the Middle Eastern target nation."[702]

Invictus noted also that the LAPs would identify Chevron-related entities—such as ***477** subsidiaries and joint ventures—and "target" them with enforcement actions also.[703]

The Invictus Memo made clear that the LAPs' enforcement strategy contemplated an initial multi-pronged attack on Chevron, its assets, and subsidiaries in multiple jurisdictions outside the United States followed by proceedings here. Although Burford was enticed by the Invictus strategy, however, it did not stick around long enough to see it implemented.

F. Fajardo Obtains a Broader Power of Attorney, and Donziger and Fajardo Enter Into Their First Written Retention Agreements with the LAPs

There is a final point to be made about the Burford story: it led to a broadening of Fajardo's power of attorney from the LAPs and the execution of a formal retention agreement between Donziger and the LAPs. Both are relevant.

On November 5, 2010, four days after he signed the Burford Funding Agreement on the LAPs' behalf, Fajardo obtained a new power of attorney ("POA") from the LAPs.[704] The reason, among others, for the broadened POA was that Donziger had secured funding by promising investors a share in the LAPs' recovery from a judgment. The Funding Agreement with Burford made

clear that Burford's return on its investment would be paid from the LAPs' share of any recovery on a judgment net of the portion allocated to the attorneys' fees.[705] Moreover, Donziger recently had agreed to amend his March 2010 funding agreement with Russell DeLeon by "deleting the[ ]reference [of DeLeon's recovery] to percentage of Attorney Fees" and changing it to "1.75% of Net Plaintiff recovery."[706] It was unclear, however, whether Fajardo had had the authority under his previous POA to sign such agreements on the LAPs' behalf. Indeed, DeLeon had raised that question with Donziger.[707] Nor was that the only such problem.[708] In order to address these concerns and to ensure that the funding agreements with Burford and DeLeon would be enforceable, the LAP team drafted a broader POA for Fajardo. It drew up also a retention agreement between Donziger and the LAPs, which was signed in January 2011.[709] The retention agreement explicitly vested in Donziger the responsibility of "coordinating the overall legal strategy of the Plaintiffs to pursue and ***478** defend all aspects of the Litigation."[710]

More will be said on this agreement below in connection with other matters. But for now it suffices to note only this. Although Fajardo, as a matter of form and convenience, signed Donziger's agreement in his capacity as attorney-in-fact for the LAPs, the Court finds that no change in the substance of the relationship was intended or occurred, at least in any time period relevant to this case. Donziger remained firmly in charge. The paperwork done in early 2011 was undertaken principally to ensure that the new investors, who were to receive portions of any recovery net of attorney fees, had a written paper trail that led back to the LAPs individually. While those concerned with the documentation were at it, Donziger and Fajardo, who both had contingent fee arrangements, obtained written agreements of their own.

G. Burford Terminates the Funding Agreement

Burford funded the $4 million first tranche under the Funding Agreement in November 2010. It never funded the others. On September 23, 2011, Burford informed the LAPs that it was terminating the Funding Agreement.[711] It claimed it had been misled, by Patton Boggs and Donziger, principally regarding Cabrera.[712] There is evidence that Patton Boggs in turn pointed the finger at Donziger.[713]

During its due diligence, Burford specifically had asked Donziger and Patton Boggs whether Chevron's allegations about the LAPs' relationship with Cabrera were a cause for concern.[714] Donziger and Patton Boggs assured Burford that they were not. They told Bogart that the LAPs' contacts with Cabrera had been "limited" and were "lawful under Ecuadorian law."[715] But subsequent events—including testimony given by Donziger in the Section 1782 proceeding in this Court—"flatly contradict[ed]" those representations.[716] Had Burford known the truth about the Cabrera Report, it asserted, it would not have invested in the Lago Agrio case. Indeed, as Bogart testified at trial, it "would have walked away immediately."[717] The failure to disclose the truth about Cabrera, Burford stated, "[i]n addition to breaching the Funding Agreement ... amount[ed] to fraud."[718]

The question whether Patton Boggs misled Burford concerning the Cabrera episode one day may be important to a ***479** Chevron claim against Patton Boggs in a related action or in any litigation that may arise between Burford and Patton Boggs. But those cases are not now before the Court, and the answer to that question is not material to the resolution of this one. Two things are plain here, however. *First,* the romancing of Burford led to the development of the Invictus strategy of proceeding on multiple fronts, especially in foreign courts, rather than bringing a single enforcement against Chevron in the United States. *Second,* there is not much doubt that Donziger misled Burford—either by misstating or failing to disclose material facts—in his determination to raise money to pay for the litigation.

H. Donziger and Patton Boggs Try to Fix the Cabrera Problem—the Cleansing Experts

As noted, after the Denver court granted the Section 1782 application against Stratus, the LAP lawyers knew they no longer could ignore the LAP team's involvement in drafting the Cabrera Report, as the truth soon was to be exposed. So they planned to hire a new expert to address Cabrera's findings in the hope of providing alternative grounds for the damages evaluation. One of the LAPs' lawyers explained that:

> "The path for an Ecuadorian decision will be simple. We would hope the judge would say/rule: There has been much controversy surrounding the Cabrera report, and objections to it. [Perhaps: The court did not anticipate that there was the degree of collaboration between plaintiffs' counsel and Cabrera, that there may have been. Given these issues, the court is not relying on Cabrera for its ruling.] However, the Court now has additional submissions from the parties ... The court finds the new report (demonstrating damages of $—billion) to be persuasive, reliable and accurate and therefore rules...."[719]

He stated also:

> "Simply put, our local team is convinced that a court ruling—relying solely on Cabrera—is potentially imminent if we don't get something on file immediately.... If we cop to having written portions of the report, the details of exactly how that might have been accomplished will be for another day, when and if the relevant people are deposed as part of the 1782s, but hopefully by that time, the process of having both sides cure this with new submissions will be under way and render the details of the Cabrera report a thing of the past. We will have already admitted that we authored portions of the report; the details of how that was accomplished might be inter[ ]esting for Chevron, but u [lt]imately irrelevant because of our admission and alternative grounds for a damage evaluation."[720]

But the LAP team knew that it had to move quickly. It needed to submit the Fajardo Petition[721]—and convince the court to grant it—before the Lago Agrio court issued a ruling relying solely on the Cabrera Report. On June 14, 2010, Donziger emailed Tyrrell and Westenberger of Patton Boggs:

> ***480** "The Ecuador team is getting nervous that there is an increasing risk that our 'cleansing' process is going to be outrun by the judge and we will end up with a decision based entirely on Cabrera. Absent our intervention ASAP, they believe the judge could issue *autos para sentencia* in about 3–4 weeks, which would in effect bar our remedy to the Cabrera problem."[722]

The Fajardo Petition was filed one week later.[723] It asked the Lago Agrio court to allow the parties to submit "supplementary information to aid th [e] Court in the process of assessing the global damages."[724] The court granted the LAPs' request on August 2, 2010.[725] Shortly thereafter, the American LAP team began "brainstorming" whom they would retain to draft the supplemental submissions.[726] As one Patton Boggs lawyer explained in an email to Donziger and others, "our new expert will most likely rely on some of the same data as Cabrera (and come to the same conclusions as Cabrera)...."[727]

Patton Boggs ultimately hired the Weinberg Group to manage the cleansing process.[728] Donziger and Patton Boggs lawyers told the Weinberg Group that "the defendants in the case had made allegations of veracity of the [Cabrera] report and involvement by another consulting firm in connection with the independent expert, and that because of these questions of veracity that they wanted to supplement or have an outside third party look at some of the same data and prepare a report."[729] Westenberger of Patton Boggs and Donziger told employees of the Weinberg Group that Cabrera "wrote the report and was an independent expert...."[730] The Weinberg Group was not told that Cabrera had met with the LAPs' representatives without the Lago Agrio court's knowledge.[731] And it was not told that Stratus had worked with the LAPs' lawyers to write the Report under Cabrera's name.[732]

The Weinberg Group recruited a team of experts to work on drafting the cleansing reports.[733] It coordinated the preparation of seven reports, all of which were submitted to the Lago Agrio court on September 16, 2010,[734] and at least some of which were reviewed and commented upon by Donziger.[735] Although the reports purported to "supplement" the Cabrera Report, some of them relied upon it directly.[736] One of the cleansing experts later testified that he was given the Cabrera Report, which he "accepted ... at face value and used as a starting point to do ***481** [his] own evaluation."[737] Another testified that, based on statements by employees at the Weinberg Group, it "was [his] baseline understanding" that the Cabrera Report had been prepared by a "neutral" expert,[738] that he relied on the cost and data information provided in the Report, and that his "results depend, in part, on the accuracy of [the Cabrera Report's] data series and his cost figures.[739] Indeed, as one Patton Boggs attorney wrote to Donziger, the cleansing should "address Cabrera's findings in such a subtle way that someone reading the new expert report (the Court in Lago or an enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages."[740]

VIII. The Judgment

A. Its Contents

With the cleansing reports in the Lago Agrio record, the 188–page single spaced Judgment was issued on February 14, 2011 by then-Judge Zambrano.[741] It found Chevron liable for at least seven categories of harm to the environment and human health. It awarded $8.646 billion plus another $8.646 billion to be paid unless Chevron issued a public apology within 15 days.

The Judgment professed to disclaim reliance on the Cabrera Report.[742] It stated also that the author or authors had "not considered the conclusions presented by the experts in their reports, because they contradict each other despite the fact that they refer to the same reality...."[743]

The Judgment mentioned some of Chevron's charges of misconduct by Donziger, many of which were based on his statements recorded in *Crude* out takes.[744] It characterized his statements regarding the Ecuadorian judiciary as "disrespectful." It went on, however, to state that there was "no record in the case file of any power of attorney granted to him by the plaintiffs.... Therefore, insofar as concerns the merits of his statements, they [a reference to Chevron's arguments] are rejected ... and the Court does not recognize anything that Mr. Donziger might say or do when he is in front of the cameras or in any other act."[745] Thus, it purported to disregard as irrelevant all of Donziger's alleged misconduct, without considering what actually occurred, because he did not hold a formal power of attorney from his clients.

Finally, the Judgment ordered that the LAPs establish a trust for the benefit of the ADF "or the person or persons that it designates" and that Chevron pay the damages awarded to that trust.[746] It directed that the trust's board of directors be made up of the "representatives of the Defense Front," *i.e.,* the ADF, and provided that the board would choose the contractors who would perform the remediation.[747] Thus, the Judgment did exactly what the complaint had asked—it put the ***482** ADF in complete control of any proceeds of the Judgment.

Chevron issued no apology. Instead, it filed a motion for clarification and expansion of the Judgment three days after it was issued.[748] It requested further explanation of several of the Judgment's conclusions, including the conclusion that Chevron and Texaco had merged and that Chevron was liable as Texaco's successor.[749] It questioned also the Judgment's award of punitive damages, "which are not defined in the Ecuadorian legal system," and were "completely identical to the items indicated in the Cabrera Report," which the Judgment purported to exclude from its consideration.[750]

The Lago Agrio court issued a clarification order on March 4, 2011.[751] It held *inter alia* that "the occurrence of the merger has been proved beyond any reasonable doubt by the public statements and actions of the representatives of the merged companies"[752] and reiterated that "the Court decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment.... [T]he report had NO bearing on the decision. So even if there was fraud, it could not cause any harm to" Chevron.[753] The clarification order stated that the punitive damage award was based on Chevron "misconduct during these proceedings" and that it was "in accordance with Article 18 of the Civil Code" and the "universal principles of law to sanction someone who well deserved it, to set an example."[754]

B. Chevron's Ghostwriting and Bribery Claims

Chevron contends that Zambrano did not write the Judgment, that the LAPs prepared it, and that the LAPs bribed Zambrano to decide the case in their favor and to sign the judgment they had prepared. The evidence concerning those contentions and its analysis are extensive. The Court here summarizes its findings before proceeding to the detailed discussion of how it reached them.

The first major point is that the Court finds that Zambrano did not write the Judgment, at least in any material part. The LAP team wrote it, and Zambrano signed it. The following sections explain the Court's bases for that conclusion.

In Part IX.A, the Court examines Zambrano's trial testimony and finds that it was not credible. Zambrano neither could recall nor explain key aspects of the 188 page opinion despite his claim that he alone wrote it. He was a new judge with very little civil experience, so much so that he admittedly had another former judge ghostwrite orders for him in civil cases. He was unfamiliar with—and on occasion bewildered by—certain of the most important concepts and evidence with which the opinion dealt. His testimony was internally inconsistent and at odds with other evidence in the record. He was an evasive witness. Finally, Zambrano had economic and other motives to testify as he did. His livelihood, what remains of his reputation after having been removed from the bench, and perhaps even his personal safety ***483** hinged on his protecting the legitimacy of the $18 billion Judgment by claiming authorship.

Having concluded that Zambrano did not write the Judgment, the Court turns in Part IX.B to the question who did. It examines the overwhelming and unrefuted evidence establishing that portions of at least eight of the LAP team's internal work product documents appear verbatim or in substance in the Judgment. These documents never were filed with the Lago Agrio court or made part of the official case record. Defendants utterly failed to explain how or why their internal work product—their "fingerprints"—show up in the Judgment. As will be seen, the most logical conclusion is that members of the LAP team wrote at least material portions of the Judgment, and probably substantially all of it, and that they copied from their own internal files in doing so. And direct evidence from the LAPs' internal

emails—dealt with in Part XI.B.3—suggests that the LAP team had been preparing since at least 2009 to write a draft judgment to pass to the judge, this despite the fact that one of their own Ecuadorian law experts testified that the submission of proposed judgments to an Ecuadorian judge is improper.

The next question is how it came to pass that Zambrano decided the case for the LAPs and signed a judgment they prepared for him. The Court in Parts X and XI examines Chevron's contention that the Judgment was the result of a corrupt scheme in which the LAPs promised to pay Zambrano $500,000 from the proceeds of the Judgment in exchange for his deciding the case their way and permitting them to write the Judgment. In doing so, it details each of the witnesses' accounts of what happened in Lago Agrio in the years and months leading to the Judgment, considers the evidence corroborating or conflicting with each account, and assesses the credibility of each witness. Having concluded based entirely on direct and uncontroverted evidence that the LAPs wrote the Judgment, the Court credits Guerra's explanation that they got Zambrano to sign it by bribing him. Although Guerra's credibility is not impeccable, that portion of his account was corroborated extensively by independent evidence. Donziger and Zambrano provided *no* credible evidence to support their versions of what transpired.

IX. The LAPs Wrote the Judgment

A. Zambrano Was Not the Author

Zambrano testified at trial. He claimed that he "was the one who exclusively drafted" the Lago Agrio Judgment, that "no one ... helped [him] to write the judgment," and that he did all the research for the Judgment.[755] He flatly denied that he considered anything that was not in the official court record.

The Court rejects Zambrano's claim of authorship, let alone sole authorship, as unpersuasive for a host of reasons.

1. Zambrano Was Unfamiliar With Key Aspects of the Judgment He Signed

Even at the most general level—that is, without considering the inconsistencies between Zambrano's deposition (taken days before his trial testimony) and his trial testimony, the internal inconsistencies in his trial testimony, and the inconsistencies between his testimony and other evidence—Zambrano was a remarkably unpersuasive witness.

As an initial matter, Zambrano was unable to answer basic questions about the ***484** Judgment that he ostensibly wrote and that he came to New York to defend.

The Judgment states that "benzene ... is the most powerful carcinogenic agent considered in this decision."[756] But when Zambrano was asked "what substance the judgment says is, quote, the most powerful carcinogenic agent considered," he could not recall.[757] Instead, he said that "[t]he hexavalente is one of the chemicals that if it is exceeded in its limits, it becomes cancer causing, carcinogenic."[758]

Zambrano was asked also which report the Judgment stated is "statistical data of highest importance to delivering this ruling."[759] He responded "[t]he report by the expert Barros."[760] But the Judgment stated that the "Relative Risk established in" the study entitled *Cáncer en la Amazonía Ecuadoriana* "is statistical data of highest importance to delivering this ruling...."[761]

Zambrano was unable also to recall the theory of causation on which the Judgment relied.[762] And, although the English word "workover" appears twice in the Judgment,[763] Zambrano testified that he does not speak English,[764] did not know what "workover" means,[765] and could not explain why the word was in the Judgment.[766]

TPH—which stands for total petroleum hydrocarbons—appears over 35 times in the Judgment.[767] Indeed, the Judgment awards plaintiffs over $5 billion for TPH cleanup.[768] But when Zambrano was asked at his deposition what TPH stands for, he testified that "it pertains to hydrocarbons, but I don't recall exactly."[769]

Zambrano's inability to recall every detail of a 188–page decision of course would not itself prove that he had not written it. But the aspects of the Judgment he was unable to recall were not insignificant details—they included the identification of a substance for the presence of which the Judgment awarded $5 billion, the identity of a substance that the Judgment described as the most powerful carcinogenic agent it considered, and the source of the most important statistical data. It is extremely unlikely that a judge who claims to have spent many months reviewing the record[770] and to have written this lengthy

***485** and detailed decision would not recall such important aspects—especially when, as will be seen, that Judgment was hailed by the president of Ecuador as the most important decision in the country's history. When this is taken together with the evidence discussed below, it is significant.

2. Zambrano's Account of the Preparation of the Judgment Was Self Contradictory and Implausible

In a declaration submitted to this Court in March 2013, Zambrano stated: "I confirm that I am the only author of the judgment that I issued on February 14, 2011.... *I did not receive support or assistance from Dr. Alberto Guerra or from any other person* ...."[771] He made the same statement in a declaration to Ecuadorian prosecutors.[772] At trial, however, he testified that he actually had received assistance from someone else—a Ms. Calva who, he claimed, typed almost every word of the Judgment as he dictated to her.[773] He paid her $15 per day for her transcription services.[774] Moreover, as his testimony proceeded, he claimed that Ms. Calva did even more.

In fact, Calva's existence first was disclosed by Guerra. Other aspects of Guerra's testimony will be explored more fully below. For present purposes, it suffices to note that Guerra testified that the daughter of an attorney friend of Zambrano, Arturo Calva, retyped drafts of orders in the Chevron case into Zambrano's computer at Zambrano's office.[775] Several days after Mr. Guerra testified, defendants moved for leave to add Ms. Calva as a witness.[776]

At that point, Zambrano changed his story. He mentioned Ms. Calva during the following week, both at his deposition and at trial, claiming for the first time that he had dictated the entire Judgment to Calva.

In addition to Zambrano's failure to mention Calva in his declaration and statement, Zambrano's testimony at trial regarding her role was internally inconsistent. For example, Zambrano first testified ***486** that "nobody helped [him] do the research [he] needed to do to write and author the judgment."[777] But when he later was asked how he had found French, British, Australian, and American authorities that were cited in the Judgment, Zambrano explained that Ms. Calva, an 18–year old whom he paid $15 per day, was "the one who would go onto the internet. She would look for a specific subject ... she would print them out so that I would read them later."[778] In any case, however, there was no credible explanation of how Calva, as Zambrano claimed, found French, British, Australian, and American legal authorities on the Internet given that there is no evidence that she had any legal training or spoke French or English. Nor was there any reasonable explanation of how Zambrano could "read ... later," much less deal intelligently with, any such French or English language authorities in light of the fact that he reads neither French nor English, has no legal training in the common law, and even had very little experience with civil matters in Ecuador.[779]

Finally, Zambrano was adamant that Calva typed only what he dictated orally to her. He "never show[ed] Ms. Calva any document for her to type from."[780] But the 188–page Judgment contains many complicated words, citations, and numerical sequences. The sampling data cited in the Judgment consists of strings of alphanumeric sequences with dashes, periods, underscores, odd spacing, and parentheses in them. For example:

> "con resultados como 3142 y 466 en Auca 1 en AU01–PIT1–SD2–SU2–R(220–240 cm)—sv y AU01–A1–SD1–SU1–R(60–100cm)—sv; 2450 y 876 en Cononaco 6 en CON6–A2–SE1—sv y CON6–PIT1–SD1–DU1–R(160–260cm)—sv; 154.152,73.6325,70.4021 en Shushufindi 18, en SSF18–A1–SU2–R(O.Om)—sv, SSF18–PIT2–SD1–SU1–R(1.5–2.0m)—sv; y SSF18–A1–SU1–R (0.0 m)—sv)."[781]

It is not credible that Zambrano dictated these sequences to Calva orally and that Calva then typed them exactly into the draft without looking at any underlying document. Moreover, as will appear, the Judgment contains portions of eight documents from the LAPs' internal files, many of them *in haec verba.* Even assuming that Zambrano actually prepared the Judgment, as he claims, he certainly would not have dictated these pre-existing documents to Ms. Calva rather than giving ***487** them to her with markings indicating exactly what he wanted her to copy.

Of course, Ms. Calva readily could have confirmed or denied Zambrano's account. When her name surfaced, the Court granted defendants' motion to add her as a witness.[782] Defendants advised the Court that she had obtained a visa to come to the United States for that purpose.[783] But defendants failed to call her or to explain her absence. While the Court does not draw any inference as to the substance of the testimony she would have given, her absence is worthy of note.

There is still another consideration. Judge Ordófiez began

presiding over the Lago Agrio case on March 12, 2010 and was expected to continue for two years. Chevron moved to recuse him on August 2010. He opposed the motion, and he was not recused until October 1, 2010.[784] Zambrano did not assume jurisdiction of the case as the presiding judge until October 11, 2010.[785] Moreover, he did not issue *autos para sentencia*—the order closing the evidentiary phase of the case, inviting final argument, and declaring the case ready for decision[786]—until December 17, 2010.[787] Thus, the intervals between the issuance of the Judgment on February 14, 2011 and (1) *autos para sentencia,* (2) Zambrano's assumption of jurisdiction as the presiding judge, and (3) the initial recusal were (1) less than two months, (2) about four months, and (3) about six months, respectively.

The Lago Agrio court record at the point at which the case was decided contained over 200,000 pages. While the 200,000 page figure no doubt overstates in some measure the part of the record that remained relevant to a decision on the merits,[788] the reasonable conclusion is that the relevant part was quite large.[789] Moreover, the Judgment is a 188 page, single spaced document of considerable complexity that purports to rely on innumerable pieces of evidence, many of them lengthy documents themselves. The preparation of the Judgment in the time available, even assuming that the author or authors began as soon as Chevron moved ***488** to recuse Judge Ordóñez, would have been a Herculean task for anyone. To have done so without any assistance save an 18–year old typist, as Zambrano claimed, would have rendered its accomplishment in the relevant time period even less likely. And to have done so by dictating orally virtually every word, without the typist copying anything at all from other documents, as Zambrano claimed, would have made it still less probable.[790] The likelihood that Zambrano would have been capable of doing what he said he did, much less capable of doing it in the way he said he did it, is quite small.

3. Zambrano's Testimony as to the Computer on Which He Claimed the Judgment Was Entered Was Inconsistent With the Evidence

Zambrano's testimony as to his alleged authorship of the Judgment was contradicted persuasively on yet another point by other evidence.

Zambrano testified that the only computer on which he and Calva wrote the Judgment was the new computer in his office at the Lago Agrio court.[791] But this is contradicted by objective evidence.

On October 24, 2013, a week into trial, defendants moved for leave to call Milton Efrain Jaque Tarco, a witness not previously identified.[792] They explained that Tarco is a police expert in computer forensics[793] and then submitted a declaration signed by Tarco in support of their motion (the "Tarco Declaration").[794] Tarco there stated that he had been asked to examine and analyze the "computer equipment ... that Dr. Nicolas Augusto Zambrano Lozada allegedly used" to write the Lago Agrio Judgment.[795]

Tarco explained in his declaration—which, to jump ahead, ultimately was received in evidence only as to two narrow ***489** points[796]—that he had been provided with both computers that had been in Zambrano's office during the time in which Zambrano claimed he had written the Lago Agrio Judgment, which Tarco called PC–01 and PC–02.[797] He created forensic copies of each of the computers and analyzed their contents.[798] Because "relevant information for [the Judgment] was found [only] in computer PC–02," Tarco limited his discussion to that computer.[799]

Although the Court granted defendants' motion for leave to add Tarco to their witness list, defendants ultimately did not call him at trial. There appears to be at least one reason why they did not.

Tarco's declaration was received to establish the serial numbers of each of the computers that had been in Zambrano's office—PC–01 and PC–02.[800] Chevron expert Spencer Lynch testified, using records obtained from the Lago Agrio court[801] and from Hewlett–Packard,[802] testified that the computer that the Tarco Declaration identified as the one that contained data relevant for the Judgment (PC–02)—a file called PROVIDENCIAS—was the *older* of the two computers.[803] PC–01—which Tarco stated did not contain any documents relating to the Lago Agrio case—was the new computer.[804] Thus, the Tarco Declaration, insofar as it was received in evidence, contradicted Zambrano's testimony that "[i]t was on this new computer that the whole writing of the judgment was done."[805]

4. Zambrano's Self Interest

It is relevant to understand also the nature and extent of Zambrano's personal motives to support the LAPs and to

deny Chevron's accusations. They are economic and political, and the two are interrelated.

One personal motive is quite simple—employment. Zambrano had been in government service almost his entire adult life, first in the Air Force, then as a prosecutor from 1994 until he was appointed a ***490** judge in 2008.[806] In February 2012, he was removed from the bench for misconduct.[807] In May 2012, the Judiciary Council again found Zambrano guilty of judicial misconduct in another incident and imposed the further sanction of removal from office to be "recorded in his personnel file since he [then wa]s no longer part of the judicial branch."[808] Following his removal, he was unemployed.[809] Moreover, we infer that Zambrano's employment prospects in the legal field were quite limited and that the likelihood that he would be hired by the government after the Judiciary Council removed him from office as a judge for two incidents of misconduct was nil.

On January 28, 2013, Chevron filed a motion in this case to which it attached a declaration by Guerra that set forth his contention that Zambrano had been bribed. On March 13, 2013, Zambrano provided the defendants with a declaration contesting Guerra's allegations.[810] In April, Zambrano started a new job as a legal adviser at the Refinery of the Pacific, a venture that is majority owned by Petroecuador, the Ecuadorian national oil company.[811]

This sequence of events gives rise to a strong inference that Zambrano's employment was—and remains—directly related to his testimony. Zambrano's attempt to deny any such connection only made the connection more likely because of the clumsy way in which he dissembled about it.[812]

The likelihood of such a connection is enhanced by the importance of the Lago Agrio case to the president and government of the ROE. It has been open and notorious in Ecuador for years that President Correa and the government support the LAPs in the case against Chevron. The government itself is litigating closely related issues against Chevron in an arbitration.[813] On the very day that Zambrano issued the Judgment, he appeared at a press conference with then-president of the Judiciary Council, Benjamin Cevallos.[814] Cevallos praised Zambrano, calling him "a brave judge, a determined judge, a judge who knows how to fulfill his obligations...."[815] And he congratulated ***491** Zambrano for a decision that he described as "a touch of happiness ... that has been shared with all of you. This is happiness for all citizens, especially for the indigenous communities of the Ecuadorian Amazon."[816] A week later, President Correa told reporters that Zambrano's ruling was "historic."[817] Yet Zambrano claimed not to recall what had been said at the press conference[818] and to have been entirely unaware, even at trial, "that President Correa supported the Lago Agrio plaintiffs' case before [Zambrano] issued the Lago Agrio Chevron judgment."[819] But that testimony is not at all credible.

For one thing, Zambrano was at the press conference, which was a media event at which a high official of the judiciary lauded him publicly. People understandably forget minor details of such events, but Zambrano's claims to lack recollection of an event that likely was a high point of his career are implausible.

The claim of unawareness of the president's and the government's position on the lawsuit is even worse. Chevron's *alegato*—its final written argument before Zambrano rendered the Judgment—argued extensively that the case had been prejudicially influenced by the government. It made abundantly clear that the government generally and President Correa in particular supported the LAPs' case.[820] Zambrano swore that he had read this document before he issued the Judgment.[821] Zambrano, contrary to his testimony, was well aware that the Judgment he issued was just what the president of Ecuador wanted.

The Court finds that Zambrano's disavowals of memory and of knowledge were false. The motive for this lack of candor was to attempt to defeat any inference that there was, or that Zambrano thought there was, a connection between his testimony and his job. But the attempts fail. The Court finds that Zambrano at least thought that his job would be in jeopardy if he did not testify favorably to the plaintiffs, and his desire to keep his job strongly motivated his testimony.[822]

In sum, the Court finds that Zambrano did not write the Judgment issued under his name. He was astonishingly unfamiliar with important aspects of its contents. His testimony at trial was evasive and internally inconsistent. He repeatedly contradicted himself when attempting to explain how he wrote the Judgment, whether he received any assistance, and what materials he relied upon in doing so. The testimony he gave at trial was markedly different from that which he gave at his deposition just days before. And his responses and explanations at trial varied from one minute to the next. Not only was his version of events internally inconsistent, ***492** it was, as we shall see, in large respects thoroughly contradicted by evidence that was unrebutted and unexplained by the defendants. So we turn to the question of who did write it.

B. Evidence that the LAPs Wrote the Judgment

1. The LAPs' "Fingerprints" Are All Over the Judgment

We explain in Appendix I, § I, that the record in the Lago Agrio case consists of the documents duly filed with the clerk and added to the *cuerpos,* booklets each containing about 100 pages. Consideration of any other materials, including any materials provided to a judge or court official informally or *ex parte,* would have been improper under Ecuadorian law.[823]

Zambrano stated that he decided the Lago Agrio case[824] "[a]ccording to the evidence that is part of the record...."[825] He added that, while documents related to the case that were not incorporated into the court record occasionally were left at the door of his office in the court,[826] he "always matched [those documents] up with what already existed in the [record of the] case."[827] If the documents were different from those in the record, he discarded them because they were not "useful" to him.[828] Thus, according to Zambrano, he considered only documents that were in the court record—that is, officially filed by the parties and added by the clerk to the *cuerpos.*

Chevron exhaustively compared documents produced by defendants in discovery in this case and in the Section 1782 proceedings, on the one hand, with, on the other hand, the Lago Agrio court record—the record that Zambrano claimed was the sole source of evidence used in writing the Judgment. That comparison establishes that portions of eight documents produced by defendants in discovery—internal work product—appear *in haec verba* or in substance in the Judgment that Zambrano claims to have written himself.[829] These documents appear nowhere in the Lago Agrio court record.[830]

a. The Fusion Memo, the Draft Alegato, the Index Summaries, the Clapp Report and the Fajardo Trust Email

The first six of the eight documents—known as the Fusion Memo,[831] the Draft Alegato,[832] the January and June Index Summaries,[833] the Clapp Report,[834] and the Fajardo Trust Email[835]—were considered by Chevron Expert Dr. Robert Leonard, who concluded that parts of them appear verbatim or in substance on 30 pages of the Judgment.[836] Some of these inclusions ***493** and commonalities were on important issues, including the question whether Chevron could be held liable for alleged pre-acquisition torts of Texaco. Even more important, however, they are, as Chevron's counsel aptly called them, like "fingerprints." There is no plausible explanation for their presence in the Judgment except that whoever wrote the Judgment copied parts of them. This becomes even clearer when one examines the commonalities between these six LAP internal work product documents and the Judgment. Examples of these are summarized in exhibits to Dr. Leonard's testimony,[837] PX 2164 through 2169[838] and PX 2170, which "contain[ ] side-by-side comparisons highlighting text from the Ecuadorian Plaintiffs' unfiled work product in the above five exhibits that appears verbatim or nearly verbatim in the Ecuadorian Judgment." PX 2164, which gives "39 examples of plagiarized text from the [se six pieces of the] Ecuadorian plaintiffs' unfiled work product that appear[ ] in the Ecuadorian Judgment,"[839] is attached as Appendix II. It and the video accompanying it are especially helpful in understanding the expert testimony, which the Court fully credits.

Two other internal LAP documents that are not in the record[840] but that show up in the Judgment are referred to as the Moodie Memo and the Selva Viva Database and warrant brief separate treatment.

b. The Moodie Memo

On February 2, 2009, a former intern for the LAP team, Nick Moodie, prepared a memorandum for Prieto and Sáenz regarding "[t]he standard of proof in U.S. common-law toxic tort negligence claims" (the "Moodie Memo").[841] The purpose of the Moodie Memo was to "provide[ ] examples of the plaintiff's [*sic*] burden of proof taken from common-law jurisdictions."[842] Both the Moodie Memo and the corresponding part of the Judgment cite, among other things, American and Australian tort law in their causation analyses.

There are three striking similarities in both documents' discussion of and citation to U.S. law on causation:

- *First,* the Moodie Memo discusses the "substantial factor" test, which it explains was taken from "Californian case law" and requires a plaintiff to prove that there is a "[r]easonable medical

probability that D's conduct was a substantial factor in contributing to the aggregate dose of toxic substance and hence the risk of developing the disease."[843] The Judgment states also that "substantial factor" is an appropriate test for legal causation.[844]

• *Second,* the Moodie Memo cites the California case, *Rutherford v. Owens–Illinois,* ***494** *Inc.,*[845] as reflective of U.S. law on causation in toxic substance cases and as requiring proof that "D's conduct was a substantial factor in contributing to the aggregate dose of toxic substance and hence the risk of developing the disease."[846] The Judgment, citing *Rutherford*, also states that substantial factor requires "that the conduct of the defendant was a factor that contributed substantially to increasing the dose of harmful substances and ultimately the risk of developing illnesses."[847]

• *Third,* the Moodie Memo states that the substantial factor test does not require that "it was toxic chemical's [*sic*] from D's conduct that *actually* produced the malignant growth (due to the 'irreducible uncertainty of which particular fibre or fibres actually cause the cancer to begin forming')."[848] The Judgment states that the substantial factor test means that agents "must be considered without the need to investigate which of them was precisely the cause of harm, due to the irrefutable lack of scientific uncertainty about which of the elements used by the defendant caused the harm."[849]

Chevron expert Michael Green, a law professor from Wake Forest University School of Law "with substantial expertise in the area of causation in toxic tort lawsuits,"[850] analyzed the Judgment and the Moodie Memo. He expressed the view that it was odd that a court in Ecuador—a civil law country—would cite to and rely upon U.S. (and other common law countries') law on causation without any explanation for doing so.[851] He found it difficult to understand also why the Judgment relied on the "substantial factor" theory set forth in *Rutherford,* as the theory is outdated and generally applied only in asbestos cases.[852] The reason, he concluded, is that this section of the Judgment was largely copied from the Moodie Memo. This Court agrees.

The documents' citation to and discussion of Australian law also indicate that the Moodie Memo and the Judgment were written by the same author. Both documents cite to Australian law regarding its "process of inference" rule for causation. Both documents contain identical strings of words:

The Moodie Memo: "Australia: *causation can be established by a process of inference which combines* primary *facts even if* each piece of evidence alone does not rise above the level of possibility...."[853]

The Judgment: "Australian case law tells us that *causation can be established by a process of inference which combines* concrete *facts even if* the actual causation cannot be attributed to anyone of them by itself...."[854]

***495** This part of the Judgment, at least, was copied from the Moodie Memo. There is evidence also of additional copying from the Moodie Memo into the Judgment. Both documents refer to the Australian case law for the "process of inference" discussion.[855] The Moodie Memo cites specifically to *Seltsam v. McGuiness.*[856] But Honorable James Spigelman, the former Chief Justice of the Supreme Court of New South Wales[857] and author of the *Seltsam* opinion, testified at trial that the citation to his opinion, or to Australian law, for this proposition is anomalous. "Besides the similarity of the language," he said, "it is striking that both the Ecuadorian Judgment and the Moodie Memo attribute this approach to Australian law, whereas it is a well-established proposition throughout the common law world. It is usually attributed, as [former Chief Justice Spigelman] did in *Seltsam v. McGuinness,* to the American text, *Wigmore on Evidence* 3rd Edition, paragraph 2497. To describe it as an Australian legal approach is inaccurate."[858]

Both Professor Green and former Chief Justice Spigelman identified other mistakes of U.S. and Australian law that are common to both the Moodie Memo and the Judgment.[859] It is unnecessary to list them all here. The fundamental point, however, is not that the Judgment came to mistaken or odd conclusions about the law of the United States or Australia. It instead is that *both* the Moodie Memo and the Judgment made the *same mistakes* in characterizing them. Nothing in the Moodie Memo appears anywhere in the Lago Agrio Record.[860] Thus, the likelihood that the Judgment independently would contain exactly the same errors in characterizations as appear in the Moodie Memo is almost zero. The Court finds that parts of the Moodie Memo were copied into and paraphrased in the Judgment.

c. Selva Viva Database

Spencer Lynch of Stroz Friedberg, LLC, compared the environmental sample names and testing results contained in the Judgment with those contained in the lab results filed with the judicial inspection reports in the Lago Agrio

case (the "Filed Lab Results"). He compared them also with those contained in a series of spreadsheets that were produced to Chevron in discovery, but not filed with the Lago Agrio court (the "Selva Viva Database").[861] While the Filed Lab Results "were similar in many ways to the" Selva Viva Database, Lynch found that there were "several notable differences [which] revealed that the [Selva Viva Database] was more likely the ***496** source of the information cited within the Ecuadorian Judgment" than the Filed Lab Results.[862] He found also that "reliance on the [Selva Viva Database] introduced several numerical errors into the Ecuadorian Judgment, indicating that the data was copied from this source."[863]

First. Many of the Judgment's citations to sample results, each of which consisted of a series of letters and numbers, ended with the suffix "—sv" or "—tx."[864] Not one of the Filed Lab Results contained an "—sv" or "—tx" suffix but the Selva Viva Database did.[865] In addition, both the Selva Viva Database and the Judgment used a naming convention "ending with numeric ranges and an 'm' or 'cm' enclosed *within* parentheses ... [but] the Filed Lab Results used a naming convention that ended with numeric ranges in parentheses, followed by an 'm' or 'cm' *outside* of the parentheses."[866] Further, in discussing the results of benzene testing, the Judgment referred to the sample result "SA—13–JI—AM1—0.1M,"[867] which matches the format used in the Selva Viva Database.[868] However, the sample names in the Filed Lab Results contained no underscores, but used dashes instead.[869]

Second. There are two striking discrepancies between numerical values in the Filed Lab Results and the Judgment that must have resulted from copying from the Selva Viva Database.

The first relates to reporting of concentrations of mercury. The sensitivity of testing to determine the presence or absence and, in the former case, concentration of a substance in a sample varies depending upon the capabilities of the equipment or testing method used. Where a test does not reveal the presence of the subject substance, the result often is reported as a less-than sign ("<") followed by a number that indicates the minimum concentration of the subject substance that can be detected by the particular equipment and testing method used.[870]

The Judgment contained the following passage (which, though it is extraneous to the present point, was relevant to liability and damages in Ecuador):

> "Mercury has been considered as a possible human carcinogenic agent by the EPA and there are multiple studies showing the effects of mercury exposure, the most serious being permanent brain and kidney damage, which alerts this Court that *alarming levels of mercury have been found in the Sacha, Shushufindi and Lago Agrio fields, where we found several samples reaching 7 mg/kg. taken by the experts* José Robalino in the judicial inspection at Sacha ***497** Central (see samples—ESTS1_sv and SAC–PIT1–S1–l_sv); and SAC–PIT–1–S1–2_sv) and Xavier Grades at Shushufindi 8 and Lago Agrio Norte (see samples SSF08–PIT1–S1_sv, SSF08–PIT1–S2_sv, SSF08–PIT1–S3_sv, SSF08–PIT2–S11_sv, SSF08–PIT2–S3_SV, SSF08–PIT2–S4–1_sv, SSF08–PIT2–S5_sv, SSF08–PIT2–S6—sv, and also LAN–ESTA–B_sv, LAN–ESTA–B1_sv, LAN–ESTA–B2_sv, LAN–ESTA–C_sv, LAN–ESTBASUE1_sv, LAN–ESTBASUE2_sv, LAN–ESTB–D1_sv, LAN–ESTB–D2_sv, LAN–ESTB–E1_sv). In light of these results, showing evidence of the presence of mercury in elevated levels in soil samples collected during the judicial inspections, there is evidence of a worrying presence of this element in the soil of the ecosystem of the concession."[871]

In fact, however, the Filed Lab Results did not report that mercury levels reached 7 mg/kg in these samples. They reported levels of "<7"—*i.e.,* no detectable mercury—for every one of them.[872]

The source of this anomaly is apparent. The Selva Viva Database separated the "<" sign from the following value by placing each in its own column. The column containing the "<" sign was labeled "flag." The author or authors of the Judgment thus used the Selva Viva Database rather than the Filed Lab Results, ignored or did not understand the "flag" column, and wrongly reported each of these test results as showing a concentration of mercury of 7 mg/kg.[873]

The next "tell" is quite similar. The Judgment reported the concentration of a substance allegedly found at some specific sites in *milligrams* per kilogram.[874]—*i.e.,* one onethousandth of a gram per 1,000 grams (2.2 pounds) of sample. Page 109 of the Judgment contains the following passage:

> "and 3142 *mg/kg.,* in the samples taken by the plaintiffs' experts, since the defendant's experts did not analyze this compound. On the other hand, the expert Luis Villacreces, in samples taken during the inspections of the Auca 1 well, Cononaco 6, the Sacha 51 well and wells 18, 4 and 7 at Shushufindi has provided results that exceed any standard of reasonable tolerance, with results such as 3,142 and 466 at Auca 1 in AU01–PIT1–SD2–SU2–R(220–240 cm)_sv and AU01–Al–SD1–SU1–R(60–100cm)_sv; 2450 and 876

at Cononaco 6 in CON6–A2–SE1_sv and"[875]

In fact, the Filed Lab Results for these samples reported their findings in *micrograms* per kilogram (¢g/kg)—that is, in millionths of a gram per kilogram.[876] Thus, the Judgment could not have obtained the results it reported from the Filed Lab Results. It had to have copied them from the Selva Viva Database which, unlike the Filed Lab Results, reported at ***498** least some of its test results in milligrams per kilograms.[877]

Finally. Both the Judgment and the Selva Viva Database incorrectly identified one of Chevron's experts, John Connor, as the submitter of a specific sample result.[878] But the judicial inspection report filed with the Lago Agrio court shows that Fernando Morales was Chevron's expert for that inspection, not John Connor.[879]

The foregoing analysis, it should be understood, does not reflect any review by this Court of the substantive merits of the Judgment. The point is that these particular characteristics of the Judgment are inconsistent with the evidence in the Lago Agrio record upon which the Judgment purportedly relied, but appear in the Selva Viva Database, which is not in that record. This goes directly to the question of the authorship of the Judgment. At least in these respects, the Judgment was copied from LAP material outside the record, and Zambrano's testimony was untrue.

2. Defendants' Failure to Provide any Explanation for the Overlap

Defendants had remarkably little to say regarding the evidence of the extensive overlap between the Judgment and their internal work product. They did not explain how the LAPs' internal work product ended up verbatim or in substance in the Judgment, despite that it appears nowhere in the record. Donziger testified that he had "a variety of explanations" for how it had occurred, but failed to provide a single one.[880] Ponce testified that documents were provided to the judge at some judicial inspections and that certain *actas* from those judicial inspections (which were incorporated into the record) did not reflect all of the documents submitted by the parties.[881] But he failed to identify a single occasion when that actually had happened, much less any given document that was submitted on such an occasion. Moreover, Ponce had left the LAP team before most of the LAP internal work product documents that appear in the Judgment even were created,[882] so his testimony explained nothing.

Zambrano testified that documents related to the case that were not parts of the court record occasionally were left at the door of his office in the court.[883] Defendants thus appear to suggest that the overlap between the Judgment and the LAPs' internal documents is explained by the possibility that the documents were left at Zambrano's doorstep and that Zambrano copied from them. But Zambrano could not recall any of the specific documents that were left at his door.[884] Moreover, he was clear that he did not use any material that was left at his door. When documents were left for him, he explained, he "always matched it up with what already existed in the [*cuerpos* of the] case."[885] If a document differed from ***499** what was in the *cuerpos,* he discarded it "because it wasn't useful" to him.[886]

More fundamentally, any contention that the eight internal LAP documents that appear verbatim or in substance in the Judgment were provided to the judge during the judicial inspections or were left at Zambrano's doorstep cannot be taken seriously. Not only would any such *ex parte* submission have contravened Ecuadorian law, but defendants utterly failed to prove that any such thing actually occurred. Had a member of the LAP team provided a document *ex parte* to Zambrano or any other judge, that person could and should have been brought to court or deposed to explain what the document was and when it was provided to the judge. But no such witness was produced. Defendants' failure to provide any evidence corroborating their explanation makes clear that it is nothing more than a post-hoc attempt to explain away the inexplicable.

Finally, it bears mention that Chevron has adduced evidence of *only* eight LAP documents that were copied into the Judgment. One may wonder why even more of the Judgment was not traced to the LAPs' internal work product. It is entirely conceivable, however, that Chevron would have done just that if it had been given complete access to the LAPs' documents. But documents from Ecuador were not produced in response to discovery requests and orders by this Court. Only through discovery from Donziger and others in the United States was Chevron able to obtain even the eight documents discussed above. Those eight documents firmly establish that the LAPs wrote at least material portions of the Judgment. In all the circumstances, the Court infers that the LAPs wrote all or most of it, particularly in light of evidence that they had been preparing for some time to write the whole Judgment.

3. Evidence that the LAPs Began Preparing the Judgment as Early as 2009

As one of the defendants' Ecuadorian law experts testified,[887] it is unlawful under Ecuadorian law for parties to submit proposed judgments to a court.[888] Nevertheless, despite the lack of any meaningful discovery from the LAP team in Ecuador or testimony by any of its members, there is more than a hint in emails that Donziger produced under court order that the LAPs did prepare a form of judgment and, indeed, had begun that task in mid–2009, if not before.

***500** In late May or early June 2009, an intern named Brian Parker began working at the Selva Viva office. On June 5, 2009, Fajardo asked Donziger for "suggestions as to what he could do during these first few days."[889] Donziger offered no printable ideas. But Fajardo responded to Donziger that he would give Parker "a research assignment for our legal alegato *and the judgment, but without him knowing what he is doing* ..."[890] Then, on June 18, 2009, Fajardo sent Donziger a copy of a new court decision. He added that "[t]he arguments by the magistrates are very interesting, I think they serve us well for our alegato and ..."[891]

These emails are suggestive. The distinction drawn between the alegato—*i.e.,* the written closing argument in an Ecuadorian litigation[892]—and the judgment in the email about Parker indicates that Fajardo's reference to "the judgment" meant exactly what it said. Parker was to do research for preparation of a judgment, but was not to be told the purpose of the assignment. Moreover, defendants have advanced no reason why it was important to keep Parker in the dark, save for the logical inference that he really was working on a judgment that could not properly have been submitted to the Lago Agrio court. Likewise, the strategically placed ellipsis at the end of the quoted sentence from the June 18 email implies that Fajardo knew that Donziger would know from the June 5 email that the ellipsis referred to the judgment.

These emails, in and of themselves, of course do not prove that the LAP team began work in 2009 on a proposed judgment. But there is more as well that suggests that they did so, at least by some time in 2010.

Donziger's distrust of the competence and integrity of the Ecuadorian judiciary is clear. Moreover, Donziger and the LAPs had strong reasons to want to control the contents of, and therefore to write, the Judgment, assuming that they could obtain the judge's signature on it. They were deeply concerned by early to mid–2010 that the Lago Agrio court, even assuming it ruled in their favor, might rely on the Cabrera Report if left to its own devices.[893] Prieto's "go to jail" email was written in late March 2010, and this June 2010 email was written in the face of the imminent disclosure of "the Stratus materials" in the Colorado 1782 proceeding. Thus, there was an immediate threat that the Cabrera Report would be discredited as the work of the LAPs' consultants, Stratus. Reliance on it by the Ecuadorian court would have threatened to discredit even a judgment favorable to the LAPs— ***501** unless such a judgment were written in a particular way, as it ultimately was, with the disclaimer of reliance already noted. In fact, on the day that Donziger wrote the email just quoted, one of the LAPs' other U.S. lawyers spelled out the hope that the cleansing expert would provide an alternate basis for a decision and that the judge would decline to rely on the Cabrera Report and rely instead on the cleansing expert.[894] There could have been no better way to ensure that the Lago Agrio court would not rely on the Cabrera Report than for the LAPs to draft the decision themselves.

The probability that the LAPs drafted the judgment draws strength also from the following deposition testimony by Donziger:

> "Q. Did the Lago Agrio plaintiff team at any time develop a proposed judgment for the Lago Agrio case? A. I don't believe so. I don't know. It is possible."[895]

Donziger, almost in the same breath, testified that he (1) believed that the LAPs had not prepared a proposed judgment, (2) did not know whether they had prepared a proposed judgment, and (3) thought it possible that they had prepared a proposed judgment. But this deposition took place only five months after the Judgment was issued. Chevron already had suggested that the Judgment, like the Cabrera Report, had been ghostwritten by the LAPs, or at least that the judge received "secret assistance" from the plaintiffs' team in writing it.[896] So Chevron's suggestion that the LAPs had ghostwritten the Judgment, the Court finds, was in Donziger's mind when this deposition was taken. Given his lead role in the litigation and the emails discussed above, it is most unlikely that he did not know whether the LAPs had prepared a proposed judgment. If they had not, the easy and truthful answer would have been that they had not done so. Period. Indeed, the fact that Donziger obfuscated—that he quickly changed his answer to this very simple question from "I don't believe so" to "I don't know" to "[i]t is possible"—suggests that Donziger knew quite a bit more than he was willing to say and that he did not say what he knew because it would have been damaging.

C. Ultimate Findings on this Point—The LAPs Wrote the Judgment

As we have noted, there is direct evidence that the LAPs began preparing a draft judgment as early as 2009. Donziger evaded the question whether they prepared a proposed judgment, notwithstanding that the submission of proposed judgments would have been improper in Ecuador. The Judgment copied extensively from eight LAP internal work product documents—documents which were not in the record, which Zambrano denied having used, and the presence of which in the Judgment defendants could not explain. There is extensive evidence of substantive *ex parte* contact by LAP lawyers,[897] including Donziger, with various Ecuadorian judges throughout the Lago Agrio case. There is the LAPs' previous ghostwriting of the Cabrera Report and their submission of a report supposedly written by Calmbacher but in fact written by the LAPs.

***502** In addition, we have referred to the LAPs' strong motive to control the specific content of the Judgment insofar as it related to the Cabrera Report. Moreover, the LAPs' Cabrera Report problem had grown even more acute by later in 2010, when the Judgment must have been in preparation. By then, the Denver lawyers had withdrawn as counsel upon their discovery of what had transpired among Donziger, Stratus, and the LAPs. The LAPs' last-ditch effort to stop the production of the Stratus documents had failed.[898] The Second Circuit had directed Berlinger to produce substantially all of the *Crude* out takes, so that material either had been or was about to be produced.[899] This Court had directed Donziger to produce extensive material and to submit to a deposition in a Section 1782 proceeding.[900] Other Section 1782 proceedings had been or were being filed around the country. Hopes of suppressing the facts that Cabrera had been neither impartial nor independent and that Stratus had written all or much of his report had been dashed.

In the circumstances, the Court finds that the LAPs wrote the Judgment in its entirety or in major part and that Zambrano made little or no contribution apart from his signature and perhaps some light editing designed to make it read more like other decisions he had signed in this and other cases. The Court would have made these findings without regard to the facts that Fajardo and the other Ecuadorian lawyers—those who naturally would have drafted or been involved intimately with the drafting of the judgment by the LAPs—(1) did not testify, and (2) did not produce documents pursuant to Chevron's request and the Court's order. But the inference from the absence of these witnesses strongly confirms these findings.

X. How it All Began: Guerra Ghostwrote Orders for Zambrano and the LAPs Paid Him

The LAPs wrote the Judgment. Zambrano did not. And yet the Judgment was issued by the Lago Agrio court under Zambrano's signature. How was this accomplished?

Chevron contends that the LAPs bribed Zambrano to allow them to write the Judgment and that this bribe was facilitated by Alberto Guerra. As will be seen, the Court finds that Chevron has so proved. To understand how this deal ultimately came to pass, however, we must turn back to mid–2009, when Zambrano first presided over the Lago Agrio case and the Judgment still was two years away.

A. The Guerra–Zambrano–Donziger Conflict

Alberto Guerra was the judge who presided over the Lago Agrio case from its filing until it was reassigned to another judge in 2004. But his involvement did not end then. Nor did it end when he was removed from the bench in May 2008.[901]

Chevron—in reliance on Guerra's testimony—claims that Guerra was a party to three distinct corrupt bargains with Zambrano before Zambrano too was removed from the bench:

- The first corrupt bargain, solely between Guerra and Zambrano, allegedly began after Guerra was removed ***503** from the bench. Zambrano, whose previous experience had been almost entirely as a prosecutor, was new to the bench and inexperienced in civil cases. He made an arrangement with Guerra pursuant to which Guerra drafted court decisions in civil cases over which Zambrano presided. Zambrano paid him for his ghostwriting services. There is no suggestion that Donziger or the LAPs were involved in this arrangement at its outset.

- The second was an outgrowth of the first. It came into existence when Zambrano was assigned in mid–2009 to preside over the Chevron case for the first of two occasions. Zambrano allegedly reached an unspecified arrangement with the LAPs to move the case along quickly and generally in the LAPs' favor. At Zambrano's suggestion, Guerra then made a deal with Donziger, Fajardo, and Yanza. The

substance was that the LAPs paid Guerra roughly $1,000 per month to ghostwrite orders for Zambrano in the Chevron case that would give effect to the Zambrano–LAP deal, expediting the case in a way favorable to the LAPs.

• The third corrupt arrangement is said to have taken place in connection with Zambrano's second and decisive period of presiding over the Lago Agrio case, which began in mid- to late 2010. At Zambrano's request, Guerra allegedly facilitated a deal among Zambrano, Donziger, and Fajardo pursuant to which the LAPs promised to pay Zambrano $500,000 in exchange for Zambrano permitting the LAPs to write the decision. Fajardo then is said to have provided Zambrano and Guerra with a draft of the judgment to which Guerra made minor editorial changes. Zambrano allegedly signed and filed it.

Zambrano admitted at trial that he had Guerra draft decisions for him in civil cases but he denied that he paid Guerra to do so and denied that he had Guerra draft anything for him in the Lago Agrio Chevron case. He denied also the second and third alleged corrupt bargains and claimed that he dictated every word of the 188–page Judgment without any help from anyone except the typist.

Donziger admitted that Guerra proposed to him and Fajardo that Zambrano would throw the case and let the LAPs write the decision in exchange for a $500,000 bribe. He claimed, however, that he rejected the deal. Fajardo and Yanza declined to testify.

There are substantial credibility issues with respect to the testimony of Guerra, Zambrano, and Donziger. The resolution of these issues draws on the history of relationships among the five key actors, all of which span close to ten and in some cases more years. Moreover, it requires careful consideration of an enormous amount of testimony and documentary evidence, some important portions of which were ignored by both sides. Determinations of credibility depend also upon assessments of intangible factors such as the courtroom demeanor, tone, and manner of witnesses as well as other considerations and evidence.[902] Before turning to what ***504** happened among Zambrano, Donziger, and Guerra in the years leading up to the Judgment, the Court makes some preliminary observations on the credibility of each witness.

B. Preliminary Observations on Credibility

Each of Guerra, Zambrano, and Donziger was a deeply flawed witness. The parties' opposing arguments naturally reflect that.

This is a civil case. Nevertheless, the defendants—in the classic manner of defendants attacking accomplice witnesses who "turn state's evidence" by testifying for the prosecution in exchange for what they trust will be reduced sentences for their own crimes—understandably train their guns on Guerra. They point out that Guerra admitted that he had been a corrupt judge, a crook just like many government accomplice witnesses in criminal cases. He later sought to profit from his proximity to these events, and he has succeeded in doing so. He is the beneficiary of what amounts to a private witness protection program created for him by Chevron, which facilitated his relocation from Ecuador to the United States and has been supporting and assisting him since his arrival here. The defendants therefore are quite right in the sense that a key witness against them, Guerra, is self interested. The Court recognizes that his testimony, in the words of the standard instruction given to juries with respect to such witnesses, "should be scrutinized with great care and viewed with particular caution...."[903]

Chevron, in the classic response, argues that conspiracies of the sort alleged here usually are proved only by the testimony of accomplices who often are scurrilous characters, that Guerra's testimony like that of many accomplice witnesses is corroborated by other evidence, and that the defendants' witnesses—Donziger and Zambrano—are at least equally flawed. We will deal below with the allegedly corroborating evidence, which requires extensive analysis. But it is well to recognize at the outset that Chevron too is quite right as to the matter of self interest.

Donziger of course stands to recover a contingent fee of more than $600 million if the Judgment is collected, a vast multiple of Guerra's economic interest. Nor, as already mentioned and as will be further detailed below, is his self interest purely economic.

Zambrano too is self interested. If indeed he was promised $500,000 from the proceeds of the Judgment, his chances of ever seeing a penny would be reduced by a finding that he was bribed to throw the case. $500,000 is a considerable fortune to ***505** someone in his position. His economic self interest in denying that corrupt bargain is obvious. And, as detailed previously, his self interest goes beyond that.

In sum, as the Court begins its analysis of what really

happened in the final phase of the Lago Agrio case, it keeps in mind that all three of the these witnesses testified in ways that, if believed, would advance their own interests, economic and personal. Guerra's admitted corrupt behavior and the consequent attack on his character, which is entirely appropriate, should not obscure the fact that there are no saints here. Donziger and Zambrano are quite open to comparable attacks. The Court will return below to the credibility of the witnesses as it pertains to specific testimony and findings of fact. It turns first, however, to its discussion of the events that led up to the ultimate bribe deal.

C. Guerra's Ghostwriting for Zambrano

1. The Guerra–Zambrano Ghostwriting Deal—Unrelated Civil Cases

Guerra first met Zambrano when Guerra was a judge on the Provincial Court in Lago Agrio, where Zambrano was a prosecutor.[904] Guerra was elected presiding judge in January 2002[905] and presided over the Lago Agrio case from May 2003 through January 2004.[906] He was dismissed from the bench in May 2008.[907] Following his dismissal, however, he maintained contact with Zambrano who, as noted, joined the court in July 2008.[908]

Guerra testified that "[a]s a former prosecutor,[ ] Zambrano had ample knowledge of criminal law and procedure, but very limited knowledge of civil law rules, substantively and especially procedurally."[909] So when Zambrano became a judge, he was much more comfortable handling his criminal cases than his civil ones. He and Guerra entered into an agreement by which Zambrano paid Guerra $1,000 per month to assist Zambrano in drafting his "writs and rulings" in civil cases.[910] Guerra explained that he was facing financial hardships at that time as a result of his removal from the bench and came to rely on his arrangement with Zambrano as a main source of income.

According to Guerra, he worked on the rulings in Zambrano's civil cases mainly on weekends at Guerra's home in Quito.[911] Zambrano lived in Manta and worked in Lago Agrio, and he sometimes met Guerra in the Quito airport on his flights home from Lago Agrio.[912] On such occasions, Zambrano sometimes gave Guerra court files and Guerra spent the weekend working ***506** on the orders.[913] Zambrano then met Guerra at the Quito airport on his return trip to Lago Agrio to collect from Guerra flash drives containing the draft rulings Guerra had written.[914] On other occasions, Guerra and Zambrano shipped the materials to each other in freight packages via the Ecuadorian TAME airline.[915]

Guerra testified that Zambrano generally paid Guerra for his ghostwriting services in cash when they met in the Quito airport.[916] On various occasions, however, Zambrano deposited the money directly into Guerra's account at Banco Pichincha in Quito.[917]

That Guerra ghostwrote orders for Zambrano in cases other than Chevron is corroborated by independent evidence Chevron produced at trial.

First, as will be seen, Guerra in 2012 provided Chevron with full access to the hard drive of his personal computer.[918] That hard drive contained drafts of 105 rulings issued by the Lago Agrio court in cases unrelated to the Chevron case from December 22, 2010 through November 28, 2011.[919] At least 101 of the 105 draft rulings were issued by then judge Zambrano or in cases assigned to him.[920]

Second, the fact that Guerra and Zambrano at times shipped documents between them is corroborated by TAME's certified shipping records.[921] The records reveal that, between November 18, 2009, and February 28, 2012, Guerra and Zambrano shipped 16 packages between them.[922] The description of these packages generally was either "documents" or "package with documents."[923]

Zambrano admitted that he and Guerra had a close relationship[924] that continued after Guerra was removed from the court and after Zambrano became a judge.[925] He admitted also that "Guerra helped [him] with the drafting of orders in [Zambrano's] cases," though he said that the arrangement did not include the Chevron case.[926] Thus, there is no doubt that Guerra ghostwrote orders for Zambrano for some time.

***507** Zambrano at one point did deny that he paid Guerra for doing so although his testimony on the point was inconsistent.[927] But Guerra produced his day planners covering the period July 14, 2011 through July 12, 2012,[928] which corroborate his testimony, at least for the period they cover.[929]

The Court sees no persuasive reason why Guerra would have done this work for Zambrano without compensation, especially given that Guerra had been removed from the bench even before Zambrano became a judge and was in

financial difficulty. Indeed, while Zambrano at one point denied such payments, his testimony on this point actually was internally contradictory and his claim that Guerra worked for nothing was not credible. And while it is true, as defendants argue, that the available day planners do not begin until 2011, the logic of the situation also supports Guerra's version.

The Court finds that Zambrano compensated Guerra for drafting orders on his civil cases and that the arrangement began in late 2008 or early 2009 and in any case before there was any immediate prospect of Zambrano being assigned the Chevron case. Zambrano's testimony that he did not pay Guerra and that the arrangement began in 2010 is not credible.

2. Zambrano's First Tenure Presiding Over the Lago Agrio Case

a. Guerra Reaches out to Chevron

In August 2009, Judge Nuñez was presiding over the Lago Agrio case. A scandal allegedly involving his conduct and the Chevron case broke in consequence of which he left the case and Zambrano became the presiding judge. According to Guerra, Zambrano instructed Guerra to reach out to the attorneys for Chevron "in order to negotiate an agreement by which the company would pay Zambrano and [Guerra] for issuing the final judgment in Chevron's favor."[930] Zambrano, Guerra said, believed that "Chevron would have much more money than the Plaintiffs for this agreement, and therefore [he] could get a better deal and greater benefits" from the company.[931]

Pursuant to Zambrano's instruction, Guerra called Alberto Racines, an attorney at the law firm of Adolfo Callejas, Chevron's Ecuadorian counsel, some time in the August to October 2009 period.[932] The two met, and Guerra informed Racines that he "could establish a direct connection with Judge Zambrano so they could discuss and negotiate important and decisive issues in the case, including the judgment."[933] After ***508** the meeting, Guerra continued to contact Racines and pressed him to "do the deal," but Racines ultimately rejected Guerra's proposal.[934]

Guerra claims that he reported Racines' rejection to Zambrano, who then decided to explore the possibility of a deal with the plaintiffs.[935] Zambrano explained that he already had reached an agreement with the LAPs' representatives to "move the case along in their favor" and told Guerra that he should "work out a financial agreement directly with Fajardo for payment of [Guerra's] ghostwriting services."[936]

b. Following Chevron's Rejection, Guerra Makes a Deal With the LAPs

Guerra said that he first met with Fajardo in Quito to discuss the matter.[937] They agreed that: (1) Guerra would "move the case quickly," (2) "Chevron's procedural options would be limited by not granting [its] motions on alleged essential errors in rulings [Guerra] was to write," and (3) the LAPs' "representatives would pay [Guerra] approximately USD $1,000 per month for writing the court rulings [ ] Zambrano was supposed to write."[938] But Fajardo told Guerra that Guerra should meet with Donziger promptly so that Donziger could hear the deal from Guerra's mouth. This was necessary, Fajardo said, because Donziger "was the boss of the attorneys—of the legal team" and "all important matters should be brought to [his] attention."[939]

At Fajardo's request, according to Guerra, Guerra several days later allegedly met with Donziger, Fajardo, and Yanza at the Honey & Honey Restaurant in Quito.[940] Fajardo summarized for Donziger the three aspects of the agreement he had reached with Guerra.[941] Donziger, said Guerra, "thanked [Guerra] for [his] work as Zambrano's ghostwriter in th[e] case and for helping steer the case in favor of the Plaintiffs."[942]

c. Guerra Drafted Zambrano's Orders in the Chevron Case

During Zambrano's first tenure on the Chevron case Guerra wrote many of Zambrano's rulings in that case as well as others.[943] He drafted most—but not all—in the LAPs' favor.[944] He continued to deliver the rulings to Zambrano by hand at the Quito airport or shipped them via TAME.[945] He testified that he occasionally met or spoke on the phone with Fajardo "to discuss matters that

were to be included in the court orders in the case....”[946]

***509** In addition to 105 drafts of orders in Zambrano’s other cases,[947] Guerra’s computer contained nine drafts of orders that Zambrano issued in the Lago Agrio Chevron case between October 21, 2009 and February 17, 2010.[948] Forensic analysis demonstrated that eight of those nine draft orders last were saved to Guerra’s computer prior to the date on which Zambrano issued the corresponding order,[949] generally by only a few days.[950] The Court finds that the Zambrano orders were prepared from the Guerra drafts. The Guerra draft orders corroborate his testimony that he was ghostwriting orders for the Chevron case, although not the claim of an arrangement between Zambrano and the LAPs.

d. The LAP Team Paid Guerra for His Ghostwriting Services

According to Guerra, the LAP team paid Guerra for his ghostwriting work directly, either in cash or by deposit into his bank account.[951] Fajardo sometimes paid him in cash on the street in Quito.[952] On other occasions, members of the LAP team deposited money into Guerra’s account at Banco Pichincha.[953]

Records of Guerra’s bank account at Banco Pichincha[954] establish also that Guerra was paid by the LAPs’ lawyers.

Guerra’s account statements and deposit slips confirm that in each of October, November, and December 2009, and February 2010, $1,000 was deposited into Guerra’s account at Banco Pichincha.[955] The deposits for December 2009 and February 2010 both were made by Ximena Centeno, who Donziger confirmed was an employee ***510** of Selva Viva at the time each deposit was made.[956] Those two deposit slips[957] bear signatures and a national identity number that match Centeno’s signature and national identity number as shown on her national identity card.[958] The authenticity of both of those deposit slips, moreover, was confirmed entirely independently of Guerra.[959] And all four deposits tie in to defendants’ own emails, which remove any doubt as to whether the LAPs in fact made these deposits to Guerra’s account.

Beginning in mid–2009, Fajardo began an email chain that involved Donziger and others and that referred to the PUPPET and the PUPPETEER. The text and context of the emails demonstrate these terms were code names, and that PUPPETEER referred to Guerra and PUPPET referred to Zambrano.[960] These emails confirm Guerra’s testimony about the ghostwriting deal he made with the LAPs during Zambrano’s first term on the case.

The chain began on September 15, 2009—shortly after Judge Nuñez had recused himself and at about the same time at which (1) Zambrano had begun acting on the Chevron case, and (2) Guerra said he struck the ghostwriting deal with Fajardo and Donziger—with an email from Fajardo to Donziger, Sáenz, Prieto, and Yanza. The subject was “PUPPETEER.” Fajardo wrote:

> “I think that everything is quiet ... The puppeteer is pulling the string and the puppet is returning the package ... By now it’s pretty safe that there won’t be anything to worry about ... The puppet will finish off the entire matter tomorrow ... I hope they don’t fail me ...”[961]

As we have seen, Zambrano formally took over and issued his first two orders in the Lago Agrio case on October 21, 2009.[962] On the same day, Fajardo emailed his colleagues to assure them that “things here are under control.”[963] Then, on October 27, 2009, Fajardo emailed Donziger and Yanza that “[t]he puppeteer won’t move his puppet unless the audience pays ***511** him something.”[964] Two days later, $1,000 was withdrawn from Selva Viva’s account at Banco Pichincha.[965] That same day, $1,000 in cash was deposited into Guerra’s account.[966]

On November 26, 2009, another $1,000 in cash was withdrawn from the Selva Viva account.[967] On November 27,$1,000 in cash was deposited into Guerra’s bank account.[968] On the same day, Yanza emailed Donziger and explained that “the budget is higher in relation to the previous months, since we are paying the puppeteer....”[969]

On December 22, 2009, $1,000 was withdrawn from the Selva Viva bank account.[970] The next day, Selva Viva employee Ximena Centeno deposited $1,000 into Guerra’s account.[971]

On February 4, 2010, $1,000 was withdrawn from the Selva Viva bank account.[972] The next day, Ximena Centeno deposited $1,000 into Guerra’s account.[973]

The alleged arrangement among the LAPs, Guerra, and Zambrano continued until Zambrano was replaced on the Lago Agrio case by Judge Leonardo Ordóñez in February 2010.[974] Although he no longer was working for the LAPs, Guerra subsequently continued to ghostwrite orders in Zambrano’s civil cases.[975]

D. Ultimate Findings on This Point—Guerra Was Zambrano's Paid Ghostwriter in Civil Cases and Was Paid By Donziger and the LAPs To Write Some of Zambrano's Orders in the Chevron Case

The Court finds that during Zambrano's first term on the Chevron case, Guerra was ghostwriting orders for him in civil cases generally and, to some extent, on the Chevron case in particular. He was paid for those services, at least as to the cases other than Chevron, by Zambrano. The bank records prove that he was paid for his services on the Lago Agrio Chevron case by the LAPs as well, which they did with Donziger's authorization and agreement.[976] This is confirmed by the PUPPETEER emails, in which PUPPETEER referred to Guerra and PUPPET to Zambrano. Indeed, the events of October 26–29, 2009, and of November 26–27, 2009, make that conclusion virtually inescapable.

Defendants offered no evidence or testimony that rebuts or explains these emails or the payments. Fajardo and Yanza, the authors of the emails, declined to testify. Donziger at his deposition denied knowledge of the identities of the PUPPETEER ***512** and the PUPPET and claimed neither to have known to what Fajardo had been referring nor to have discussed the matter with him.[977]

Donziger attempted at trial to pass off the code names as jokes or nicknames.[978] But that attempt is unpersuasive, particularly in light of the fact that he admitted in a deposition that the LAP team used code names in emails "to prevent any reader of those documents from knowing exactly who it was [he] w[as] talking about."[979] So too is his contention that he does not know who the PUPPET and the PUPPETEER were but that they were not Zambrano and Guerra.[980]

But there remains an important qualification. Guerra asserted at trial that Zambrano, during his first tenure on the case (late 2009 into early 2010), told him that he, Zambrano, had made an agreement with the LAPs to move the case along in their favor and told Guerra to work out a deal with Fajardo to obtain payment from the LAPs for Guerra's ghostwriting services. Guerra claimed that he then met—first with Fajardo and later with Fajardo, Donziger, and Yanza—and worked out a deal to move the case in the LAPs' favor, limit Chevron's procedural options by denying its motions claiming essential errors, and to receive $1,000 per month from the LAPs for doing those orders for Zambrano.

Guerra first began telling his story to Chevron representatives in June 2012. He had a series of discussions with Chevron's lawyers in Ecuador, at least some of which were recorded and transcribed. In the June 25, 2012 interview, Guerra told a slightly different story about his ghostwriting role with respect to the Chevron Lago Agrio case during Zambrano's first tenure. Although he said that he was ghostwriting for Zambrano on the Chevron case and others, he never mentioned that Zambrano had reached any arrangement with the LAPs to issue orders in their favor. To the contrary, he suggested that Zambrano's motives for wanting to move the case were vanity and the hope that, if the case proceeded quickly, Zambrano later might be in a position to decide it and then to extract a lucrative payment from someone.[981] Indeed, Guerra told an anecdote, that he attributed to Fajardo, in which Fajardo claimed that he had approached Zambrano during this period (*i.e.,* Zambrano's first tenure on the case) to try to have the case expedited, but that Zambrano had thrown him out of his office.[982]

This inconsistency was not explored at trial by either side. Nevertheless, it is not easily reconciled with the truth of Guerra's later testimony that Zambrano had told him that Zambrano already had reached an unspecified arrangement with the LAPs to move the case quickly as opposed to wishing to do so for his own reasons. There is no other evidence that this arrangement ***513** took place. The Court therefore declines to find that the alleged arrangement between Zambrano and the LAPs during Zambrano's first tenure on the Lago Agrio case existed or to credit Guerra's testimony with respect to the alleged 2009 Honey & Honey restaurant meeting.[983]

We proceed now to Zambrano's second tenure in the Lago Agrio Chevron case, the bribe, and the Judgment.

XI. The Story Ends: The LAPs Bribed Zambrano to Allow Them to Write the Judgment and Issue It Under His Name

As noted, Zambrano returned to preside over the Lago Agrio Chevron case in late 2010 when the case had progressed to the point at which a judgment was near. Chevron contends that the LAPs reached a deal with Zambrano by which they agreed to pay him $500,000 to allow them to write the Judgment in their favor, which he would sign and issue as his own. Guerra was instrumental in facilitating this plan. The Court in this section assesses Chevron's allegations. It first details each witness' account of what transpired among Guerra, Zambrano, and the LAPs during Zambrano's second tenure on the Lago Agrio Chevron case. It then discusses the pertinent credibility problems of each witness and examines the evidence corroborating or conflicting with each account. Finally, it explains why—given the history of the litigation, the weight of the evidence, and the credibility

of the witnesses—the bribery claim is the explanation that makes sense and is persuasive.

A. Zambrano's Second Tenure Presiding Over the Lago Agrio Chevron Case: The Accounts of the Three Witnesses at Trial

1. Guerra

a. Guerra's Account

i. More Ghostwriting, The Bribe, and The Judgment

In August 2010, Chevron moved to recuse Judge Ordófiez.[984] According to Guerra, Zambrano "saw this as an opportunity to once again take control of the Chevron case, and asked [Guerra] to help him write the court ruling sustaining Judge Ordófiez's disqualification from the case."[985] Zambrano saw this also as a chance to reach out to Chevron's attorneys once again in the hopes of striking a deal. Zambrano instructed Guerra to make another overture to the Callejas firm.[986]

At more or less the same time, Guerra, who had maintained contact with the LAP team, on September 5, 2010, emailed Donziger to ask for legal advice on an immigration ***514** issue relating to Guerra's daughter.[987] But he closed with the statement that he would "support the matter of Pablo Fajardo so it will come out soon and well."[988] Guerra testified that the only business Guerra then had with Fajardo was the Lago Agrio case and that he and Zambrano knew by this date that Zambrano would return to the case.[989] Thus, his message was an assurance to Donziger that he would continue to assist the LAPs with respect to the case so that it would "come out soon and well."[990] Donziger did not reply to Guerra directly, but Fajardo later told Guerra that Donziger had received the email and was looking into the matter.[991]

Guerra pursued the prospect of a deal with Chevron. He testified that "[g]iven that [his] previous attempts to approach Chevron through Mr. Racines had been unsuccessful, on this occasion [Guerra] asked an intermediary to propose to Chevron's attorneys that Chevron write the final judgment in the case in exchange for a payment to Mr. Zambrano and" to Guerra.[992] The intermediary informed Guerra that he or she had reached out to attorneys at the Callejas firm and that the attorneys had rejected the overture.[993]

Guerra allegedly reported this to Zambrano, who then suggested that Guerra approach the LAPs' representative with essentially the same proposition—"that they could obtain a verdict in their favor, in exchange for a payment of at least USD $500,000 to Mr. Zambrano; and for whatever amount [Guerra] could negotiate or agree to for [him]self."[994] Guerra then took the offer to Fajardo, who allegedly was enthusiastic but said that he had to discuss it with Donziger.[995] Days later, Guerra said, he received a call from Fajardo, who asked him to a meeting with himself, Donziger, and Yanza.[996]

The meeting took place at the Honey & Honey restaurant in Quito. Guerra summarized the proposal. Donziger had several questions for Guerra, including how he could be sure that Zambrano actually would rule in the LAPs' favor if the payment were made.[997] Guerra assured Donziger that he could trust Zambrano. Although he appeared interested in the deal, Donziger ultimately replied that they, the LAPs, did not then have that sum of money.[998]

***515** Some time later, Zambrano informed Guerra that he had been in direct contact with Fajardo and that "the Plaintiffs' representatives had agreed to pay him USD $500,000 from whatever money they were to collect from the judgment, in exchange for allowing them to write the judgment in the Plaintiffs' favor."[999] Zambrano told Guerra that he would share some of the money with Guerra once it was paid to him.[1000]

Guerra then resumed his role as Judge Zambrano's ghostwriter, albeit in a manner different from before.[1001] Zambrano "advised [Guerra] that [they] had to be more careful because the attorneys for Chevron would be very attentive to any irregularities. Because of that, there were times when [Guerra] traveled to Lago Agrio to work on the court rulings for the Chevron case" and he shipped documents via TAME less frequently.[1002]

When Guerra was in Lago Agrio, he said, he worked on the Chevron rulings in Zambrano's apartment.[1003] He drafted them on a laptop Fajardo had given him during Zambrano's first tenure on the Chevron case.[1004] When he completed a ruling, he left the laptop for Zambrano, who did not have a printer, and Zambrano took it elsewhere to print the document.[1005] Zambrano then had the orders re-typed on his personal work computer in his office at the courthouse by Calva.[1006] Zambrano apparently did this

because "he did not want to upload the draft order onto his work computer from a flash drive, as he understood that computer technicians could detect when that happens and he did not want it to become known that the orders had not been drafted on his work computer."[1007]

About two weeks before the Judgment was issued in February 2011, Guerra went to Zambrano's apartment where he said he met with Fajardo and Zambrano. "Zambrano gave [Guerra] a draft of the judgment so that [Guerra] could revise it."[1008] He told Guerra that the LAPs' attorneys had written the judgment and delivered it to him, and it was then Guerra's job to "work on the document to fine-tune and polish it so it would have a more legal framework."[1009] Fajardo told Guerra to call him if Guerra needed any further assistance.[1010]

Guerra worked on the draft judgment in Zambrano's apartment for several hours over the course of two days.[1011] At some point, he called Fajardo to ask him about ***516** two sections of the draft that confused him, and Fajardo told him he would provide him with a "memory aid" to clarify Guerra's concerns.[1012] Fajardo brought it over to Zambrano's apartment later that day.[1013]

Guerra's edits were minor, involving mainly spelling and punctuation.[1014] When he was through, he returned the document to Zambrano on the laptop.[1015] The document was "not too different from the one that the Plaintiffs lawyers had given to Mr. Zambrano."[1016] Zambrano later told Guerra that "the Ecuadorian Plaintiffs' attorneys made changes to the judgment up to the very last minute before it was signed and issued by Judge Zambrano" on February 14, 2011.[1017]

Three days after it was issued, Chevron filed a request for expansion and clarification of the Judgment.[1018] Guerra testified that he assisted Zambrano over the phone as he prepared the supplemental and clarification order,[1019] which was issued on March 4, 2011.[1020]

ii. Guerra's Last Meeting with the LAP Team

Guerra continued assisting Zambrano with orders in his civil cases until Zambrano was dismissed from the court.[1021] He had no further contact with the LAP team save a meeting in May or June 2011 with Fajardo and one of the LAP Representatives' U.S. lawyers at which Fajardo and the U.S. lawyer asked Guerra to "testify [in this case] about the suitability of the Ecuadorian legal system."[1022]

iii. Guerra Contacts Chevron

Guerra testified that in April 2012, Zambrano, who by then recently had been dismissed from the court, authorized Guerra to "begin talks with Chevron's representatives to reveal the truth regarding the drafting of the judgment in the Chevron case."[1023] Guerra explained that "[i]n [his] initial discussions with Chevron's representatives ... [he] attempted to negotiate a large payment for [himself], as [he] believed that, with the substantial $18 billion judgment issued by Mr. Zambrano, Chevron would be willing to pay [Guerra] a substantial amount for evidence and testimony that the judgment was illegal and obtained by fraud."[1024]

Zambrano "ultimately had a change of heart" and told Guerra "that he was not ***517** willing to provide information to Chevron or to reveal the truth."[1025] Guerra continued cooperating with Chevron's representatives nonetheless. He informed them that he had ghostwritten for Zambrano.[1026] He disclosed that the LAP team agreed to pay Zambrano $500,000 from any proceeds collected on the Judgment in order to be able to ghostwrite it.[1027] And he told them he had physical evidence to back up his story. Guerra agreed also to make himself available to testify in this case,[1028] although Chevron's attorneys "told [him] repeatedly that Chevron absolutely would not pay [him] for testimony."[1029]

In July 2012, Guerra began to turn over physical evidence to Chevron's representatives. He gave them his personal computer, on which he had typed many of the orders in Zambrano's cases,[1030] two cellular telephones,[1031] his daily planners,[1032] TAME shipping records,[1033] his cellular telephone records,[1034] bank records, and credit card statements.[1035] And he provided Chevron's investigators access to two of his email accounts.[1036] Chevron paid Guerra a total of $48,000 for the physical evidence.[1037]

After two meetings with Chevron attorneys in Ecuador, and after he had turned over the bulk of his physical evidence,[1038] Chevron in November 2012 flew Guerra to Chicago to meet with Chevron representatives and attorneys.[1039] Guerra there signed a declaration that was filed in this case in January 2013 in which he described his relationship with Zambrano and the drafting of the Lago Agrio Judgment.[1040]

Fearing retaliation from the ROE, Guerra and his family (including his wife, his son, and his son's family) relocated to the United States.[1041] Chevron representatives paid for the move[1042] and, as his visa status does not allow him to work while he is in this country, Chevron pays him $10,000 per month for his living expenses, pays for health insurance coverage for Guerra and his family, leases a car for him, and pays for an attorney to represent him in any dealings with federal or state government investigative authorities or any civil litigation, and for an immigration attorney to deal with his resident status.[1043]

***518** Shortly after Guerra left Ecuador, the LAP team filed a criminal complaint against him there.[1044]

b. Assessing Guerra's Account

i. Guerra's Credibility

From the standpoint of demeanor, Guerra was an impressive witness. He testified clearly, directly, and responsively, regardless of which side questioned him. He rarely hesitated. On the other hand, it is appropriate to recognize that he was very extensively prepared for his testimony by Chevron.[1045] While there is nothing wrong with extensive preparation of a witness, it may bear on the weight of the testimony. But there is more to assessing Guerra's credibility than the fact that he came across well on the stand.

The first consideration is Guerra's self interest—including the fact that Chevron, to summarize briefly, is supporting him and has assisted his relocation from Ecuador to the United States.

Second, Guerra admitted that he often has been dishonest.[1046] His professional history includes multiple instances in which he has accepted bribes, lied, and facilitated illegal relationships between parties and judges. For example, Guerra testified that he:

> • Issued rulings in Zambrano's favor when Guerra was a judge and Zambrano a prosecutor in Lago Agrio. Although Guerra was "careful to issue these rulings with some legal grounds," he claimed to have known "that the party benefitting from [his] decision was paying Mr. Zambrano bribes for arranging to have the case ruled in that party's favor, and Mr. Zambrano, from time to time, shared with [Guerra] a portion of those bribes."[1047]
> • As a practicing attorney, Guerra "on occasion bribed judges, including judges on the nation's highest courts, to rule in [his] clients' favor or assist [Guerra] in obtaining favorable ruling."[1048]
> • As a judge, Guerra "occasionally accepted bribes from litigants in exchange for issuing favorable rulings."[1049]
>
> • Ghostwrote orders for Zambrano in return for payments from both Zambrano and the LAP team.
>
> > • Attempted to solicit bribes from both the LAP team and, on at least two occasions, from Chevron.
> >
> > • Solicited a $500,000 bribe to be paid by the LAP team to Zambrano in exchange for a ruling in the LAPs' favor.
> > • Was removed from the court apparently for making statements that the "Chevron case should be declared null, at a time when [he] no longer presided over the ... case."[1050]
>
> • Admittedly lied to the Chevron investigators in claiming that the LAPs had offered him $300,000, a lie that he explained at trial by saying that he had been trying to exaggerate his own importance.[1051]

***519** The details of some of these admissions are important to this story and indeed form the basis for much of Chevron's theory of how the Judgment came about. They will be dealt with more fully below. For present purposes, the Court notes only that Guerra's willingness to accept and solicit bribes, and his lie to Chevron about the supposed offer by the LAPs of $300,000, and other considerations, put his credibility in serious doubt, particularly in light of the benefits he has obtained from Chevron. Indeed, Guerra admitted that he came forward because he believed he would be "rewarded handsomely."[1052] In addition, there are some inconsistencies in his story.

ii. Inconsistencies in Guerra's Account

As discussed, it appears that Guerra first began to tell his story to Chevron representatives in June 2012.[1053] There were three interviews in June and July 2012, two entirely and one partly recorded.[1054] He told his story again when he met with Chevron lawyers in Chicago and signed the

declaration that later was filed in this case. And he told it again at trial. Each recounting yielded variations in some of the details. The Court begins with the following concerning Guerra's participation in the drafting of the Judgment as they were matters upon which the defendants have focused.

First, Guerra's testimony regarding how he allegedly received the draft of the Judgment to begin his work on it changed.

As noted, Guerra testified at trial that Zambrano gave him a draft on Fajardo's laptop approximately two weeks before the Judgment was issued so that Guerra could revise it.[1055] Guerra then spent two days working on the document in Zambrano's apartment in Lago Agrio using Fajardo's computer.[1056] But when he spoke with Chevron's representatives earlier, he said that Zambrano had given him a draft of the Judgment on a flash drive at the Quito airport.[1057]

Second, Guerra's testimony regarding his receipt of the "memory aid" from Fajardo while he was working on the Judgment changed as well.

At trial, he said that he called Fajardo to ask him about two sections of the draft that confused him at some point while he was working in Zambrano's apartment.[1058] Fajardo then brought him the memory aid to clarify Guerra's concerns.[1059] When Guerra met with the investigators in July 2012, however, he said that Fajardo had emailed the memory aid to him,[1060] and he repeated that in his November 2012 declaration.[1061]

Guerra explained at trial that "[a]t the beginning, [he] was certain that [he] had received that memory aid via e-mail, but ***520** then [he] later recalled that [Fajardo] personally handed [Guerra] the document in the nighttime hours of the first day of [his] review of" the Judgment.[1062] He said further that "[w]hen [he] first summarized these events in a sworn declaration in November 2012, [he] stated that [he] recalled receiving this 'memory aid' from Fajardo ... but [he] could not locate the document itself."[1063] However, while later searching for documents responsive to defendants' requests in this action, Guerra located the memory aid and provided it to Chevron.[1064]

Defendants contend that Guerra initially told Chevron that he had received the Judgment and the memory aid on a flash drive and by email because Guerra wanted to convince Chevron that he had hard evidence to back up his story. He then gave Chevron representatives his computer, access to his email accounts, and a number of flash drives in exchange for payment, promising them that they would find the memory aid and a draft of the Judgment on his media. But when Chevron's experts searched his email and flash drives, they found no memory aid and no Judgment. So, defendants argue, Guerra changed his story to explain his alleged receipt of the memory aid and the draft judgment in ways consistent with the absence of those documents on Guerra's computer. But there is at least one problem with defendants' theory that these changes reflected a careful conforming by Guerra of the details of the story to new evidence as it emerged.

Guerra explicitly told Chevron's representatives in his July 2012 meetings that he had *not* found the memory aid or the draft of the Judgment on his computer or the flash drives.[1065] What he said were on his computer hard drive were copies of drafts of orders he had written for Zambrano,[1066] and that was accurate. It is entirely possible that Guerra told Chevron that he received the draft of the Judgment from Zambrano on a flash drive because that is how he normally received drafts of orders from Zambrano, that he so believed at the time, and that his memory subsequently was refreshed.

Third, there is another possibly troublesome question concerning the memory aid testimony. The memory aid itself, though it purports to contain a chronology of the Lago Agrio case, does not refer to anything that occurred after 2009 although it allegedly was provided to Guerra in late 2010 or early 2011.[1067] Thus, one might expect that any chronology given to Guerra in late 2010 or early 2011 would have included events after 2009. Nevertheless, there is no necessary inconsistency in this, as Guerra stated that the memory aid responded to specific questions he had asked,[1068] which may explain the date cutoff. Likewise, it is entirely possible that Fajardo responded to Guerra's request with a preexisting document that, though old, was adequate to the purpose.

2. Zambrano

We have discussed Zambrano's account of how he claimed to have prepared the Judgment. He claimed that he was the sole author of the Judgment. He never asked Guerra to make revisions to it before ***521** it was issued on February 14.[1069] He never asked Guerra to travel to Lago Agrio to work on the Judgment.[1070] Indeed, according to Zambrano, Guerra never worked on the Lago Agrio Judgment at any time before it was issued.[1071] But for reasons previously explained, Zambrano was not a

credible witness.[1072] No more need be said on that point. We turn now to Donziger.

3. Donziger

a. Donziger's Account

Donziger's direct testimony on these subjects was brief. He stated:

> "I did not write the judgment in the [Lago Agrio] case in Ecuador. I have no knowledge that anybody on the legal team of the plaintiffs wrote the judgment in this case, or wrote any part of the judgment.
>
> I have never met Judge Nicolás Zambrano, nor have I communicated with him. Other than his live testimony during this trial, I have never seen Judge Nicolás Zambrano.
> I did not bribe Judge Zambrano. The allegations by former Judge Alberto Guerra that I was involved in a meeting where I 'approved' a plan arranged by Pablo Fajardo to pay Zambrano $500,000 is false."[1073]

With respect to Guerra, Donziger testified that he "did not agree or express any support for a plan to pay any amount of money so that the plaintiffs would be able to draft the final judgment."[1074] Donziger did admit that he had had a relationship with Guerra, although he described it in minimal terms.

Donziger stated that he "occasionally chatted about non-substantive matters" with Guerra when Guerra was the presiding judge on the Lago Agrio Chevron case, *i.e.,* from May 2003 until January 2004.[1075] He acknowledged that Guerra had Donziger's phone number in 2008.[1076] They each had the other's email address, and Donziger admitted having received emails from Guerra, which he claimed he thought were ***522** spam and ignored.[1077] But he conceded also that he had received a March 1, 2008 email from Guerra in which Guerra sought a favor for a friend, and that he forwarded it to Fajardo for advice.[1078]

Donziger said that "[t]he one meeting with Guerra that stands apart vividly in [his] memory was the one in Quito" with Guerra and Fajardo[1079] at which, he acknowledged, the topic of a bribe was discussed.[1080] But he said that he agreed to attend only "with the idea that [he] would pick up useful tidbits of 'courthouse gossip.' "[1081]

The meeting took place in late 2010 at "a restaurant in Quito" and lasted approximately 45 minutes.[1082] Toward the end of the meeting, Donziger acknowledged, Guerra said that he could ensure that the judgment would come out in the LAPs' favor for $500,000—that "he could get it done for a payment."[1083] But Donziger, in contrast to Guerra, testified that he "immediately and unequivocally refused" Guerra's request.[1084] He added that "I would never do that.... Whatever money we had we would not—it would not be used to bribe a judge...."[1085]

Donziger admitted that neither he nor anyone else on the LAP team reported Guerra's bribe solicitation.[1086] He said there were "various reasons"[1087] for that, but the only one he gave was that he "felt like [Guerra's] offer didn't have a lot of credibility. And [Donziger] was very concerned that doing anything at that point to turn [Guerra] in would give Chevron an excuse to further use it against the court or against the process such that the trial could be derailed."[1088]

b. Donziger's Credibility

i. Self Interest

That Donziger is deeply self interested—both on the ghostwriting questions and, in addition, with respect to the outcome of this case generally—is obvious. We have noted already that Donziger personally stands to gain a contingent fee in excess of $600 million[1089] and, it appears, control of or influence over the billions that would go to the ADF were the Judgment collected.[1090] The money is important to him. Just one indicator, of many, came from his own lips in an exchange with the *Crude* camera crew:

> "DONZIGER: You can never underestimate the power of personal relationships in this business. You know?
>
> CAMERAMAN: What business is that?
>
> DONZIGER: The business of getting press coverage as part of a legal strategy. ***523** CAMERAMAN:

> Hey, uh. Can we, Can we all fit in your—?
> DONZIGER: The business of plaintiffs' law. To make fucking money."[1091]

And Donziger's self interest extends beyond money. As he confided to his personal notebook on April 4, 2007:

> "I had an incredible email with Russ this morning. He read the VF [Vanity Fair] story.
>
> R[u]ss is funding the case. Russ is funding the movie. And Russ wants to fund more cases and more movies. *I sit back and dream.* I cannot believe what we have accomplished. *Important people interested in us. A new paradigm of not only a case, but how to do a case. Chevron wanting to settle. Billions of dollars on the table. A movie, a possible book. I cannot keep up with it all.*"[1092]

Thus, Donziger wants money, but he wants more as well. These desires have been important motivating factors.

ii. Deceit

Donziger has deceived when deception served his interests.[1093] Many such incidents have been discussed already, including these:

- Donziger recruited Reyes and Pinto, ostensibly to act as independent monitors but in reality to work for the LAPs, to undermine an anticipated negative report from the court's settling experts. He made an under the table payment to induce them to do so. Contrary to the facts, he arranged with them to conceal their relationship with the LAPs to the court and to pose as independents. Donziger admitted in the privacy of his notebook that this was a "bargain with the devil" in which he had gone "over to the dark side."
- Donziger recruited Cabrera and then ensured that Cabrera "would totally play ball" with the LAPs. He and his Ecuadorian colleagues secretly prepared the work plan, a version of which Cabrera, in accordance with the scheme, passed off on the court as his own. Donziger then hired and worked extensively with Stratus to have Stratus write most of the Cabrera Report that was supposed to be Cabrera's independent, impartial product. In order to conceal the roles of Stratus and the LAPs vis-a-vis Cabrera, he instructed Stratus' Beltman and Maest to keep their involvement secret. Once the report was filed, complete with Cabrera's repeated false protestations to the court of his independence, Donziger knowingly promoted the fiction of Cabrera's impartiality and independence, drafting or assisting in the drafting of numerous press releases touting the work of the "independent expert."
- Donziger long hid the truth about Cabrera from Karen Hinton and others on the public relations team, whom he repeatedly had issue press releases emphasizing Cabrera's independence and lambasting Chevron's allegations to the contrary.[1094]

***524** • Donziger concealed Stratus' real role from Kohn despite that Kohn at the time was funding the LAPs. Donziger hid from Kohn the fact that some of the funds Kohn provided were shuttled covertly to Cabrera through a "secret account." And Donziger prevented Kohn from commissioning an independent investigation of the Cabrera episode when allegations of misconduct began to surface.

- Donziger concealed the truth about the Cabrera Report from certain, though not all, members of the LAP team. He did not inform the Weinberg Group or the cleansing experts that Cabrera had not been independent. Nor did he reveal that fact to his co-counsel in the United States, many of whom were working directly on the Cabrera fallout.
- Donziger convinced Shinder and McDermott to represent the LAPs in the Stratus Section 1782 proceeding by assuring them that Chevron's allegations concerning the LAPs' collusion with Cabrera were untrue. It was not until they learned the truth directly from Beltman that Donziger confessed that the LAPs' involvement in the preparation of the report were more extensive than he initially had indicated.
- Once the details of the Cabrera episode began to leak out, Donziger encouraged the American lawyers not to reveal in their court filings any more than they absolutely had to. He specifically warned them of the "negative fallout" that could occur if the Fajardo Declaration and Petition disclosed too much. As we know, the misleading Fajardo Declaration was filed in the Denver court and at least sixteen others in the United States, including

this one.

iii. Misrepresentation to this Court

As noted, Prieto on March 30, 2010, sent an email to Donziger, Fajardo, and others expressing Prieto's concern that "the proceeding," *i.e.,* the Lago Agrio case, would be destroyed and "all of us, your attorneys, might go to jail" if Stratus' documents were produced in the Colorado Section 1782 proceeding.[1095] Donziger has testified twice about that email. His two accounts were very different.

In a January 2011 deposition, Donziger admitted that Prieto's email expressed "concern[ ] that all of the local Ecuadorian lawyers for the Lago Agrio plaintiffs might end up in jail *because of ... [t]he role they played related to Stratus, Mr. Cabrera* ...."[1096] But when he was questioned about the same email at a sanctions hearing before this Court in April 2013, Donziger said that Prieto had not been concerned with the *substance* of the Stratus documents that would be disclosed—that is, with the fact that the truth about the relationship among the LAP lawyers, Stratus and Cabrera would come out. He was concerned instead, Donziger claimed, with "his fear that by turning over documents in the United States via the Stratus 1782, that it would violate their Ecuadoran law obligations in Ecuador among local counsel"[1097]—in other words, a professional obligation of confidentiality.

The hearing at which Donziger offered this new explanation for the email dealt with Chevron's motion to sanction Donziger ***525** and the LAPs for their failure to produce documents from Ecuador. Defendants had refused to produce the documents because, among other reasons, they claimed it would have been illegal under Ecuadorian law. Donziger's testimony at the sanctions hearing thus offered a convenient explanation for the very damaging email—with the added benefit that the new explanation was in line with defendants' newly-minted argument that Ecuadorian law prevented disclosure of Stratus' documents. But it was contradicted directly by his prior sworn testimony on the matter. The Court finds that this testimony by Donziger at the sanctions hearing deliberately was false.[1098]

iv. Evasiveness and Demeanor

In November 2011, Donziger prepared a memorandum for himself in advance of his deposition in the Section 1782 case in this Court.[1099] The memorandum began as follows:

> "Read: RICO, Borja, Cabrera report, Tropical Rainforest EP, Cancer–San Seb, Guanta, Genocide, Wray testimony (3rd day), Chevron's own test results; define SRD role; 2nd circuit brief; basis for belief people were dying.
>
> Comments: *'It's possible but I don't think so'; 'I guess it's possible, but to best of my recollection I didn't.'* "[1100]

He testified, "I wrote it [the italicized language] in response to specific questions that might come up that that would be an appropriate response to."[1101]

Donziger graduated from Harvard Law School. He tried cases as a public defender in Washington before getting involved with *Aguinda.* He did not need a written reminder to respond to a question by saying, ***526** if such an answer would be true, that he did not remember or even that his best recollection was that something had or had not happened.

Donziger was evasive repeatedly at his deposition in the Section 1782 action against him, his deposition in this case, and again at trial. In his June 2013 deposition in this case, Donziger replied "I don't know" or "I don't recall" to more than 180 questions, nearly every substantive question posed to him.[1102] And during his cross-examination at trial, Donziger so responded over one hundred times.

The likelihood that Donziger's memory was as bad as these answers suggested is very small.

* * *

In sum, the Court declines to credit Zambrano's and Donziger's testimony with respect to the bribe scheme. As to Guerra, the Court has examined his credibility carefully, considered his past dishonesty, and examined the inconsistencies in his testimony. Guerra on many occasions has acted deceitfully and broken the law. Some details of his story of what transpired in the Lago Agrio case have changed. But that does not necessarily mean that it should be disregarded wholesale.

The Court next considers the circumstantial evidence relevant to the bribe scheme, and the defendants' evidence at trial. It concludes that this evidence leads to one conclusion: Guerra told the truth regarding the bribe and the essential fact as to who wrote the Judgment. The

Court is convinced that the LAPs bribed Zambrano and wrote the Judgment in their favor.

B. Chevron's Circumstantial Evidence Pertinent to the Alleged Bribery

Certain facts probative of the validity of Chevron's contention that the LAPs bribed Zambrano are undisputed or already have been determined.

First, Guerra and Zambrano had a long standing and close relationship. No one disputes that Guerra drafted orders for Zambrano, at least in some civil cases other than Chevron. The Court has concluded that the arrangement between them was improper under Ecuadorian law and found, in addition, that Zambrano paid Guerra for his drafting services.

Second, Guerra drafted orders for Zambrano on the Chevron case, as well as others, during Zambrano's first tenure. The LAPs paid him $1,000 a month for his services with respect to Chevron.

Third, Guerra and Donziger both testified that Fajardo arranged a meeting in late 2010 at the restaurant in Quito at which Guerra proposed to fix the case with the judge (then Zambrano) for a $500,000 bribe. Donziger did not deny that Guerra proposed that the quid pro quo would include not only a decision in favor of the LAPs, but allowing the LAPs to write the Judgment. Nor did he deny Guerra's testimony that Fajardo was at the meeting.

Fourth, the Court has found that Zambrano did not write much, if any, of the Judgment.

Fifth, the Judgment includes substantial passages and references that do not appear anywhere in the Lago Agrio Record, but that do appear verbatim or in substance in a number of documents from the LAPs' files. Whoever wrote the Judgment copied those materials from the LAPs' unfiled work product. Moreover, a complete review of the LAPs' files never took place ***527** because the files located in Ecuador were not produced.

Sixth, neither Donziger nor the LAP team reported Guerra's bribe solicitation to authorities.[1103] Indeed, the LAPs considered hiring Guerra as an expert witness on the fairness of the Ecuadorian judicial system for use in the United States long after Guerra had solicited a bribe from them to fix the Lago Agrio case.

Seventh, Fajardo—who is the LAPs' counsel of record in Ecuador and the holder of a power of attorney on behalf of all of the LAPs—and their other Ecuadorian lawyers declined to testify.

In addition to the foregoing, there is additional circumstantial evidence independent of Guerra's testimony.

First, Zambrano needed the money.[1104]

Second, Donziger and the LAPs had huge financial and other incentives to want to win.

Third, Donziger and the LAPs had at least two important reasons for wishing to control precise aspects of the decision, quite apart from winning in general.

The first already has been discussed—Donziger and the LAPs had strong incentives to ensure that the decision not rely on the Cabrera Report.[1105] But he was unwilling to abandon reliance publicly on the Cabrera Report because doing so would have discredited the case and impugned the LAPs' integrity in vital respects.[1106] So the LAPs continued to rely on the Cabrera Report in their final *alegato* ***528** [1107] but they needed to ensure that the decision did not do so.

The Court has not yet discussed the second, and it is this. The LAPs were concerned about an ambiguity in the EMA in connection with their attempts to raise new financing in 2010 after Kohn withdrew his support. As Patton Boggs spelled out in 2010 in the Invictus Memo, which was prepared in the effort to obtain a new investment from Burford, Article 43 of the EMA provides that the judge in an action such as the Lago Agrio case is to order payment of damages "to the community directly affected and to repair the harm and damage ... [and] also order the responsible party to pay to the moving party ten percent (10%) of the value of damages."[1108] Thus, "Art. 43 present[ed] some measure of risk that a substantial portion of the judgment could be awarded to a presently uninvolved—and therefore unforeseen—agency or public authority" with only ten percent going to the LAPs.[1109] Although Patton Boggs said it thought the possibility of such an outcome was low, it recognized that such an outcome would dramatically reduce the money available for investors and the fees payable to the attorneys, both of which depended on the LAPs winning. This was of sufficient concern that the Invictus Memo contemplated that "the Plaintiff group [might] ... arrang[e] for receipt of any funds recovered against the judgment through payment agents in the United States and thereafter dividing those funds outside the Republic of Ecuador."[1110]

Writing the decision precisely as they wished and securing Zambrano's signature on it would have solved or, at least gone far toward solving, both the Cabrera Report and Article 43 problems. The disclaimer of reliance on the Cabrera Report offered the best hope for the first. Obtaining a judgment providing that *all* of the damages would be payable to the ADF, as the Judgment ultimately did, would have eliminated the EMA Article 43 concern.

Finally, there was no lack of opportunity. The LAPs previously had availed themselves of Guerra's ghostwriting efforts when Zambrano was on the case for the first time. These facts circumstantially support Chevron's contention.

C. Other Circumstantial Evidence—The Fajardo December 2010–January 2011 Emails

That said, and despite the fact that the defendants have not argued the point, there are two exhibits that at first blush would be in some tension with Chevron's claim that the defendants bribed Zambrano with respect to the outcome and the Judgment, *if* they were admissible and fully candid. They are emails by Fajardo dated December 31, 2010 and January 8, 2011.[1111]

***529** The December 31, 2010 email was addressed to Eric Westenberger of Patton Boggs, Donziger, and Sáenz. The subject was "ABOUT THE ALEGATO," *i.e.,* the final written argument to be submitted to the Lago Agrio court. Fajardo pointed out that the LAPs' final submission would have to be filed in the next week, that its preparation was being coordinated by Westenberger[1112] and Sáenz, that Fajardo already had hoped to have received it for translation into Spanish, but that "it ha[d] not arrived, at least not yet." He went on to say that "[n]obody knows when the Judge may issue the judgment ... but if the judge issues the judgment soon, we will end up with the document [*i.e.,* the *alegato*] in hand and it will be useless to us." The email closed by stating that "we are behind schedule with this memorandum of law, which could have serious consequences for the case."[1113]

The January 8, 2011 emails[1114] went to a broader audience, including also Prieto, Yanza,[1115] Anne Carrasco, and Vanessa Barham, the former of whom worked at Patton Boggs and the latter of whom was among the LAPs' lawyers working in Ecuador.[1116] The first of Fajardo's two emails of that date reported that Chevron had filed its *alegato* on January 6. Prieto responded that he could not "believe they beat us!" to which Fajardo in turn replied that "[t]he one who strikes first has greater success or causes greater impact ... They want to influence the judge with their theory. It is a mistake on our part to have fallen asleep for so long on the alegato."[1117]

These emails, if admissible and taken literally, would be consistent with a belief on Fajardo's part in late December and early January 2011 that the result of the Lago Agrio case then was in doubt. If Fajardo in fact so believed, that fact would undercut Chevron's argument that the case had been fixed by then with the promise of $500,000 out of the judgment proceeds in exchange for Zambrano's promise to decide the case for the LAPs and to sign a judgment they prepared.[1118] ***530** But the Court would not construe these emails in such a manner even if they were admissible, which they are not.

The key consideration is that the only individuals on the LAP side who *necessarily* would have known if a bribery deal had been struck would have been Fajardo and Donziger. That is so of Fajardo because he is said to have agreed to it. It is true of Donziger because his approval would have been essential for reasons discussed in the following section. Given the relationships on the LAP side of the case, it is not unreasonable to think that Yanza also perhaps would have known. But all of these emails went to other people as well, including Patton Boggs' Westenberger in the case of the December 31 email and Patton Boggs' Carrasco and Westenberger, as well as junior lawyers in Ecuador, in the case of the January 8 communications.

There is no reason to believe that any of the core three on the LAP side of the case—Fajardo, Donziger, and Yanza, if Yanza was knowledgeable about this—would have confided the fact that they had bribed Zambrano to any of the other recipients of the emails. Their goal was to urge the email recipients to finish the work on the *alegato,* which already was late, even if only to keep up the pretense that the Lago Agrio litigation was in real dispute and the end result in doubt. They could not successfully have done that if they had told those working on the *alegato* that "the fix was in" and that the *alegato* would be no more than window dressing. Equally important, this trio had a long record of keeping knowledge of questionable behavior as close to their personal vests as possible. That was the case with concealment from Kohn and Donziger's principal public relations person, Karen Hinton, of the true facts with respect to the Cabrera Report and the LAPs' relation to it. It is reflected in the edict in the Cabrera work plan, addressed to those who were in on the LAPs' role in the Cabrera Report, that everyone was to be "silent." And there are other examples. The bottom line here is that there is no

reasonable likelihood that Donziger, Fajardo, or Yanza would have disclosed a bribery arrangement, assuming it existed, to the other recipients of these two emails. The risks were too great.[1119]

Accordingly, these emails would not bear the weight that might have been placed upon them even if they were admissible in evidence.[1120] Moreover, in the only important respects they are not admissible.[1121]

***531** *D. The Defendants' Evidence Regarding Zambrano's Alleged Agreement to Fix the Case*

The defendants offered no evidence with respect to Guerra's contention that the LAPs bribed Zambrano save for Zambrano's denial and Donziger's testimony.

As noted, Zambrano was not credible. We are left then with Donziger's testimony.

1. Donziger's Testimony, Even If True, Would Not Negate the Alleged Bribe

It should be recalled at the outset that Donziger's testimony on this point was narrow. He essentially said no more than that Donziger himself "did not bribe Judge Zambrano," that "allegations by former Judge Alberto Guerra that I [Donziger] was involved in a meeting where I 'approved' a plan arranged by Pablo Fajardo to pay Zambrano $500,000 is false," and that he "did not agree or express any support for a plan to pay any amount of money so that the plaintiffs would be able to draft the final judgment."[1122]

This testimony, assuming its truth, would be of only limited value. Among other things, Guerra never said he was present when Donziger agreed to the alleged bribe or that anyone told him that had occurred. He attributed the corrupt promise to Fajardo. Fajardo, on behalf of the LAPs, is alleged to have promised a bribe to Zambrano *after* the 2010 meeting at the Honey & Honey Restaurant and outside Donziger's presence. So Donziger's testimony would not necessarily have been inconsistent with a finding that Fajardo did precisely that. But this raises an additional issue that warrants serious consideration—whether Donziger authorized or approved any such deal, assuming it was made.

2. Donziger's Approval Was Necessary for the Alleged Deal With Zambrano

a. Donziger Controlled the LAP Team

Donziger once wrote that he was "at the epicenter of the legal, political, and media activity surrounding the case both in Ecuador and in the U.S."[1123] He has described himself as the "lead lawyer" in the Lago Agrio litigation and the "person primarily responsible for putting [the LAP] team together and supervising it."[1124] In a November 2009 email, Donziger wrote that his "primary obligation" was to "run the case on a day to day basis."[1125] His January 2011 retention agreement with the LAPs—signed just a few months after the alleged bribery of Zambrano—bears this out, describing him as the LAPs' U.S. Representative and his duties as being "to ***532** exercise overall responsibility for the strategic direction of the Litigation and the day-to-day management of the Litigation."[1126]

As the "cabeza"—or head—of the LAP team, Donziger supervised the Ecuadorian legal team, set deadlines, paid the lawyers' salaries, including Fajardo's,[1127] reviewed at least their important court filings in Ecuador, and coordinated the work among the lawyers in Ecuador and the scientists, experts, lawyers, litigation funders, politicians, and media consultants in the United States and elsewhere.[1128] He visited his local counsel monthly since the case began.[1129] He controlled the LAP team's media strategy, communicated with the press, and recruited Berlinger to film *Crude.*

In addition, Donziger largely has controlled the money used for purposes of the Lago Agrio case, public relations, and related litigation. He was the intermediary between the Ecuadorian lawyers and Kohn when Kohn was funding the case. He recruited Russell DeLeon, his law school classmate, to fund *Crude* and other aspects of the LAPs' efforts. He secured funding from Burford, and, together with H5, brought on Patton Boggs. He occasionally paid even some of the LAP team's expenses and lawyers' salaries out of his personal funds.

Donziger has been intimately involved with the LAP team's legal strategy in the U.S. and in Ecuador. He hired David Russell to come up with the first damages estimate.

With Russell, he hired the LAPs' first nominated expert, Calmbacher, and then rode herd over the completion of his reports. He repeatedly met with Ecuadorian judges presiding over the Lago Agrio case.[1130] He recruited Reyes and Pinto, supposedly to serve as independent monitors but in reality to challenge the settling experts' conclusions concerning two site inspections, and agreed to make the under the table payments in the "bargain with the devil" referred to above. He (at Reyes' suggestion) selected and vetted Cabrera to be the global expert and made sure Cabrera was under the LAP team's control. He met with Cabrera and the LAP team on March 3, 2007 to plan Cabrera's work, and then he met with the American experts the following day to discuss their involvement in it. He recruited, hired, and worked directly with Stratus in drafting much of the Cabrera Report. And when the truth about Cabrera began to leak out, Donziger controlled the LAPs' efforts to minimize, contain, and spin it. He recruited and hired lawyers to assist the LAPs in the Stratus 1782 proceeding. And he personally was involved in determining what information the Fajardo Declaration and Petition would—and would not—reveal.

Donziger's role is reflected in the fact that he stands to receive more money from the Lago Agrio case than any other lawyer—or law firm—who has worked on the case. His January 2011 retention agreement with the LAPs—signed just shortly after the LAP team allegedly struck the deal with Zambrano and shortly before the Judgment was issued—entitles him to 31.5 ***533** percent of all attorneys fees (which will be 20 percent of anything collected on the Judgment, net of certain preferred payments).[1131]

b. Donziger's Approval Was Necessary, and Given, for the 2009 Ghostwriting Deal with Guerra

Guerra's testimony that the LAPs paid him for ghostwriting Zambrano's orders during Zambrano's first term as the Lago Agrio Chevron judge was extensively corroborated by independent evidence: the Guerra bank deposit slips (including those bearing the signature and *cedula* number of the LAPs' Ximena Centeno) and Guerra bank statements, the Selva Viva bank statements, and the PUPPETEER emails.[1132] The PUPPETEER emails corroborate Donziger's approval of these payments to Guerra.[1133] And Donziger has admitted the significance of that finding with respect to the question whether Donziger was complicit in a later scheme to bribe Zambrano:

> "The importance of this story to Chevron's case is simple: If the plaintiffs' lawyers in fact entered into a deal with Guerra in 2009 to influence the case, then that shows their willingness to act corruptly, making it far more likely that they bribed Judge Zambrano a year later."[1134]

In sum, Donziger was the boss of the LAP team; Fajardo was his "local counsel." If Fajardo promised consideration to Zambrano to fix the case, he would have done so only with Donziger's authorization.

E. Ultimate Findings on this Point—Fajardo, with Donziger's Approval, Promised Zambrano $500,000 of the Judgment Proceeds to Decide the Case for the LAPs and Sign a Judgment They Prepared

As we have seen, (1) Zambrano, a new judge inexperienced in civil matters, had his close friend and associate, Guerra, who had been removed from the bench for misconduct, drafting orders for him in civil cases which Zambrano signed and filed as his own; (2) Zambrano had motives to solicit a bribe in the Chevron case; (3) his friend and ghostwriter, Guerra, was a ready means of doing so; (4) Guerra concededly solicited the bribe from Donziger, Fajardo, and Yanza; (5) Donziger, Fajardo, and Yanza had motives and the opportunity to promise the bribe and, at least as long as the money was paid out of judgment proceeds and probably otherwise, the means to pay it; and (6) the Judgment that Zambrano ultimately signed copied from LAP internal work product that was not in the court record. In short, there is a classic circumstantial case—independent of Guerra's testimony—that the LAPs bribed Zambrano to rule in their favor and sign a judgment they wrote for him. To this must be added (1) the Court's finding that Zambrano could not and did not write the Judgment himself, least of all in the manner in which he claimed he did so, and (2) neither the files of the LAPs' Ecuadorian counsel nor their testimony was made available.

[1] The defendants, to the extent they produced evidence, sought to deny the charge. But neither Zambrano nor Donziger was a credible witness, at least on ***534** this point. And the other witnesses associated with the defendants—Fajardo and Yanza—declined to testify. That said, this Court recognizes that "disbelief of a ... denial of a fact which the [adverse party] has the burden of proving is not sufficient to sustain [the adverse party's] burden."[1135] So the question comes down to whether the circumstantial evidence, either alone or in conjunction with Guerra's testimony, carries Chevron's burden.

[2] This Court already has made clear its skepticism concerning Guerra's testimony, character, and motives. Among other things, it has concluded that Guerra's testimony to the effect that Zambrano had cut a deal with the LAPs during his first tenure on the Lago Agrio case was not sufficiently persuasive in view of prior statements he made to Chevron investigators. But, in language specifically approved by our Circuit:

> "There never has been any positive rule of law which excluded evidence from careful consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when the testimony is once before the jury, the weight and credibility of every portion of it is for them...."[1136]

In other words, a jury is entitled to believe part or even most of the testimony even of one who, it concludes, deliberately has lied under oath as to other particulars. Substantially the same is true of a judge sitting, as in this case, as the trier of the facts.

In this particular instance, Guerra told the Chevron investigators very early on that (1) Zambrano told Guerra to go to Chevron and 'have them give me [Zambrano] around 500 and see how much they give you, ... have them bring the judgment, we dress it up here and we issue it,' (2) Guerra's attempt to do so was unsuccessful, (3) Zambrano later told Guerra that he '[made] contact with the other side ... [and] ultimately, he sets it up ... with Fajardo,' and (4) and 'they offered him ... half a million dollars ... [b]ut to be paid later.'[1137] He never wavered from that account.[1138]

In view of the entire record—including but not limited to the circumstantial evidence that predominantly supports Chevron's contention and the Court's evaluation of all of the pertinent testimony—this Court finds that (a) Zambrano agreed with Fajardo to fix the case for a payment of $500,000 paid out of any judgment proceeds, (b) Fajardo did so with Donziger's express authorization, (c) the LAPs drafted all or most of the Judgment, and (d) Zambrano signed their draft without consequential ***535** modification as part of the *quid pro quo* for the promise of $500,000.

XII. The Appeals

A next logical point in the story of the Lago Agrio case is the appeals. In order to appreciate one aspect of that story, however, it is necessary first to describe briefly an event that occurred in this action only days after this case began.

Chevron filed its complaint in this case on February 1, 2011.[1139] It sought *inter alia* a preliminary injunction barring the enforcement of the then imminently expected Judgment.[1140] The Judgment was rendered thirteen days later, on February 14. On February 15, Chevron filed its reply memorandum in support of the preliminary injunction motion in this Court.[1141] In a footnote, it wrote that it "suspected" that Judge Zambrano had "received secret 'assistance' drafting the judgment...."[1142] It based this allegation primarily on the fact that Zambrano had stated to the press only weeks before the Judgment was issued that he had reviewed only three quarters of the approximately 200,000–page record.[1143] Chevron pointed out that it would have been impossible for the judge to have reviewed 50,000 pages and write a 188–page judgment in that period of time, and noted that it anticipated "requesting discovery on this issue shortly."[1144]

With that fact in mind, we turn to the appeals.

A. The First Level Appeal

Both Chevron and the LAPs appealed the Judgment.[1145] The LAPs argued that the lower court had failed to account for three types of harm in its damage award and sought an increase in damages.[1146] Chevron argued that the Judgment should be reversed on multiple grounds, including ghostwriting.[1147] It attached to its appellate brief among other things an affidavit of an expert in which the expert identified overlap between the LAPs' internal Selva Viva database and the Judgment.[1148] Chevron contended that the overlap indicated that the LAPs secretly had assisted Judge Zambrano in writing the Judgment.

1. The LAPs Contend that Chevron Set Up its Ghostwriting Claim

Shortly after the parties filed their appellate briefs, the Judicial Council of the Sucumbíos Court selected three judges from the trial court to hear the appeal.[1149] Several

months after the panel was chosen, the LAPs filed a motion requesting that the panel "take into account and analyze Chevron's [judgment fraud] allegations ***536** when deciding this appeal to prevent Chevron from taking advantage of this Division's possible silence and so continue its worldwide smear campaign against the Ecuadorian judicial system."[1150]

Although the LAPs admitted in the motion that they "ha[d] been unable to determine with certainty how it was that overlapping of information identified by Chevron occurred," they suggested that "maybe it was the company [Chevron] itself that established the conditions for Judge Zambrano to be able to use the contested material[s] as a basis."[1151] The LAPs noted that Chevron first alleged that Zambrano had received secret assistance in its reply brief to this Court on February 15. They contended that "[t]he fact that Chevron has identified similarities and differences between the judgment of February 14, 2011, and some documents obtained from plaintiffs through collateral procedures initiated in the U.S., all in **only one day,** [wa]s categorical evidence that Chevron was ready to make these accusations before the judgment was rendered."[1152] Thus, the LAPs continued, "Chevron might know perfectly well how these materials were taken into account by Judge Zambrano.... Logic compels us to conclude that Chevron knew where to look for it because Chevron itself put it there from the beginning."[1153]

Chevron responded two weeks later. It denied the allegation that it had provided the LAPs' unfiled work product to Zambrano.[1154] It noted that its February 15, 2011 filing with this Court said that it suspected fraud in the authorship based on "Judge Zambrano's admission only weeks before February 14, 2011, that he still had a quarter of the approximately 200,000–page record left to review."[1155] It was not until Chevron obtained further discovery from the LAPs' U.S. counsel and then compared the documents it received in discovery to the Judgment that it presented evidence of the overlap to the Ecuadorian appellate court in May 2011.[1156] Thus, the LAPs' assertion that Chevron had located the portions of the Judgment that matched the LAPs' internal files in "only one day" was false. Moreover, Chevron noted that, despite the LAPs' accusations and bluster, "*[n]owhere* do Plaintiffs deny that they secretly provided Judge Zambrano with the content of their internal documents so that it could be incorporated into the text of the lower court judgment."[1157]

Chevron appended to its response additional evidence of overlap, based in part on discovery it had obtained from Section 1782 proceedings in the U.S. Nonetheless, ***537** Chevron requested—based on the overlap evidence and the LAPs' failure to explain it or deny their involvement in writing the Judgment—that the Judgment be declared null and void.[1158]

2. The Appellate Panel Affirms the Judgment

The three judge appellate panel affirmed the Judgment on January 3, 2012, rejecting the arguments made by both parties.[1159] Although it claimed to have resolved the appeal "on the merits,"[1160] the panel stated that it would not "refer at all" to Chevron's specific allegations "of fraud and corruption of plaintiffs, counsel and representatives ... except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America due to a complaint that has been filed by ... Chevron, under what is known as the RICO act, and this [court] has no competence to rule on the conduct of counsel, experts or other officials....."[1161]

Indeed, the appellate court declined almost entirely to address Chevron's allegations concerning overlap between the Judgment and the LAPs' unfiled work product. While Chevron had not yet obtained Guerra's evidence by the time the appeal was decided, it did present to the appellate court some other evidence that it presented at trial in this case—for example, that portions of the unfiled Selva Viva Database, the Fajardo Trust Email, and the Fusion Memo—were copied either verbatim or in substance into the Judgment. But the appellate court by and large disregarded it. The court failed entirely to address the overlap between the Judgment and the Fusion Memo, the Index Summaries, and the Fajardo Trust Email.[1162] And, while the appellate court stated that it "ha[d] been able to confirm first hand that the record include[d]" certain "information" in the Judgment that appeared also in the unfiled Selva Viva Database,[1163] it did not identify the specific "information" to which it referred, where it had found it within the record, or why it differed from the LAPs' filed sampling data.[1164] The appellate court thus declined to address the fundamental implication of the overlap between the Judgment and the LAPs' unfiled work product—that the LAPs had written, or assisted Zambrano in writing, the Judgment.

Moreover, to the extent the appellate court acknowledged that the Judgment incorrectly had reported some of the data samples—for example, its incorrect reporting of mercury and PAH levels as much higher than the Filed

Lab Results reported them to be—it concluded that the errors were immaterial to the Judgment's damages award.[1165] The panel did not attempt to re-calculate the damages based on the correct figures. It concluded simply ***538** that the judge had considered *all* of the evidence—not each piece individually—to arrive at the total damages award.[1166] But that of course missed at least one major point—Chevron pointed to the overlap in general and to the errors and other idiosyncracies common to the Judgment and the unfiled LAP documents as evidence that the LAPs had written or secretly had a hand in writing the Judgment, which raised an entirely different issue from whether there simply had been factual errors.

Consistent with its statement that it would not "refer at all" to Chevron's specific allegations "of fraud and corruption of plaintiffs, counsel and representatives," the intermediate appellate court failed largely to address the question whether these commonalities supported Chevron's claim of misconduct.

3. The Appellate Clarification Order

The LAPs sought clarification of the appellate court's decision.[1167] They referred to the appellate court's statement that it "ha[d] no competence to rule on" Chevron's fraud allegations that were "pending resolution before" this Court[1168] and asked that "the [appellate] Division clarify and state that in fact it *ha[d]* analyzed Chevron's accusations, and that it *ha[d] not* found any fraud in the activities of the plaintiffs or their attorneys."[1169]

The appellate court issued its clarification order on January 13, 2012.[1170] It stated that, while it did "not find evidence of 'fraud,' " it was "stay[ing] out of these [fraud] accusations, preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America."[1171] It noted that "[t]his was a determining factor for the [Appellate] Division's considerations in the judgment that is being clarified, since it is obvious that it was not its responsibility to hear and resolve proceedings that correspond to another ju ***539** risdiction...."[1172]

Nonetheless, the court stated conclusorily that "all of the samples, documents, reports, testimonies, interviews, transcripts and minutes, referred to in the judgment, are found in the record without the defendant identifying any that is not—the defendant's motions simply show disagreement with the reasoning, the interpretation and the value given to the evidence, but they do not identify correctly legal evidence that is in the record."[1173] But the clarification order—like the underlying appellate order—did not address any of Chevron's specific ghostwriting claims. Nor did it identify where in the record it had located the documents it claimed were there and—as noted previously—its statements concerning what it allegedly found in the record may not be considered for their truth. It posited instead that "[i]f there had been any 'secret assistance,' the presumed concordance between the plaintiffs' internal documentation, and the text of the judgment would not be limited to a fairly simple interpretation of evidence that is contained in the record."[1174]

B. The National Court of Justice Affirms the Judgment in All But One Respect

Chevron sought review in the Ecuadorian National Court of Justice on January 20, 2012.[1175] The National Court of Justice is a court of cassation. It reviews only the legal arguments and does not re-examine the facts.

Despite its limited scope of review, Chevron made a plethora of arguments—both legal and factual—to the National Court. Most relevant, however, were its contentions that the trial court proceedings should have been "nullified" because, *inter alia,* the LAPs had submitted fraudulent reports by Dr. Calmbacher, Cabrera had been appointed illegally and had illegally carried out his duties, and the LAPs had ghostwritten the Judgment.[1176]

The National Court issued its opinion affirming in large part the appellate court's decision on November 12, 2013, while trial in this case was underway.[1177] It noted that "the cassation appeal is an extraordinary appeal granted to the losing party so that the Cassation Court may annul not every unfair judgment, but only those in which their own specific unfairness has been proved to have been founded on a wrongful interpretation of the law."[1178]

With respect to Chevron's allegations concerning Calmbacher and Cabrera, the National Court noted that Chevron had not "mentioned which legal rule ha[d] been supposedly infringed" or "which procedural rules have rendered the proceeding absolutely null" and stated that it had concluded that the cassation court therefore was unable to pass on them.[1179] It accepted the trial court's

statement that it had not relied on the Cabrera Report.[1180] The National Court "concluded that ... [t]he court of appeals ha[d] adequately addressed the requests of the defendant with respect to the report of Mr. Cabrera and ***540** has properly weighed the evidence in accordance with the rules of the sound judgment, within which it has considered that the aforementioned report was not taken in consideration by the trial judge ...."[1181] The National Court therefore "discard[ed] the [Cabrera] allegation inasmuch as it is shown that there has been a correct weighing of the evidence in accordance with legal standards ..."[1182] It pointed out, however, that it had not reviewed the record before the trial court as "one cannot attempt to re-evaluate the evidence through a cassation appeal...."[1183]

The National Court stated also that Chevron's ghostwriting allegations were inappropriate for cassation review.[1184] The court wrote:

> "appellant has alleged that the judgment rendered by the trial judge was drafted by the plaintiffs, and making reference even to the commission of a procedural violation, which would result in the nullity of the trial court's judgment. The nullity of any judgment, according to the Code of Civil Procedure, arises for reasons expressly provided for in the law itself, which is something different from the grounds for nullity of a proceeding, as we discussed herein, therefore allegations such as those involving the perpetration of a crime are not sufficient legal foundation to lodge a cassation appeal and allege the nullity of a judicial proceeding, since the record also does not show any judicial determination on the commission of a crime."[1185]

The National Court affirmed the appellate court in all but one respect. It "quashed" the punitive damages award "since punitive damages are not contemplated under Ecuadorian law and public apologies are not admissible nor, therefore, is any award for that concept."[1186] It therefore cut the LAPs' damages award to $8.646 billion.

XIII. The Pressure Campaign Continues

A. The Invictus Strategy Deployed—Attempts to Enforce the Lago Agrio Judgment

As noted, the Invictus Memo set out a plan to enforce the Judgment "quickly, if not immediately, on multiple enforcement fronts—in the United States and abroad."[1187] It laid out also a so-called "keystone nation" strategy:

> "As with the domestic enforcement analysis, proceeding as an initial matter in a jurisdiction housing the highest concentration of Chevron's domestic assets would offer certain obvious advantages, including efficiency. Nonetheless, it is more important for Plaintiffs to proceed *initially* in a jurisdiction that promises the most favorable law and practical circumstances. To that end, Plaintiffs' Team will identify and potentially target certain 'keystone' nations—that is, nations that enjoy reciprocity, or, better yet, are part of a judgment recognition treaty—with nations that serve as the locus for greater Chevron assets."[1188]

***541** In pursuit of this strategy, the LAPs currently are seeking enforcement of the Judgment against subsidiaries of Chevron in Argentina,[1189] Brazil,[1190] and Canada.[1191] The Court finds that they intend to do so in the United States when they conclude that it is tactically advantageous to do so.[1192]

The LAPs are enforcing the Judgment in Ecuador despite that Chevron never has operated in the country and has no subsidiaries there. As noted, Invictus foreshadowed the LAPs' plan of seeking "attachment of Chevron's assets prior to successful recognition of the Ecuadorian ***542** judgment."[1193] It noted that "attachment would undoubtedly compound the pressure already placed on Chevron vis a vis an international enforcement campaign, and force Chevron to focus its resources on the proceedings initiated by the Plaintiffs, rather than its sideshows."[1194] The LAPs recently have attempted to employ this strategy in Ecuador.

A few months after the intermediate appellate court affirmed the Judgment, the Provincial Court of Sucumbíos issued orders attaching Chevron's assets and the assets of its subsidiaries worldwide. In furtherance of enforcement of the Judgment, it attached Chevron's intellectual property rights in Ecuador, funds going into or leaving Ecuador to Chevron's bank accounts abroad, and a $96 million arbitration award issued against the Republic of Ecuador ("Embargo Order").[1195] More will be said on this below, but it suffices now to note only that it is another important aspect of the LAPs' multi-pronged enforcement plan.

B. The Purpose of All of These Efforts

Donziger's and the LAPs' purposes in pursuing the expansive media campaign previously discussed, in their

attempts to instigate the criminal prosecution of Chevron lawyers, in their efforts to precipitate disinvestments in Chevron stock, and in their overtures to government officials and agencies to investigate Chevron and in related activities, always have included driving Chevron to the settlement table.

On October 6, 2007, Donziger confided to his personal notebook the following:

> "The key issue is criminal case. Can we get that going? What does it mean? I really want to consolidate control with contract before going down a road that I think could force them to the table for a possible settlement."[1196]

Later that month, Donziger, on the eve of a mediation with settlement, wrote confidentially to another of his hired PR people that "[w]e need to get more press and increase the pressure b/w now and then, to get the price up."[1197]

In August 2009, Donziger sent a new prospective PR firm a memorandum outlining his ideas for their efforts. It began by stating that the "primary objective is to pressure Chevron such that they will have to settle the case at a level that would allow for a comprehensive environmental clean-up" and then discussed generating pressure from shareholders, disinvestment, pressure from governmental investigators, diplomatic pressure, celebrity endorsements, and pressure from Congress and NGOs.[1198]

***543** To be sure, Donziger's long-time head PR person, Karen Hinton, testified at trial that Donziger's interest was only in taking the case to verdict and not in settling it:

> "I had numerous conversations with Mr. Donziger about resolving the case. Mr. Donziger repeatedly told me that in the settlement talks Chevron refused to agree to pay for a full and complete remediation of the concession area. As a result, Mr. Donziger made it clear during this time that his clients did not want to settle the case. As Mr. Donziger repeatedly told me, settlement meant, by definition, compromise and his clients deserve a full recovery, not a compromised recovery. Since the sample data overwhelmingly proved contamination, Mr. Donziger and his clients wanted a full trial and verdict so the Amazon would get completely cleaned up (and not just partially). He also wanted Chevron to provide medical facilities and clean drinking water. Throughout the time I worked on the case, the team prepared the case for trial, not settlement."[1199]

But she quickly admitted on cross-examination that Donziger wanted to get more press attention to get the settlement price higher.[1200] The Court finds disingenuous Hinton's efforts to deny or to equivocate about Donziger's objective to use media and other outside attention of various sorts to force Chevron to the settlement table and to induce it to offer more in settlement than it otherwise would have done. Moreover, trying the case to judgment (and even through appeals) and achieving a favorable settlement are not mutually exclusive goals. There are indications that Donziger and the LAPs concluded long ago that trying the case to a decision could provide the best chance for a significant settlement.[1201]

This Court finds that Donziger and the LAPs were very much interested from the outset in settling the Lago Agrio case. Logic dictates the finding also that they are, and will remain, at least as interested in doing so now and in the future. The objects of all of Donziger's media and outside pressure efforts, including his attempt to have Chevron lawyers prosecuted criminally in Ecuador, prominently included increasing the pressure on Chevron to make it more willing to compromise, and at a higher amount, than otherwise would have been the case. The questions whether and ***544** to what extent those efforts were actionable, which is not quite as simple as the defendants would have them, are dealt with below.

Prior Proceedings in this Litigation

The Pleadings

This action was filed on February 1, 2011 against the LAPs, Donziger, Fajardo, Yanza, the ADF, Selva Viva, and a number of other individuals and entities.[1202] All defendants were duly served. Fajardo, on behalf of himself, the LAPs, and all of the other Ecuadorian defendants, sought and obtained an extension of time within which to move or answer.[1203] Two of the LAPs—Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (the "LAP Representatives") answered and have defended the action. None of the other Ecuadorian defendants answered or moved with respect to the complaint. A certificate of default has been entered against them.[1204]

The Amended Complaint
The amended complaint contained nine causes of action. As the Court has granted defendants' dismissal motions as to some,[1205] only five remain—(1) counts 1 and 2, which assert substantive and conspiracy claims against Donziger under RICO, (2) Counts 3 and 7, which assert, respectively, fraud and civil conspiracy claims against all defendants, and (3) Count 8, which asserts that Donziger violated Section 487 of the New York Judiciary Law.[1206]

Count 9 sought a declaration that the Judgment was unenforceable and unrecognizable "on, among others, grounds of fraud, failure [by Ecuador] to afford procedures compatible with due process, lack of impartial [Ecuadorian] tribunals, lack of personal jurisdiction, [and] contravention of public policy."[1207] As discussed below, Count 9 has been disposed of as well.

The Answers
Two aspects of the defendants' answers[1208] are relevant here.

First, Donziger's seventh affirmative defense asserts that "Chevron's claims are barred, in whole or in part, by the doctrines of collateral estoppel and/or res judicata."[1209] Likewise, the LAP Representatives' thirty-third affirmative defense asserts that "[t]he claims asserted in the Complaint and any relief sought thereunder are barred, in whole or in part, under the doctrines of res judicata and/or collateral estoppel."[1210]

Second, both assert unclean hands and *in pari delicto* affirmative defenses.[1211] Moreover, the LAP Representatives' pleading explicitly and significantly relies, ***545** in this respect, on findings by the Lago Agrio court of misconduct by Chevron in the defense of the Lago Agrio case.[1212]

Discovery and Motion Practice

Discovery and Discovery Sanctions
During discovery, the defendants refused to comply with Chevron's request for production of documents insofar as it sought documents located in Ecuador that were not in the personal physical possession of Donziger or the LAP Representatives—in principal part documents physically in the hands of Fajardo and the Ecuadorian LAP lawyers as well as Yanza, the ADF, and Selva Viva.

The Court granted Chevron's motion to compel production and, when the defendants did not comply, its motion for sanctions.[1213] As will be discussed below, the only sanction ultimately imposed was the striking of the LAP Representatives' personal jurisdiction defense.[1214]

The Partial Summary Judgment Motions
Chevron made four motions for partial summary judgment on various aspects of the case. Three motions were denied in their entirety and the fourth in all but one small respect.[1215]

***546** *Attempts to Recuse the Judge or Require Reassignment of the Case*
From the very outset of this case, the defendants made repeated efforts to get rid of the judge, who previously had ruled against them and been affirmed in both the Berlinger and Donziger Section 1782 proceedings.[1216] The several early efforts, which began within a week of the filing of this action, are recounted in the Court's ruling denying the first formal recusal motion.[1217] Defendants then unsuccessfully sought a writ of mandamus or an order reassigning the case to a different judge. The Court of Appeals summarily denied both requests. In denying mandamus, it stated that "[B]ias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it in for the party for reasons unrelated to the officer's view of the law[.]"[1218] It rejected the reassignment request without comment.[1219]

Undaunted, Donziger within days of the Court of Appeals' decision, made another motion for recusal,[1220] which this Court denied summarily.[1221] Still undaunted, defendants later filed yet another mandamus petition, that one ostensibly to challenge a number of interlocutory rulings by this Court, but in which they again asked the Court of Appeals to reassign the case to another judge.[1222] Those applications too were denied summarily.[1223]

The Trial

Chevron waived all claims for damages and sought only equitable relief. The case was tried without a jury[1224] from October 15 through November 26, 2013. In conformity with common practice in this district in non jury cases, the direct testimony of most witnesses was taken in the form of written statements, the truth of which was affirmed on the witness stand. The witnesses so testifying then were tendered for cross-examination, redirect, and any subsequent questioning as usual. Some exhibits were offered through witnesses in the usual way. Many were offered and received in bulk, subject to the ***547** filing and, where appropriate, rulings on objections to exhibits so offered.

Chevron called 25 witnesses live and offered deposition testimony of 22 additional witnesses. The defendants called only six witnesses live—Donziger, Hinton, Ponce, Javier Piaguaje, Selva Viva employee Donald Moncayo, and Assembly leader Humberto Piaguaje. They did not call Fajardo, Yanza, Sáenz, Prieto, or Cabrera, none of whom was deposed. The record thus lacks any testimony from them.

The trial was conspicuous for the fact that the defendants sought to offer extensive evidence of environmental conditions in the Orienté and of Texaco's alleged responsibility for them notwithstanding the Court's numerous pretrial rulings that those questions were not at issue in this case.

Post–Trial Briefing

The post-trial briefing in this matter was notable for the fact that the defendants made little effort to address the evidence presented at trial or to argue the facts. They confined themselves, for the most part, to rearguing the contentions they made in Ecuador with respect to alleged environmental pollution in the Orienté and to legal arguments that, they contend, require dismissal even if the facts are as Chevron contends.[1225]

One consequence of this approach is that the defendants—who offered only a handful of their proposed exhibits through witnesses in open court[1226]—made little effort to show the relevance or significance of most of the more than 1,000 exhibits they tendered in a mass submission on the last day of the trial. The Court therefore does not have the benefit of much reasoned discussion by defendants as to what defendants think they proved or disproved even assuming their exhibits are admissible, which many quite obviously are not. Nevertheless, the Court has considered the evidence on both sides and, to the extent it is admissible, given it such weight as it deserves.[1227]

Discussion and Additional Findings

Chevron's principal remaining claims seek equitable relief with respect to the Judgment both on non-statutory grounds and under RICO. These two claims are entirely independent of each other[1228] although, ***548** of course, they rely to a great but not complete extent on the same facts. Chevron asserts in addition certain other claims.

The Court begins by disposing of Donziger's claim, raised only after trial, that the Court lacks subject matter jurisdiction because Chevron lacks Article III standing. It then turns to the merits of Chevron's claims, the affirmative defenses, and then to relief. The appendices to this opinion, filed separately for convenience, are an integral part of it and contain additional findings of fact and conclusions of law.

I. This Court Has Subject Matter Jurisdiction

[3] Following the completion of the trial and all post-trial briefing, defendants moved to dismiss the case for lack of subject matter jurisdiction. They argue that Chevron lacks Article III standing by virtue of its recent withdrawal of its damage claim and its decision to limit the geographic scope of injunction against enforcement of the Judgment to the United States. Defendants claim that these recent changes in the relief sought eliminated any "case or controversy" between them and Chevron. Parenthetically, that is a proposition that defies common sense given the bitter adversity of the parties on the central issue between them, whether the Lago Agrio Judgment was procured by fraud. But putting that aside, their argument is completely baseless.

[4] *First,* subject matter jurisdiction— ***549** including standing[1229]—is determined as of the time the action is brought.[1230] But defendants do not suggest that Chevron lacked standing when the action was brought. The basis for their present motion—Chevron's limitation of the relief it seeks—occurred only recently. So they have posed the wrong question. The right question is whether these recent changes have mooted the case.[1231] The answer

to that question quite plainly is "no."

Second, even were the Court to engage defendants' standing argument—thereby ignoring the horn book law that subject matter jurisdiction and its standing component are determined as of the time the action is brought—it would reject it. Defendants' arguments ignore the factual record in this case. Given the record and this Court's findings, there would be standing here even if the matter were determined as of this moment.

In sum, this Court has subject matter jurisdiction.

A. This Case Is Not Moot

[5] [6] [7] Article III of the Constitution limits the judicial power of the United States—and thus the jurisdiction of federal courts—in relevant part to "Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States" and "to Controversies between ... Citizens of different States"[1232]—or, as it often is stated more broadly, to "cases and controversies."[1233] Assuming the existence of a case or controversy at the time an action is brought—and defendants' motion, not to mention their behavior in litigating this case over the past three years so assumes—the federal court continues to have subject matter jurisdiction unless and until "a suit becomes moot," *i.e.,* until " 'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' "[1234] But, as the Supreme Court held just months ago, "a case 'becomes moot only when it is impossible for a court to grant *any effectual relief* ***550** *whatever* to the prevailing party.' "[1235] "As long as the parties have a concrete interest, *however small,* in the outcome of the litigation, the case is not moot."[1236]

[8] *First,* the litigants here plainly retain a "concrete interest" in the resolution of this case. Chevron insists that it has been a victim of defendants' fraud and racketeering activity. It alleges that it is threatened with additional injury. It seeks equitable relief both to rectify past injuries and prevent further injury. Donziger and the LAP Representatives argue in response that Chevron's claims are spurious, that this Court lacks jurisdiction to provide Chevron with any effective relief, and that comity in any event demands respect for the Lago Agrio Judgment and the various enforcement courts. Nevertheless, "there is not the slightest doubt that there continues to exist between the parties 'that concrete adverseness which sharpens the presentation of issues.' "[1237]

Second, Chevron's withdrawal of its damage claim and its limitation of the geographic scope of the anti-enforcement injunction it seeks did not make it "impossible for [this] court to grant any effectual relief whatever."[1238] This Court can and, as will appear below, does impose a constructive trust on the proceeds of the Judgment to these defendants, including the proceeds of intellectual property and royalties already seized from Chevron in Ecuador in Judgment enforcement proceedings and a $96 million arbitration award in favor of Chevron against the ROE, in order to prevent these defendants from profiting unjustly at Chevron's expense. It can and, as will be appear below, does enjoin these defendants from pursuing any proceedings in the United States to enforce the Judgment, once again to prevent them from profiting from the fraud. Regardless of whether those and any other remedies granted would afford Chevron all the relief it could hope for with respect to the fraud and racketeering of which it complains, Chevron certainly has "a concrete interest, [even if others might characterize it as] small," in obtaining them. The fact that the Court can afford Chevron such relief means this case is not moot.[1239]

B. This Court Had Subject Matter Jurisdiction When the Action Was Brought

Defendants have not questioned the existence of subject matter jurisdiction generally, or Chevron's standing in particular, as of the time this action was brought. But subject matter jurisdiction goes to the Court's power to hear a case, and the Court therefore is obliged to raise the issue of its own motion whenever a question appears. Accordingly, the Court does so now.

***551** One element of a "case" or "controversy," the existence of which is essential to the jurisdiction of a federal court, is that the plaintiff have standing to sue. The determination, as the Court has shown, is made "on the basis of what was known at the time a suit was initially filed."[1240]

[9] "[T]he irreducible constitutional minimum of standing contains three elements:" (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical," that is (2) " 'fairly traceable to the challenged action of the defendant,' " and (3) "likely" to "be redressed by a favorable decision."[1241] Although an "injury-in-fact" exists when a defendant has inflicted a "present harm" on a plaintiff, the "Supreme Court has recognized that a plaintiff in some circumstances may have standing to sue even when the plaintiff shows only

an imminent threat of future harm or a present harm incurred in consequence of such a threat."[1242]

The complaint in this case alleged that the defendants (1) corrupted the judicial process in Ecuador, (2) colluded with the Ecuadorian government, (3) improperly procured the appointment of Cabrera and secretly ghostwrote his report, (4) improperly induced the Ecuadorian government to prosecute two former Texaco lawyers, and (5) mounted a public relations blitz, aimed at Chevron and based in part on knowing misrepresentations, all to extort a payment from Chevron, and that they also had obstructed justice and tampered with witnesses in U.S. discovery proceedings to prevent proof of their misconduct.[1243] Chevron asserted that it already had suffered substantial damages, that the entry of a large judgment against it was imminent as a result of the alleged corruption, that the defendants would move promptly to seek to enforce that judgment, and that it was threatened with irreparable injury absent equitable intervention.[1244] Chevron sought damages as well as an injunction barring the defendants from seeking to enforce the imminent judgment anywhere in the world.[1245]

[10] Those allegations satisfied Article III's standing requirements. And while a plaintiff ultimately bears the burden of proving, not merely alleging, facts sufficient to satisfy the standing requirements as of the date an action is begun, Chevron did so. The findings in this opinion demonstrate that Chevron proved the substantial truth of the facts alleged in the complaint. Finally, the remedy it initially sought—*damages and a global injunction* prohibiting the LAPs and both their Ecuadorian ***552** and U.S. counsel from enforcing or profiting in any way from the Judgment—would obviously redress Chevron's injuries by compensating it for injuries already incurred and by preventing future injuries stemming from both the Judgment and attempts to enforce it.[1246]

Chevron had standing, and the Court had subject matter jurisdiction, as of the commencement of this action.

C. The Court Would Have Subject Matter Jurisdiction Even on Defendants' Erroneous Premise

Even were this Court to accept defendants' erroneous premise that the standing requirements that apply at the commencement of a lawsuit persist through the twists and turns that litigation can take—in other words, their invitation to ignore (1) the foundational principle that standing is determined at the time the complaint is filed, (2) the fact that Chevron both pleaded and proved that it had standing at the outset, and (3) the fact that this action is far from moot—the Court still would conclude that Chevron has standing here.

First, defendants' enforcement of the Judgment in Ecuador already has resulted in the loss by Chevron of Ecuadorian trademarks and related revenue streams, which are being applied to the satisfaction of the Judgment.[1247] The value of those trademarks is between $15,703,986 and $23,195,020, and the value of lost future royalties amounts to $5,138,596.[1248] And it has lost its $96 million arbitration award against the ROE to the extent that the award otherwise would have been enforceable in Ecuador.[1249] As the attachment orders say, all of that property is applicable to the satisfaction of the Judgment under Article 2367 of the Ecuadorian Civil Code.[1250] The application of that property to the satisfaction of the Judgment—that is, to the benefit of the Judgment creditors and, through his contingent fee arrangement, Donziger—is a concrete, particular, and direct consequence of the fraudulent Judgment, not merely "fairly traceable" to ***553** it.[1251]

Those injuries are redressable by the constructive trust the Court today imposes on, and the related relief it grants with respect to, Donziger's right to share in those proceeds and any benefits accruing to the other defendants and the LAP Representatives. The constructive trust with respect to the any royalties and other income generated by the trademarks will deprive Donziger and these other defendants of any benefit from the Judgment and restore that value to its rightful owner, Chevron.[1252]

Second, Chevron has established that it is threatened with additional, imminent injury as a direct result of defendants' continued efforts to enforce the Judgment. It currently is incurring substantial legal fees and other expenses to defend enforcement proceedings,[1253] all concrete and direct consequences of the fraud perpetrated by these defendants. In addition, it is threatened with the risk of further disruptive pre-judgment attachment in foreign countries, as occurred in Argentina,[1254] with the risk that some foreign country will enforce the Judgment, and with additional enforcement proceedings, including pre-judgment attachment, in the United States. All of these threatened injuries are direct consequences of the Judgment.

Defendants nevertheless argue that the risk of further attachments and of foreign enforcement are not certain to be realized and, even were they certain, would be products of the actions of other courts and thus not "fairly traceable" to defendants. But these arguments are not

persuasive.

The suggestion that the risks of attachments or a foreign decision enforcing the Ecuadorian Judgment are merely speculative is disingenuous. Defendants' own written enforcement strategy lays out the plan to use prejudgment attachment wherever possible,[1255] and they have pursued that course in Argentina already. If the possibility of a foreign judgment enforcing the Judgment entered in Ecuador were as speculative as defendants argue, they would not be pursuing such judgments in Argentina, Brazil, and Canada, spending large sums doing so, and obtaining investors willing to fund those (and doubtless other) efforts in exchange for percentages ***554** of the result.[1256] Finally, the attempt to lay any outcome adverse to Chevron at the doorstep of whatever foreign court might render a decision adverse to it, and thus to disconnect defendants' fraud from the threatened harm, does not withstand analysis. Defendants' fraud produced the Judgment. Their enforcement efforts present the foreign tribunals with the opportunities to enforce that Judgment. If any does so, it would be in consequence of defendants' actions and arguments. Thus, there is a substantial risk that the harm Chevron apprehends will come to pass and, should that occur, it would have come to pass as a direct result of defendants' actions. That would suffice to give Chevron standing to seek relief even if the existence of standing now matter, which for reasons already discussed it does not.[1257]

Finally, the fact that the relief sought in this case would not remedy all of the past harms nor prevent all of the threatened harms of which Chevron is at substantial risk would not deprive it of standing even if standing were viewed as of the present rather than as of the commencement of the action. The requirement of redressability is satisfied if the relief would "relieve *a* discrete injury."[1258] A plaintiff "need not show that a favorable decision will relieve his *every* injury."[1259] Because Chevron "would benefit in a tangible way from the [C]ourt's intervention,"[1260] it has standing ***555** here.

II. The Non–Statutory Claims for Equitable Relief With Respect to the Judgment

Chevron asserts that the Judgment was procured by bribery and coercion of Ecuadorian judges and, even if that were not so, that it nevertheless was procured by fraud in other respects. It nevertheless does not seek to set aside the Judgment in the Ecuadorian court—an institution of a sovereign nation—or even to enjoin its enforcement outside the United States. Rather, it seeks equitable relief "that will strip Defendants of any profits they are able to procure as a result of their corrupt judgment"[1261] and to enjoin enforcement of the Judgment in the United States.[1262]

A. Equitable Relief With Respect to Fraudulent Judgments Generally

Three basic principles underlie Chevron's non-statutory claim for relief from the Judgment.

First, independent equitable actions long have afforded relief from judgments obtained by fraud, whether by enjoining their enforcement, preventing those responsible from benefitting from their fraudulent actions, or otherwise.[1263] The willingness of equity to "enjoin a judgment obtained by fraud" has existed at least since the seventeenth century.[1264] While the merger of law and equity altered the procedural context in which such actions are pursued and other changes in the legal environment have reduced the frequency with they are brought, all relief traditionally granted in equity remains available.[1265]

***556** [11] [12] *Second,* equity acts *in personam*—it acts on the person subject to its jurisdiction and, in this context, not on the challenged judgment, whether foreign or domestic.[1266] It therefore "may command persons properly before it to cease or perform acts outside its territorial jurisdiction."[1267] Since the time of Lord Coke, this principle has resulted, in proper cases, in equitable decrees "enjoin[ing] parties from enforcing judgments obtained by them at law when it was unconscionable for them to do so" even "leav[ing] the judgment in peace."[1268] Moreover, the principle that equity acts *in personam* means that a court of equity having jurisdiction over individual parties may enjoin those parties from enforcing, or afford other equitable relief with respect to, a judgment ***557** of another state or another nation.[1269] Thus, the fact that equity acts *in personam* affords ample scope for equitable relief short of voiding or setting aside a fraudulent judgment.

[13] *Third,* fraud in its procurement is an ancient basis for enjoining enforcement of or granting other equitable relief with respect to a judgment where other requisites of the exercise of equitable power are present.[1270]

With this background, the Court proceeds to the claim that the Judgment was procured by fraud.

B. Fraud on the Court—Corruption and Coercion of Judges and Judicial Official

[14] [15] [16] There is a good deal of learning concerning the kinds of fraud that support an independent action for relief from a judgment.[1271] But there is uniform agreement on the proposition that "a judgment may be avoided ... if the judgment ... [r]esulted from corruption of or duress upon the court ..."[1272] "Where ... the ***558** situation is clear cut, as where a judge accepts a bribe ..., the person injured thereby is entitled to equitable relief."[1273] The position is equally clear with respect to the coercion of judicial officers. "[E]quitable relief will be given from a valid judgment to a party ... injured thereby because of ... duress upon the court ... by the other party or a third person" if the judge "submits to duress."[1274] Indeed, defendants do not contend otherwise.

This record establishes both of these types of fraud on the Lago Agrio court.

1. The Bribery of Zambrano

[17] This Court has found by clear and convincing evidence that Zambrano was corrupted by Donziger and the LAPs. Fajardo—with Donziger's approval—agreed to pay Zambrano $500,000 out of proceeds of the Judgment in exchange for Zambrano deciding the Lago Agrio case in the LAPs' favor and signing a decision provided by the LAPs. The principle that such a bribe warrants equitable relief is so well established that counsel for the LAP Representatives recently conceded before the Second Circuit that they "would not have a problem" with "the alternative relief that [Chevron] would be seeking, such as enjoining the person who paid the bribe from benefitting from it," assuming that the judge was bribed.[1275] Thus, the bribery of Zambrano establishes a clear basis for relief provided that other equitable considerations are satisfied.

2. The Coercion of Judge Yánez

[18] The Court has found, also by clear and convincing evidence, that Fajardo and Donziger coerced Judge Yánez to allow the LAPs to terminate their remaining judicial inspections, to appoint a global expert, and to designate their hand-picked choice, Richard Cabrera, for that position. They did so by threatening him with the filing of a misconduct complaint at a time when he was especially vulnerable, and by other pressure as well.

Defendants do not dispute that the coercion of Judge Yánez would be fraud on the court and afford a basis for equitable relief if it were material to the outcome. Rather, they argue that the coercion of Judge Yánez was immaterial because the Cabrera Report played no role in the ultimate decision. But they are mistaken.

***559** The only basis for the contention that the Cabrera Report played no role in the ultimate decision is the statement in the Judgment that the Lago Agrio court did not rely on it.[1276] But that disclaimer does not carry the day for the defendants on this point for at least two reasons.

First, the disclaimer is inadmissible hearsay—it is nothing more than an out-of-court statement by the author or authors of the Judgment, and it is offered for its truth. It therefore is inadmissible hearsay, and it would be so even if Zambrano were the author.[1277]

Second, even if the disclaimer were admissible for its truth, it would be only some evidence on the question. But this Court has found, on the basis of other evidence, that the Cabrera Report in fact was relied upon by the author or authors of the Judgment and that it played an important role in holding Chevron liable to the extent of more than $8 billion. The most material respect in which that was true was the reliance on the Cabrera Report for the count of 880 pits, which was an essential predicate to more than $5 billion of the damage award.[1278]

Accordingly, the coercion of Judge Yánez, coupled with the important reliance on the Cabrera Report by the author or authors of the Judgment, is a second material fraud on the Lago Agrio court, and it is entirely independent of the bribery of Zambrano.

3. The Corruption of Cabrera

In late February and early March 2007, Donziger and Fajardo, having concluded that Cabrera would cooperate them, were giving him the 'hard sell' to accept the global expert appointment. They promised him a lifetime of work on the remediation if the LAPs won the case. Even before Cabrera was sworn in as the global expert on June

13, 2007, Donziger and the LAPs began covertly paying him through the secret account in addition to paying him via the public and established court process. They provided him also with a secretary and life insurance.

[19] The Court finds, by clear and convincing evidence, that at least some of these payments and benefits, actual and promised, were bribes given to influence Cabrera's actions as the court-appointed global expert. The *quid pro quo* were Cabrera's repeated representations to the Lago Agrio court and others that he was impartial and independent, his putting of his name to the Report largely prepared by Stratus and it subcontractors and claiming that Report as his own product, and his filing as his own purported response (actually written mostly by Stratus and the LAPs) to the LAPs' and Chevron's comments on the Cabrera Report.

Cabrera took an oath administered by and was an officer of the court. When Donziger and the LAPs covertly paid him and provided him with other benefits under the table to make sure he "totally play[ed] ball" with them, they bribed or corrupted a judicial official.[1279] The same ***560** principles that apply to the bribery of Zambrano apply to this behavior.[1280] In light of the reliance by the author(s) of the Judgment on the Cabrera Report, this corruption of Cabrera is highly material.

C. Fraud—Ghostwriting and Deception

Donziger and the LAPs committed fraud on the court and/or extrinsic fraud by means independent of the bribery of Zambrano, the corruption of Cabrera, and the coercion of Judge Yánez.

1. The LAPs' Ghostwriting of All or Part of the Judgment and Zambrano's Adoption of Their Product Was Fraud Warranting Equitable Relief Even Absent Bribery

[20] This Court has found that the LAPs wrote the Judgment, in whole or in major part, that they gave the draft to Zambrano, and that Zambrano (whether with or without Guerra's participation) made little or no contribution apart from his signature and perhaps some light editing. Even if Zambrano had not been bribed to take these actions, his actions and those of the LAPs would have been fraud on the court and/or extrinsic fraud, the choice being only a matter of one's verbal preference.

In *Morgan v. United States,*[1281] upon which Chevron relies, the plaintiffs challenged rates fixed by the Secretary of Agriculture on the ground that the Secretary signed findings submitted to him *ex parte* by department staff without notice to the unsuccessful litigant and without hearing or considering the evidence submitted by the plaintiffs. In holding the order invalid, the Supreme Court reasoned that the Secretary's action would have been improper in a court of law and that no lesser standard applied to the rate making proceeding before it:

> "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."[1282]

Even more pointed, in present circumstances, is *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation,*[1283] the misconduct in which shares some elements with that in this case. In *Bridgestone/Firestone,* the Mexican plaintiffs in a U.S. wrongful death action sought to avoid a *forum non conveniens* dismissal of their U.S. case on the ground that Mexican courts were not an adequate and available alternative forum. They pointed to the fact that they had sued in Mexico but that the Mexican court had dismissed their action. Upon inquiry into the circumstances of that dismissal, however, it turned out that (1) the plaintiffs' had sought the dismissal of their own Mexican case in order to bolster their opposition to ***561** the *forum non conveniens* motion in the United States, (2) the plaintiffs' Mexican lawyers had been given $20,000 "for expenses" plus 10 percent of plaintiffs' gross recovery (in the U.S.) if they obtained the dismissal of the Mexican action, (3) the Mexican lawyers manipulated the proceedings in Mexico to have the case assigned to a particular judge and to a *secretaria de acuerdos*—essentially a permanent law clerk whose job was "to draft all orders issued in a case prior to the final judgment and present those orders to the judge for final approval"—who was a sister of one of the plaintiffs' Mexican lawyers, (4) the plaintiffs' Mexican lawyers improperly submitted to the judge a proposed order dismissing the Mexican case, and (5) the judge signed the order thus provided. Moreover, as has been the case here with Fajardo, Yanza, Prieto, and Sáenz, the Mexican

lawyers in *Bridgestone/Firestone* refused to testify in the U.S. proceeding. The U.S. court held that the Mexican dismissal had been obtained by fraud.

Neither *Morgan* nor *Bridgestone/Firestone* was an independent action for relief from an allegedly fraudulent judgment. They nevertheless illustrate the fact that the Judgment here was obtained by fraud regardless of whether Zambrano was bribed and even without regard to whether Yánez was coerced or Cabrera corrupted. Judges and a judicial officer, at the behest of the LAPs, abandoned their sworn responsibilities of fairness and impartiality. Even without that misconduct, the actions of the LAPs and Zambrano—the secret submission of a form of judgment desired and written by the LAPs and Zambrano's adoption of that form of judgment in whole or in part, respectively—would have deprived Chevron of a fair determination of the Lago Agrio case. Those actions constituted fraud on the court because they involved misconduct by both court officials and a litigant that went directly to the integrity of the process. In any case, they satisfied the classic definition of extrinsic fraud—"by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case.... [T]he unsuccessful party [Chevron w]as ... prevented from exhibiting fully [its] case, by fraud or deception practised on [it] by [its] opponent."[1284]

2. The Deception of the Lago Agrio Court By The Misrepresentations that Cabrera Was Independent and Impartial and By the Passing Off of the Ghostwritten Report as His Work Was Fraud Warranting Equitable Relief Even Absent Bribery

[21] The facts concerning the Cabrera Report and Cabrera's response to the LAPs' Stratus-authored critique, as well as Chevron's critique, of the Cabrera Report, are not disputed, at least seriously. These two documents were presented to the Lago Agrio court on the basis that the documents had been prepared by Cabrera and that Cabrera himself was impartial and independent. The representations and pretenses that Cabrera was impartial, that he wrote the documents and, in this Court's view, that he was independent all were inaccurate.[1285] These false pretenses ***562** and representations to the Lago Agrio court—engaged in by Cabrera as a court official at the instance of Donziger and the LAPs—constituted fraud warranting equitable relief.

Particularly relevant here is the Supreme Court's decision in *Hazel–Atlas Glass Co. v. Hartford–Empire Co.,*[1286] also heavily relied upon by Chevron, in which the Court reversed a ruling that had denied equitable relief against a previous judgment and, indeed, in which the Court directed that the prior judgment be vacated. Attention to the facts is useful, as they parallel those of this case in important respects.

The first suit had been for patent infringement. Hartford, the eventual patentee, had met with resistance from the Patent Office during prosecution of its patent application. In order to overcome that resistance, it ghostwrote and procured publication of an article, signed by a supposedly disinterested expert whom Hartford procured, that described the alleged invention as "a remarkable advance in the art." It brought the article to the attention of the Patent Office, and the patent issued.

Hartford then sued Hazel–Atlas for infringement. The ghostwritten article played no role in the trial, and the district court dismissed the case on the ground that the accused device did not infringe. Hartford appealed and drew the appellate court's attention to the ghostwritten article. The court of appeals reversed and reinstated the infringement suit, which then was settled on terms favorable to Hartford.

Over time, the facts concerning the article, some small part of which had been known to Hazel–Atlas at the time of trial, came out, many after the court of appeals' ruling in favor of the patentee. Hazel–Atlas then commenced a new action in the court of appeals seeking relief from the prior judgment.[1287] The court of appeals ruled against it, but the Supreme Court reversed and directed that the prior judgment be vacated.

The basis for the Supreme Court's ruling was that Hartford's actions constituted fraud on the court. As the Court put it:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. *Cf. Marshall v. Holmes, supra*[, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891)]. Proof of the scheme, and of its complete success up ***563** to date, is conclusive. *Cf. United States v. Throckmorton, supra.*

* * *

> We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered.[1288]
>
> Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law. [citations omitted] From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement trial, it would have been warranted in dismissing Hartford's case. * * * So, also, could the Circuit Court of Appeals have dismissed the appeal had it been aware of Hartford's corrupt activities in suppressing the truth concerning the authorship of the article. The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.[1289]

The Court went on to direct that the earlier judgment of the court of appeals be set aside, that the mandate be recalled, that Hartford's original appeal be dismissed, and that the district court be directed to dismiss the infringement suit in addition to "tak[ing] such additional action as may be necessary and appropriate."[1290]

The situation here, even without regard to the fact that Cabrera was paid covertly by Donziger and the LAPs, is at least as egregious. That is so notwithstanding that, in retrospect, the Lago Agrio court was aware of what might appear to have been a few drops in what in fact was a heavy downpour:

> • The Lago Agrio court knew that Cabrera was the LAPs' ultimate choice because Fajardo and Donziger had lobbied and coerced it *ex parte* for his appointment. Moreover, Cabrera in February 2007 had written the court to ask that Chevron be ordered to pay him certain fees he claimed with respect to alleged prior services as a settling expert and, in the course of doing so, said he had made an arrangement with the LAPs, who already had paid him their share of the fees allegedly due for settling expert work.[1291]
>
> • The Lago Agrio court knew also that Chevron had suspicions about Cabrera's neutrality and independence, as Chevron brought them to its attention more than once.[1292]

But those inklings were a far cry from a full and fair disclosure. Neither the Lago Agrio court nor Chevron knew anything approaching the whole story of the overall Cabrera fraud—the thorough-going deception that Cabrera was impartial and independent, ***564** that he did his own work with his own independent helpers, that he wrote the Report and other documents that he purported to have written, and that he was compensated only through the court process. Indeed, the first important evidence did not leak out until March 2010, after the Netflix release of *Crude,* and the production of the Stratus documents later that year in the Denver Section 1782 proceeding. Confirmation came still later.[1293]

Nor may *Hazel–Atlas* be distinguished successfully on the basis of the statement in the Lago Agrio Judgment that the Lago Agrio court did not rely on the Cabrera Report. As we hold below, that statement is not even admissible in evidence for its truth. In any event, the evidence persuasively establishes that the Judgment rests in material respects on the Cabrera Report.

D. The Other Requirements for Relief Have Been Satisfied

[22] In considering whether a litigant is entitled to relief from a prior judgment on the ground of fraud, courts frequently consider whether (1) the fraud (whether intrinsic or extrinsic) prevented a full and fair presentation or determination of the litigant's claim or defense in the prior action or otherwise would render it unconscionable to give effect to the prior judgment, (2) the party seeking relief was diligent in discovering the fraud and attacking the judgment, and (3) evidence of the fraud is clear and convincing.[1294] For present purposes, only the first of these considerations warrants discussion.[1295]

[23] When courts are asked to grant relief from or to decline to recognize a prior judgment on the ground of fraud, a central question is whether such an outcome is appropriate to "protect the fairness and integrity of litigation."[1296] In cases in which the tribunal has been corrupted, "no worthwhile interest is served in protecting the judgment."[1297] The point is analogous to that made by the Second Circuit in the infamous *Manton* case, a criminal prosecution of a Court of Appeals judge where the Circuit rejected a contention that there had been no obstruction of ***565** justice by a judge because the cases would have been decided the same way in any case.[1298] The Circuit's view in that case has equal bearing here.

[24] [25] Even in cases of extrinsic fraud short of judicial corruption, a plaintiff need not prove that the outcome of the prior case would have been different absent the fraud.[1299] It ordinarily must show only that the fraud "prevented the losing party from fully and fairly presenting his case or defense" or otherwise significantly tainted the process.[1300] Implicit in this latter criterion is a requirement of materiality, as judgments will not be set aside or denied recognition where the only impact of the misconduct or other taint is to prevent a litigant from presenting cumulative evidence, to deceive as to a peripheral issue, or the like.[1301]

Zambrano's exchange of a favorable decision and his signature on the LAPs' proposed judgment for a promise of $500,000 of the judgment proceeds was corruption that went to the integrity of the judicial process and requires relief from that judgment. Its materiality is beyond question.

The same would be true of Zambrano's signature on a judgment ghostwritten by the LAPs and submitted to him *ex parte,* even absent the promise of the $500,000. That alone would have been a classic case of fraud on the court. As the Supreme Court recognized in *Morgan*, "there would ***566** be no hesitation in setting aside" such a decision "as having been made without a fair hearing."[1302] The actions of Zambrano and the LAPs would have deprived Chevron of a full opportunity to makes its defense.[1303]

The coercion of Judge Yánez, the corruption of Cabrera, the ghostwriting of the Cabrera Report and associated documents, and the misrepresentations to the Lago Agrio court of Cabrera's impartiality and independence stand somewhat differently, as the significance of these events, assuming they stood alone, would depend upon whether the Cabrera Report ultimately mattered in any significant way. The Court, however, already has found that the Ecuadorian court relied significantly on the Cabrera Report despite the disclaimer of reliance. These fraudulent elements therefore were material to the outcome.[1304]

E. Conclusion

All of the elements required for equitable relief from the Judgment as against all defendants have been satisfied in this case subject only to the resolution of two remaining ***567** questions—whether (1) the Ecuadorian appellate decisions alter this conclusion, and (2) the *sine qua non* for the exercise of equitable jurisdiction, the inadequacy of legal remedies, is present here. The first of these issues implicates the import of and the effect, if any, of the appellate decisions, which is dealt with in Point VII below. The second is common to the non-statutory claim for equitable relief and to Chevron's RICO and other claims. The Court defers discussion of it to the section of this opinion dealing with relief.

III. The RICO Statute Applies Here

Chevron asserts that Donziger, though not the LAP Representatives, has violated two sections of the RICO statute.[1305] The first, 18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The second, Section 1962(d), prohibits "any person" from "conspir[ing] to violate" the preceding section. The Court begins by disposing of certain arguments common to both claims.

A. RICO Applies to Prohibited Conduct Regardless of Whether a Defendant Is a Member of Organized Crime

RICO was drafted as a weapon in the fight against organized crime. Some therefore argue that the statute is limited to mobsters of the sort portrayed in *The Godfather, Goodfellas,* or *The Sopranos*. That argument is misconceived.

"Congress drafted RICO broadly to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."[1306] Thus, while the statute's legislative history focused on "the predations of mobsters," it "shows [also] that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."[1307] Hence, the Supreme Court has made it clear that RICO applies "not just [to] mobsters" but to "*any person* " who violates its provisions.[1308] The statute, moreover, is intended "to be read broadly," in accordance with "Congress' self-consciously expansive language and overall approach," as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime," regardless of whether the defendant is associated with organized crime or a "respected business."[1309]

***568** Against this clear background, the RICO claims against Donziger are entirely appropriate despite the fact that he is a Harvard-educated lawyer. The RICO question in this and all other such cases is whether all of the statutory requirements are satisfied with respect to each defendant, not whether the defendant fits a particular popular stereotype. Nevertheless, it bears mention also that this is a *civil* RICO case in which the plaintiff's burden is to prove its case by a preponderance of the evidence—that is, that "its version of the facts is more probable than its adversary's"[1310]—rather than beyond a reasonable doubt, as would be the case in a criminal prosecution.[1311]

B. Equitable Relief Is Available in Private RICO Actions

Two circuits have ruled definitively on whether equitable relief is available to private plaintiffs under RICO. They are divided.[1312] The question is open in our own.[1313] Unsurprisingly, Chevron asserts that the statute affords such relief to private litigants where otherwise appropriate while defendants argue for the opposite conclusion. This Court thus far has not passed on the issue though pressed by both sides to do so. The case now has been tried and the facts determined. The time for a decision on this point is at hand.

[26] Judge Diane Wood's opinion for the Seventh Circuit in *National Organization for Women v. Scheidler,*[1314] which held that equitable relief is available under the statute to prevailing civil RICO plaintiffs, is the most persuasive analysis of the issue thus far. In this Court's view, the conclusion reached by the Seventh Circuit is demanded by the plain language of the statute[1315] and draws added support from ***569** the context in which the statute was enacted.

RICO's civil remedies provision contains three parts. The first, Section 1964(a), grants district courts jurisdiction to "prevent and restrain" RICO violations.[1316] It does not limit the breadth of that jurisdictional grant.

The second part of the remedies provision is Section 1964(b),[1317] which states that the Attorney General may institute proceedings under Section 1964(d) and authorizes the court to enter restraining orders, prohibitions, or take such other actions as it deems proper.

The third and final part, Section 1964(c),[1318] provides that any person injured in his business or property by a violation of the statute may sue in a district court and shall recover, *inter alia,* treble damages and attorneys' fees.[1319]

Read together, as they must be, Sections 1964(b) and (c) plainly provide remedies in addition to, and not in place of, the remedies provided for in Section 1964(a). Section 1964(a) empowers district courts to "prevent and restrain" RICO violations, thus authorizing injunctive relief. It does so generally rather than limiting the jurisdiction conferred only to cases brought by the Attorney General or some other public actor. Section 1964(b) specifically authorizes suits by the Attorney General and confers additional powers on the district courts in such actions—the issuance of restraining orders, prohibitions, or other relief they deem appropriate. Finally, Section 1964(c) creates a private right of action for treble damages.

"[T]his reading of the statute gives the words their natural meaning and gives effect to every provision in the statute."[1320] It is consistent also with Congress's intent "not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."[1321] The Supreme Court repeatedly has rejected efforts to curtail the scope of civil RICO actions where courts ignore Congress's insistence that the statute be "liberally construed to effectuate its remedial purposes."[1322] "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."[1323]

This reading is supported also by the context in which RICO was enacted, a context of which Congress is deemed to have been aware.[1324] ***570** Article III of the Constitution provides that the judicial power of the United States extends "to all Cases, in Law *and Equity*."[1325] Congress implemented Article III in 1789 by conferring "jurisdiction over 'all suits ... in equity.' "[1326] The Supreme Court has rejected efforts to curtail the equitable powers of district courts in cases in which they otherwise have subject matter jurisdiction unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity."[1327]

RICO does not "in so many words, or by a necessary and inescapable inference," foreclose equitable relief in actions brought by private plaintiffs. Accordingly, this Court agrees with *Motorola Credit Corp. v. Uzan* that "[i]t would be extraordinary indeed if Congress, in enacting a statute that Congress expressly specified was to be 'liberally construed to effectuate its remedial purposes,' intended, without expressly so stating, to deprive the district courts of utilizing this classic remedial

power in private civil actions brought under the act."[1328] Absent just such an express Congressional deprivation, the Court declines to divest itself of equitable powers that the Framers intended district courts to have and that they have possessed since 1789.

This Court holds that RICO empowers a district court to grant such equitable relief as may be warranted in cases in which the court finds a violation of the statute and that the principles of equity support relief sought. It respectfully shares Judge Rakoff's view that the contrary reading of the statute in *Religious Technology Center v. Wollersheim*[1329] is unpersuasive.

C. Morrison v. National Australia Bank Does Not Require Dismissal

Donziger argues that *Morrison v. National Australia Bank, Ltd.,*[1330] requires dismissal of Chevron's RICO claims on the ground that application of the statute here would be extraterritorial and therefore improper.

[27] As the Court noted in denying in part defendants' motion to dismiss,[1331] the Supreme Court in *Morrison* reiterated the longstanding principle "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United ***571** States."[1332] "This principle," the Supreme Court said, "represents ... a presumption about a statute's meaning."[1333] "When a statute gives no clear indication of an extraterritorial application, it has none."[1334] Accordingly, the analysis of statute-based claims that involve foreign aspects involves two steps. The first is to determine whether Congress has given sufficient indication of an intention that the statute apply outside the United States. If it has not, the second step is to determine whether the proposed application of the statute in fact would be extraterritorial. This, the Court said, turns on "the 'focus' of congressional concern" or the activity "that the statute seeks to 'regulate.' "[1335] The determination is informed by the "objects of the statute's solicitude" and "th[e] transactions that the statute seeks to regulate."[1336]

The first step in the analysis is not open to significant discussion. Our court of appeals has ruled that RICO does not apply extraterritorially.[1337] The second step, however, is another matter entirely, as it requires determination of the focus of congressional concern, a matter not yet addressed by the Second Circuit.

The decisions to have considered the matter have taken essentially one of two approaches to determining whether application of RICO to situations involving conduct both in the United States and abroad would be extraterritorial. Some have taken the view that RICO's focus is on the enterprise, an approach that would make the domestic or foreign character of the enterprise, however that is to be determined, dispositive of whether the alleged conduct falls within RICO.[1338] Others, including this Court, have rejected that analysis. ***572** They have concluded that the focus of RICO is on the alleged pattern of racketeering activity.[1339] Chevron maintains that application of RICO to the conduct in question here would not be extraterritorial under either approach.

[28] This Court adheres to its determination that the focus of RICO for *Morrison* purposes cannot properly rest on the domestic or foreign character of the enterprise for the reasons this Court previously has expressed, which have been amplified by the Ninth Circuit in *Chao Fan Xu.*[1340] "RICO's focus is on the pattern of racketeering activity for purposes of analyzing the extraterritorial application of the statute."[1341] The next question, then, is how a court should look at the alleged pattern of racketeering activity.

This much is clear. RICO defines "racketeering activity" as an act "chargeable" or "indictable" under enumerated state and federal statutes.[1342] Thus, we first must direct our attention to acts "chargeable" or "indictable" under state or federal law, giving due regard in each case to *Morrison,* as only such acts are eligible for inclusion in a pattern of racketeering activity. If no pattern of racketeering activity, as that term is defined in the statute, has occurred, no substantive violation of RICO has taken place. But what more is required, if anything, is not evident.

Donziger contends that the answer is found in *Norex Petroleum Ltd. v. Access Industries, Inc.,*[1343] which, he contends, requires dismissal of the RICO claims as improper extraterritorial applications of the statute. As this Court concluded in denying his motion to dismiss the amended complaint, however, he is mistaken.[1344] It suffices for present purposes to quote the discussion from that opinion:

> "In *Norex,* a Canadian plaintiff alleged that the defendants had engaged ***573** in a racketeering scheme, using Russian companies, to take over control of another Russian company in which the plaintiff was a minority shareholder, leaving the Canadian plaintiff as 'a powerless minority shareholder.' { 631 F.3d at 31.} The district court dismissed the complaint under the pre-*Morrison* conduct-and-effects test. The Second Circuit affirmed. Insofar as the brief opinion addressed

the question now before this Court, it said only that 'simply alleging that some domestic conduct occurred cannot support a claim of domestic application. "[I]t is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." [*Morrison,* 130 S.Ct.] at 2884 (emphasis in original). The slim contacts with the United States alleged by *Norex* are insufficient to support extraterritorial application of the RICO statute.' { *Id.* at 33.}

The allegations of the amended complaint here are entirely different. Unlike the *Norex* complaint, the scheme alleged here was conceived and orchestrated in the United States to injure a U.S. plaintiff, involved a predominately U.S. enterprise, and was carried out in material respects, though by no means entirely, here. *Norex* therefore does not control. Indeed, as the Circuit in *Norex* found it unnecessary to articulate an approach to deciding whether application of RICO in a given situation is extraterritorial, beyond drawing a conclusion with respect to the particular complaint before it, that case sheds no light on the pivotal question before this Court. { *See* Note, *Life After Morrison: Extraterritoriality and RICO,* 44 Vand. J. Transnat'l L.. 1385, 1402 (2011) (*Norex* did not 'offer [ ] much guidance as to what might constitute domestic application.').} "[1345]

So *Norex* does not answer the question before the Court. Nor is this the only Court to reach that conclusion on analogous facts.[1346]

Chao Fan Xu[1347] is relevant also. The RICO conspiracy indictment in that case charged "a scheme to steal funds from the Bank of China" in China and to escape prosecution and retain the proceeds by transferring proceeds to the United States and fleeing here by, among other things, passport and visa fraud.[1348] The only predicate acts charged, however, were violations of U.S. criminal statutes.[1349]

On appeal from convictions, the Ninth Circuit first held that RICO's focus is on the pattern of racketeering activity.[1350] It then stated that it would "look at the pattern of Defendants' racketeering activity taken as a whole" in order "to determine whether Defendants' count one [*i.e.,* RICO] convictions are within RICO's ambit." ***574** [1351] It next observed that the first part of the alleged scheme "center[ed] on the Bank of China fraud and, to that extent it was predicated on extraterritorial activity [and therefore] beyond the reach of RICO."[1352] But it went on to note that the "second part [of the scheme] involved racketeering activities conducted within the United States," that those racketeering activities were within RICO's focus, and affirmed the RICO conspiracy conviction on the ground that they fell "within the ambit of the statute."[1353] It reached that conclusion, despite its view that the pattern of racketeering activity "may have been conceived and planned overseas," because "it was executed and perpetuated in the United States."[1354]

Chao Fan Xu thus seems to cut in two directions. At one point it suggested that the presence of a domestic pattern of activity is sufficient even where it is bound up with extensive foreign conduct. At another it indicated that it looked at the defendants' actions as a whole. In either case, however, it concluded that the conception and planning of the scheme overseas and the embezzlement in China as an integral part of the overall scheme did not foreclose application of RICO to the domestic pattern of racketeering activity.

In the last analysis, these cases yield no clear, authoritative principle for determining whether a given application of RICO is or is not extraterritorial. Quite understandably given the difficulty of the issue, they bring to mind Justice Stewart's famous observation with respect to hardcore pornography—"I know it when I see it."[1355]

In this case, the evidence at trial established that Donziger, a New York lawyer and resident, here formulated and conducted a scheme to victimize a U.S. company through a pattern of racketeering. That pattern included substantial conduct in the United States—*e.g.,* the bulk of Donziger's overall supervision of the entire operation; much of Donziger's fund raising activity; the ghostwriting of the Cabrera Report, which occurred mainly in Boulder, Colorado, and was supervised by Donziger from New York; much of the pressure and lobbying campaign designed to injure Chevron's reputation and impact its bottom line and its stock price, a campaign micromanaged by Donziger that employed many U.S. public relations advisors and lobbyists; the making of *Crude* by a New York-based and recruited film maker; and the improper efforts to ward off discovery through U.S. courts of what really had taken place with Cabrera, Stratus, and the LAPs. Much of the funding came principally from Kohn in Philadelphia and Burford, which operated at least partly in the United States. Absent the U.S. activity, there would have been no scheme. Even had there been one, it would have been doomed to failure, without that activity. Unlike ***575** *Norex,* this is not a case "simply [involving] some domestic conduct."[1356]

[29] As we demonstrate below, all of the elements of the RICO claims, including the existence of a domestic pattern of racketeering activity, have been proved. It therefore suffices for purposes of this case to hold that the

application of RICO to that domestic pattern of racketeering activity would not be extraterritorial.

IV. The Section 1962(c) Claim

The first RICO claim is that Donziger and others who did not appear at trial conducted, and continue to conduct, the affairs of an enterprise—essentially, the LAP team—through a pattern of racketeering activity that includes extortion, wire fraud, money laundering, obstruction of justice, witness tampering, and violation of the Travel Act through violation of the Foreign Corrupt Practices Act ("FCPA").

The Court begins the analysis by setting out the elements of a Section 1962(c) violation, knowledge of which is indispensable to all that follows. It then conducts a detailed analysis of whether there has been a Section 1962(c) violation and whether further violations are likely.

A. The Elements of a Section 1962(c) Violation

"A violation of § 1962(c) ... requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[1357] Here, the alleged enterprise in substance is the LAP team and its associated persons—an enterprise over which Donziger long has presided. The alleged pattern of racketeering activity by which Donziger and others conducted the affairs of that enterprise includes many of the wrongful, improper, and illegal actions discussed above.

B. The Enterprise

[30] [31] Section 1961(4) defines "enterprise" to "include [ ] ... any union or group of individuals associated in fact although not a legal entity." An enterprise may consist of "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which is proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[1358] It "need not have a hierarchical structure or a 'chain of command,' " and "decisions may be made on an ad hoc basis and by any number of methods."[1359]

[32] [33] A RICO enterprise "is an entity separate and apart from the pattern of activity in which it engages" and must be proved separately.[1360] Importantly, an enterprise need not be illegitimate or illegal, and the enterprise itself (or the members of an associated-in-fact enterprise) need not commit any of the racketeering acts at ***576** all.[1361] Indeed, the enterprise frequently is itself a victim of the racketeering activity perpetrated by its participants.

[34] In this case, the LAP team and its affiliates were a group of persons associated in fact for the common purpose of pursuing the recovery of money from Chevron via the Lago Agrio litigation, whether by settlement or by enforceable judgment, coupled with the exertion of pressure on Chevron to pay. The group included (1) Donziger, (2) the U.S. and Ecuadorian lawyers, including Kohn, Patton Boggs, and others, (3) Yanza, the ADF, and Selva Viva, (4) the investors who gave money to finance the operation, usually in exchange for shares of any recovery, (5) the LAPs' public relations, media, and lobbying arms, (6) the LAPs' technical people, including Stratus, Beltman, Maest, Russell, Calmbacher, Champ, Quarles, E–Tech, UBR, and 3TM, and (7) others. In accordance with the authorities just cited, the Court emphasizes that it does not imply that each and every member of the enterprise committed acts of racketeering activity or, for that matter, acted improperly in any respect, although some did. The findings are that all of these persons and entities were associated in fact for the purposes stated and that they constituted an enterprise within the meaning of the RICO statute.

C. Donziger Conducted and Participated in the Conduct of the Affairs of the Enterprise

[35] [36] Liability under Section 1962(c) does not attach unless an individual "employed by or associated with any enterprise ... conduct[s] or participate[s], directly or indirectly, in the conduct of [the] enterprise's affairs." In sum, a defendant must have "participated in the operation or management of the enterprise" in order to be liable under Section 1962(c).[1362] Section 1962(c) liability, however, is not confined "to those with *primary* responsibility for the enterprise's affairs," or to "those with a *formal position* in the enterprise."[1363] In the Second Circuit, "discretionary authority in carrying out the instructions of the [enterprise's] principals" is sufficient to satisfy the "operation or management" requirement.[1364]

For reasons amply detailed above, the Court finds that Donziger was in ultimate command and, in any case,

certainly conducted, and participated in the conduct of, the affairs of the enterprise at all relevant times.

D. The Predicate Acts

1. Extortion

Hobbs Act extortion, which is a RICO predicate act, requires "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened ***577** force, violence, or fear, or under color of official right" and attempts to do so.[1365] As Chevron has not paid the Judgment and nor settled the case, we are concerned here with attempted extortion.

One of Donziger's principal objectives from the early days of the Lago Agrio case was to subject Chevron to pressure sufficient to produce a generous settlement prior to judgment. Failing that, his aim was to obtain the largest possible judgment in the hope that the threat of enforcement would bring Chevron to the table or, if that did not occur, that the judgment actually could be collected.

[37] [38] These objectives, of course, are shared by every plaintiff in every lawsuit. As long as a lawsuit is pursued by lawful and proper means, it is not extortion, in the criminal sense, because the means are not wrongful.[1366] Indeed, some courts have held that even the filing of a meritless lawsuit is not extortionate lest every unsuccessful lawsuit lead to an extortion claim and thus chill resort to the courts.[1367] As we will see, however, this case is far more complicated than this simple proposition because it was not pursued by lawful methods alone.

a. The Elements of Extortion and Their Application Here

[39] The Hobbs Act's principal elements are two: "wrongful means and wrongful objective."[1368] The "means"—in other words, the threat—"can be wrongful because it causes the victim to fear a harm that is itself wrongful, such as physical injury, or because the means is wrongful, such as violence."[1369] Moreover, there is no need for a threat of violence. "[T]he Hobbs Act may ... be violated by a threat that causes the victim to fear only an economic loss."[1370]

[40] In this case, the allegedly extortionate behavior included Donziger's efforts to pressure Chevron to settle without exhausting the legal process—in other words, to pay before the marshal literally came to its door and took away its property to satisfy a final, enforceable judgment. ***578** Donziger wrote, for example, that the LAPs' "key leverage point ... is our ability to threaten Chevron's cash position—*i.e., to get their money without going through a lengthy appeals process that drags this out for years.*"[1371] On another such occasion, he said that, at "the end of the day[,] it is about brute force; who can apply the pressure and who can withstand the pressure. And can you get them to the breaking point."[1372] And he engaged in two categories of conduct to apply that pressure. Both were wrongful.

The first category was the corrupt and fraudulent behavior in and relating to the Lago Agrio litigation itself. It included the coercion of Judge Yánez to appoint a global expert and to select Cabrera, the secret payments to Cabrera and other means used to ensure that he would cooperate with the LAPs, the covert use of Stratus and others to write most of the Cabrera Report, the passing off of the Stratus–LAP product as that of a supposedly impartial and independent neutral expert, the payments to Guerra to influence the content of Zambrano's decisions during Zambrano's first tenure on the case, the ghostwriting of the Judgment, and the bribery of Zambrano.

The connection between Donziger's wrongdoing in the Lago Agrio case itself and his objective "to get [Chevron's] money without going through a lengthy appeals process that drags out for years" was straightforward. The bribery of Cabrera and Stratus's secret preparation of the report were intended to ensure that the court-appointed, supposedly impartial and independent expert—whose appointment Donziger and the LAP team engineered—would recommend damages "in the multiple billions of dollars."[1373] Inflating Chevron's potential exposure by means of that ostensibly neutral expert was a means to "threaten Chevron's cash position." So too with the ghostwriting of the Judgment, the corruption of Zambrano, and the LAPs' efforts to enforce that Judgment. The object all along was to maximize Chevron's possible exposure and to increase *both* the risk that the Ecuadorian court in fact would rule for the LAPs and the additional risk that any such judgment would be enforceable outside Ecuador, all in order to bring Chevron to its knees.

The other category of activities designed to pressure Chevron to pay was the use of the media, NGOs, the disinvestment campaign, celebrity advocacy, lobbying, incitement of official investigations and inquiries, and the attempt to incite criminal prosecution of former Texaco lawyers in order to pressure Chevron to settle. As will appear, by no means all of this activity was wrongful, but some certainly was.

b. Much of Donziger's Conduct Was Not Protected

Chevron contends that every act in furtherance of this plan was an act of racketeering activity because it was indictable under the Hobbs Act. Donziger makes essentially two rejoinders. The net of this ***579** clash is that both sides overreach, but that some of Donziger's means were wrongful.

First, Donziger contends that the LAPs were entitled to the recovery that was obtained in Ecuador, that Donziger so believed, and that a threat of economic harm is not extortionate, *i.e.,* wrongful, "unless (1) the defendant is not legally entitled to the property that he or she seeks *and* (2) does not hold a good-faith belief in that entitlement."[1374]

Second, he asserts that he did nothing more than conduct a lawsuit. Lawsuits, he correctly notes, all inherently instill fear of adverse results, and most settle for that reason. But the bringing of a lawsuit, he argues, is not extortion, at least not in the criminal sense, notwithstanding that it always exerts some pressure on the defendant to part with something of value in exchange for peace. Indeed, he understandably invokes the First Amendment in his defense.

Ultimately, the parties' respective arguments are not completely persuasive as to either categorical position.

i. Donziger's Entitlement Argument Is Without Merit

The first of Donziger's arguments rests on the uncontroversial proposition, derived from *United States v. Jackson*[1375] and its predecessors, that some perfectly lawful activities instill fear of economic harm and thus are not wrongful. The distinction between legitimate and wrongful (*i.e.,* extortionate) threats of economic harm turns, he argues, upon whether the threatener in good faith believes it is entitled, and in fact has a plausible claim, to the property it seeks. But that is where Donziger's argument goes off the tracks.

The *Jackson* panel did not hold that no threat of economic harm to obtain property is extortionate as long as the threatener, with the benefit of hindsight, could be said to have been entitled to the property demanded. Rather, it said that "Congress meant to adopt the traditional concept of extortion, which includes an element of wrongfulness."[1376] The element of wrongfulness may be supplied by (1) the lack of a plausible claim of entitlement to the property demanded, *or* (2) the lack of a good faith belief of entitlement, *or* (3) the lack of a nexus between the threat and the claim of right. It may be supplied also, in this Court's view, by inherently wrongful conduct. The existence of this element of wrongfulness is a question of fact for the fact finder.[1377] Finally, neither the plausibility of a claim of right nor the threatener's good faith belief is established merely by proof that the threatener in fact thought that the threatener, in some cosmic, moralistic or personal ethical sense, was entitled to the property.

One may assume, without deciding, that there was a plausible basis for bringing the Lago Agrio case in the first place and that Donziger at its inception had a good faith belief that his clients were entitled to recover something. One may assume further that the mere bringing of the lawsuit, though it of course carried with it some threat of economic harm to Chevron, was not wrongful. This does not get Donziger where he wishes to go.

It would be fundamentally wrong to view the threat of economic harm in this case in static terms. It was Donziger's purpose to magnify the pressure on Chevron by increasing both the perceived magnitude ***580** of its potential exposure and the perceived likelihood that the exposure in the end would culminate in huge liability. He repeatedly did so by manifestly wrongful means, which included corruption of the litigation and a pressure campaign premised on misrepresentations. Within the litigation, he coerced Judge Yánez to allow the LAPs to drop their remaining judicial inspections and to appoint their hand-picked global expert, coordinated the ghostwriting of the Cabrera Report to threaten Chevron for the first time with more than $16 billion of exposure; co-opted Cabrera to put his name to it; supervised the ghostwriting for Cabrera's signature on the response to the LAP and Chevron comments on the Cabrera Report, which raised the ante to more than $22 billion; and bribed Zambrano to allow the LAP team to ghostwrite the

multibillion Judgment. His pressure campaign relied upon his repeated dissemination of estimates of Chevron's damages exposure and the magnitude of the harm allegedly created by Texaco that he knew to be false.

Each of these tactics increased the perceived threat of harm to Chevron, either by increasing the dollar exposure, by increasing the probability of a judgment that could be enforced outside Ecuador, or by both. They were inherently wrongful by any definition. Chevron "had a preexisting right to be free from the threats invoked" by the illegitimate means employed.[1378] Viewing them in terms of the *Jackson* formulation, they destroyed the nexus between the original plausible claim and the fear of a catastrophic adverse result on that claim because the fear of such a result was a product not solely of the original plausible claim, but of the illegitimate means used to increase the exposure on that claim, the likelihood that Chevron would be found liable, and the likelihood that any such finding ultimately would prove enforceable. In other words, the illegitimate means that Donziger and his confederates used provided them with "leverage to force the payment of money" that arose uniquely from the illegitimate means. Moreover, the "actual disclosure" of those illegitimate means would have been, and even today would be, "counterproductive."[1379] Put still another way, one engaged in litigation either accepts the risk of an adverse result reached by fair and honest methods or settles, and that is fine. But a litigant who magnifies the risks to its adversary by corrupting the litigation in order to "get the price up" creates leverage purely attributable to the corruption, which is inherently wrongful, which bears no proper nexus to any plausible claim that may have been asserted in the first place, and from which the victim has a right to be free.

ii. Donziger's Conduct is Not Protected Petitioning Activity

Implicit in what has been said already, this Court accepts that litigation is a constitutionally protected right in the United States and assumes it should be afforded ample scope even when conducted abroad. It serves the important purpose of permitting resolution of disputes by means more desirable than otherwise might be employed. Accordingly, while the authorities already referred to do not compel a conclusion so broad, it assumes without deciding that even "meritless litigation is not extortion" under the Hobbs Act.[1380] But we are dealing here with something else entirely.

***581** [41] Chevron's claim with respect to the Lago Agrio case itself, insofar as it pertains to the predicate acts of attempted extortion, is not that the case was entirely baseless. Rather, it is that Donziger and others corrupted the case by bribing the judge and by other corrupt and fraudulent means and that they did so, among other reasons, to instill fear in Chevron of a catastrophic result sufficient "to get [Chevron's] money without" litigating the case to judgment, without "going through a lengthy appeals process that drags this out for years," and without the need for time consuming and expensive judgment enforcement proceedings.[1381] It is clear from cases in the *Noerr–Pennington* area[1382] that corruption of an adjudicative process removes any shield that the First Amendment otherwise would provide.[1383] That is so because "bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition."[1384] Accordingly, the actions in the Lago Agrio case itself, which are said to have been corrupt, to the extent proved, were wrongful means for Hobbs Act and RICO purposes.

c. Donziger's Extortionate Conduct

i. Donziger's Misconduct in the Litigation

As amply detailed above, Donziger's actions in increasing the pressure on Chevron by dishonest and corrupt steps in the litigation—coercion, bribery, ghostwriting, and so on—were intended to communicate threats to Chevron. Their purpose was to instill fear of a catastrophic outcome in order to increase the amount Chevron would pay to avoid the worst.

***582** [42] The Hobbs Act requires only obtaining, or attempting to obtain, "property from another, with his consent, induced by wrongful use of ... fear."[1385] No verbal or explicit threat is required.[1386] Thus, subject to the constraints of *Morrison,* which are discussed below, Donziger's misconduct in the litigation that was undertaken for the purpose of instilling fear of economic harm in order to induce payment by Chevron were indictable under the Hobbs Act, chargeable under the New York extortion statute, and therefore acts of racketeering activity.

ii. Donziger Made Representations He Knew Were Materially False in Order to Exert Pressure on Chevron

Donziger's misconduct outside the courthouse went hand in hand with his misconduct within it. Both were parts of an offensive to produce a multi-billion dollar payout. Donziger's "brute force" campaign depended largely on his ability to threaten Chevron by portraying the litigation as a likely source of huge liability for the company.[1387]

As an initial matter, although the existing case law perhaps does not go so far, the Court assumes for purposes of this decision that advocacy through public statements and lobbying activities for the purpose of inflicting economic harm, except to the extent it rests on knowingly false statements or statements as to the truth of which the speaker in fact entertains serious doubt, is not extortionate. But Donziger in some instances relied upon estimates and comparisons that he knew were false or the truth of which he seriously doubted. These included Russell's $6 billion SWAG, claims that contamination in the Orienté exceeded that of the Exxon Valdez by a factor of thirty, and assertions of Cabrera's impartiality and independence. Accordingly, these are proper subjects of the extortion predicate act claim.

As we have seen, Donziger exercised virtually total control over the specific content and timing of the press campaign.[1388] He rebuffed repeatedly Hinton's and Amazon Watch's efforts to exercise discretion over the substance or wording of particular materials.[1389] Donziger accordingly made or caused these assertions to be made in press releases and sought to have them repeated by prominent figures to create "pressure ... to get the price up"[1390] and induce Chevron to settle.

***583** *(A) Donziger Repeatedly Used Damages Estimates He Knew Were False or the Truth of Which He Doubted*

The LAPs' former chief scientist, David Russell, disavowed his initial damages assessment and repeatedly requested that the LAPs and Amazon Watch cease using his $6 billion figure.[1391] Russell warned that the estimate "was prepared in a very short time, with only a week of review ..., and [was] heavily influenced by [Donziger] in the writing."[1392] He said the number "[was] too high by a substantial margin, perhaps by a factor of ten, or more."[1393] As a result, he warned, the "2003 cost estimate is a ticking time bomb which will come back to bite you, and very badly if anyone attempts due diligence on it."[1394]

Donziger and Amazon Watch both promised to stop citing Russell's estimate in their press releases and statements to the public. But these promises were broken. The ADF[1395] and Amazon Watch—at Donziger's direction—continued to tout the $6 billion figure[1396] and continued to attribute it to Russell's firm.[1397] Donziger knew that Russell had disavowed his cost estimate and had revealed that it was wildly inaccurate. His continued reliance on the figure thus was deliberately deceitful or, at best, highly misleading.

Donziger now claims that his team had prepared a new, higher estimate, which satisfied him that it was acceptable to continue using Russell's cost estimate despite Russell's repeated demands that he stop doing so.[1398] But the Court does not credit that claim. The "replacement" estimates were prepared under Donziger's direction by junior lawyers who worked for him.[1399] They were intended to "make media/court/CVX [Chevron] itself start thinking in terms of billions,"[1400] and potentially to be used to pique the SEC's interest in ***584** the litigation.[1401] To the extent they ever were publicly quoted or relied upon, they too were weapons in Donziger's scheme to ratchet up the pressure on Chevron to settle.

Evocation of the Exxon Valdez disaster was another such weapon. Donziger's allegiance to the hyperbolic and highly misleading comparison between the contamination in the Orienté and the oil spilled by the Exxon Valdez further demonstrates Donziger's willingness to disregard the truth in order to inflate Chevron's perceived exposure. Despite repeated warnings from the LAPs' own scientific experts about the inaccuracy of the comparison,[1402] ADF press releases and other materials continued to maintain that "[e]xperts for the plaintiffs have concluded the disaster is at least 30 times larger than the Exxon Valdez spill."[1403] And they did so at Donziger's direction. Indeed, when the director of Amazon Watch suggested removing references to the spill from its website,[1404] Donziger insisted that it stick to the claim. He warned that there would be "HUGE implications for the legal case" if they disavowed the comparison to Exxon Valdez, and told Amazon Watch that it "[w]ould terribly prejudice the people it is trying to help if it makes this change."[1405]

It is no accident that the substance of the misrepresentation pertained to the scale of the disaster and, consequently, the supposed scope of Chevron's exposure. In dogged pursuit of headlines and, ultimately,

support for a number likely to "get the price up,"[1406] Donziger ignored warnings that those claims were "off by [a] factor of ten" or more.[1407]

(B) Donziger Sought to Pressure Chevron by Causing Third Parties to Act on His Misrepresentations

Donziger devoted particular attention to promulgating the misrepresentations related to Cabrera, the Russell SWAG, and the Exxon Valdez to elected officials, the SEC,[1408] and Chevron investors in the hope ***585** of inducing them to pressure Chevron themselves.

Donziger targeted then-New York Attorney General Andrew Cuomo and New York State Comptroller Thomas DiNapoli, the latter of whom is "the sole Trustee of the Common Retirement Fund ... whose portfolio includes more than 7.5 million shares of Chevron Corporation ... valued at approximately $556 million."[1409] In response to lobbying efforts by Donziger's team,[1410] Cuomo and DiNapoli wrote to Chevron chief executive officer, David O'Reilly, repeating what they were told and doubtless believed—that an independent, court-appointed expert (Cabrera) had recommended billions in damages against Chevron.[1411] Comptroller DiNapoli repeatedly urged the company to settle.[1412] He even wrote a Huffington Post piece recounting his request that "Chevron's board of directors settle this marathon litigation and spare the company's battered reputation any further damage."[1413] Both Amazon Watch and the ADF (*i.e.,* Donziger) then publicized Cuomo and DiNapoli's ***586** positions.[1414]

Donziger fed DiNapoli and Cuomo the same misrepresentations he was feeding the press.[1415] And he sought to use their influence, both as public officials and in the case of the Comptroller as a major Chevron stockholder, to "increase the leverage and increase the cost [to] Chevron," including "the cost of all the hassle [it has] to put up with from the environmental groups" and "the cost of their sullied reputation ...."[1416] That leverage was intended to convince Chevron to settle with Donziger and the LAPs.

(C) Donziger Pressed the Republic of Ecuador to File Criminal Charges Against Chevron Attorneys in Order to Pressure Chevron into Settlement

We have discussed already Donziger's efforts to incite the ROE to prosecute two Chevron lawyers—Reis Veiga and Pérez–Pallares—criminally. Donziger viewed a "criminal case" against the two lawyers, premised on alleged fraud in connection with the release signed with the ROE, as "a road that ... could force [Chevron] to the table for a possible settlement."[1417] Donziger was convinced that such a prosecution would be a potential source of "major press in [the] U.S." and a way to "really raise the cost to CVX."[1418]

To that end, he asked Chris Lehane to prepare a plan to "fully leverage the criminal investigation of ... Chevron executives."[1419] The priority of the plan was "to apply shareholder pressure on Chevron, including" letters to Chevron board members, "elected officials who head major pension funds," and "major investors" such as "public and university funds ...."[1420] The plan called also for "Meetings with State Pension Fund Elected Officials" (to persuade them "to publicly demand a meeting with Chevron to discuss the matter"), an "Analyst Road Show," a "Google ad that [would] put[ ] out some provocative information for anyone who types in a search for Chevron," and "SEC letters calling for an investigation of Chevron" in the "days and weeks" following the release of a story about the criminal investigation in order "to keep imposing tremendous pressure on Chevron."[1421]

Although the LAPs' efforts to stimulate such a prosecution initially met resistance, the tide turned following President Correa's election in 2007. After a series of meetings with Donziger and the LAP team, the president announced his support ***587** for the prosecution.[1422] On April 29, 2010, the Prosecutor General's office issued an opinion citing the Cabrera Report and formally accusing Reis Veiga and Pérez–Pallares of the crime of *falsedad ideologica.*

Donziger knew that, "[i]n the US, threatening to file a criminal case to get an advantage in a civil case is considered a violation of ethical rules of the profession."[1423] He nevertheless used the criminal prosecutions in an attempt to "keep the hammer over [Chevron's] head"[1424] and to "force [Chevron] to the table."[1425] His action in doing so, moreover, was wrongful irrespective of whether there was a plausible claim of wrongdoing by the lawyers and of any belief by Donziger in the merit of the claim of such wrongdoing. In terms of *Jackson's* formulation, there was no nexus between the property Donziger sought to obtain by threatening the Chevron lawyers with criminal prosecution and any

plausible claim that the lawyers had violated Ecuadorian law in connection with the release of Texaco years earlier. Moreover, Donziger and the LAP lawyers were well aware of the wrongful nature of their actions. They "resort[ed] to very sophisticated means" to prevent being "tied to the matter."[1426] Their efforts to distance themselves is probative of their awareness of the wrongful nature of their attempts to procure these prosecutions.

d. Application of the Hobbs Act to This Conduct Is Consistent With Morrison

Donziger's media, lobbying, and public relations campaign, as well as the Cabrera scheme, took place largely in the United States. Much of it was directed by Donziger in major part from his New York City apartment. As a result, *Morrison* has no bearing on the bulk of Donziger's conduct. Among Chevron's allegations of extortion, however, are various actions that took place, in whole or in part, in Ecuador or abroad, including the bribery ***588** of Zambrano, efforts to persuade the ROE to criminally charge Chevron attorneys, efforts to enforce the judgment abroad, and quite possibly the ghostwriting of the Judgment. The Court therefore must determine whether the presumption against extraterritoriality applies to the Hobbs Act.

The Hobbs Act has two basic components—(1) the wrongful use of fear, in this case, of economic or reputational harm (2) in order to obtain the property of another—neither of which evinces a Congressional intent that the statute be applied to extraterritorial conduct. To determine which of defendants' conduct properly is considered part of the domestic pattern, the Court therefore must discern the focus of the statute or the "object[ ] of the statute's solicitude."[1427]

The defining element of extortion is the pursuit of "something of value from the victim that can be exercised, transferred, or sold."[1428] By the statute's very terms, the conduct prohibited is to, "in any way or degree," "obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce, by ... extortion ...."[1429] In *Scheidler v. National Organization for Women, Inc.,*[1430] the Supreme Court explained that, "[a]t common law, extortion was a property offense"[1431] and demonstrated the significance of the defendant's objective to the definition of extortion by examining the claim alongside the crime of coercion. Coercion, the Court explained, targeted those who "employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses," but stopped short of seeking and acquiring property, which the crime of extortion requires.[1432] Thus, it is the defendants' desire "ultimately to enrich themselves" at the target's expense that transforms merely *coercive* tactics into *extortion.*[1433]

[43] As a result, the fact that certain of Donziger's wrongful efforts to force Chevron to pay took place in Ecuador is of no moment. While Donziger's activities in Ecuador were important, they in many respects were merely tools. Regardless of where the conduct creating the threat took place, the plan was hatched and run from the United States and its object was a multi-billion dollar payment from Chevron, a U.S. based company. The application of the Hobbs Act to the extortionate behavior therefore would not be extraterritorial.

2. Wire Fraud

Donziger engaged in multiple acts that are indictable under the wire fraud statute and that therefore are acts of racketeering activity.

a. The Elements of Wire Fraud

[44] [45] [46] The wire fraud statute prohibits the use of the wires "for the purpose of executing" a "scheme or artifice to defraud."[1434] A "scheme or artifice to defraud" is a plan to deprive a person of ***589** something of value by trick, deceit, chicane or overreaching. "[A]ny 'mailing that is incident to an essential part of the scheme satisfies the mailing element,' even if the mailing itself contain[s] no false information."[1435] Nor need the defendant personally communicate by wire—he or she need only cause the wires to be or initiate a series of events which foreseeably would result in their use.[1436] The scheme need not even be successful in order for liability to obtain under the statute.[1437]

[47] [48] Fraudulent intent is established by proof of intentional fraud or by demonstrating "reckless indifference to the truth."[1438] Intentional fraud is established by "a 'conscious knowing intent to defraud' ... [and] that the defendant contemplated or intended some

harm to the property rights of the victim."[1439]

[49] The statute requires also that the plaintiff prove the defendants used materially false or fraudulent pretenses, representations, or promises in the scheme.[1440] The materiality element is satisfied if the false pretense or representation has "some independent value" or "bear[s] on the ultimate value of the transaction."[1441]

Finally, although many of the wires at issue were interstate, a number of them were sent to or from the United States. In any event, "the wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' so this is surely not a statute in which Congress had only 'domestic concerns in mind.' "[1442]

b. The Conduct

[50] Donziger's overriding goal was to extract a large payment from Chevron in exchange for peace. In pursuit of that objective, however, he engaged, as we have seen, in a number of deceitful schemes, each of which was intended to play its part in achieving that end and each of which was furthered by use of the wires. These ***590** included, but were not limited to: (1) the ghostwriting of the Cabrera Report by Stratus and the LAPs and the passing off of the report as the work of Cabrera, together with the misrepresentations of his supposed impartiality and independence; (2) the false portrayal of Cabrera as neutral and impartial, (3) the concealment of the true relationship among Cabrera, Stratus and the LAPs, including concealment of the secret payments to Cabrera; (4) the ghostwriting by Stratus of the response to Chevron's objections to the Cabrera Report, which too were passed off as Cabrera's work; (5) the attempts to deceive Chevron and courts in the Section 1782 proceedings concerning what actually had transpired among Cabrera, Stratus, and the LAPs; (6) the ghostwriting of all or much of the Judgment and Zambrano's false claim of authorship; and (7) the false statements to the media and to public officials that were made to increase the pressure on Chevron.

In each of these schemes, Donziger specifically intended to mislead Chevron by falsely portraying the extent of its potential exposure and the likelihood of an adverse result, both material matters designed to induce it to settle the case and to do so at a higher figure than otherwise might have been available. He sought also to portray those same matters falsely to others in a position to exert pressure on Chevron toward the same end. Thus, he acted with *scienter,* and the schemes involved deception as to material matters. The jurisdictional means requirement was satisfied by the extensive use of the wires by Donziger, Fajardo, and Yanza, among others, to transmit messages—chiefly emails—both within the United States and between the United States and Ecuador in furtherance of the schemes.[1443]

***591** *3. Money Laundering*

Money laundering, a violation of Section 1956 of the Criminal Code,[1444] is a RICO predicate act.[1445] Section 1956 in pertinent part states that:

> "Whoever transports, transmits, or transfers ... funds [1] from a place in the United States to or through a place outside the United States or [2] to a place in the United States from or through a place outside the United States—
>
> > "(A) with the intent to promote the carrying on of specified unlawful activity ..."
>
> thereby commits a felony.[1446] "[S]pecified unlawful activity" includes, with an exception irrelevant to this case, "any act or activity constituting an offense listed in section 1961(1) of this title...."[1447] "[S]pecified unlawful activity" thus includes any act of racketeering activity, including Hobbs Act and state law extortion, wire fraud, obstruction of justice, witness tampering, and violation of the Travel Act. Section 2(b) of the Criminal Code, moreover, provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."[1448] Thus, whoever transfers, or willfully causes another to transfer, funds into the United States from abroad, or from the United States to another country, "with the intent to promote the carrying on of" a RICO predicate offense violates the money laundering statute.

[51] As the "cabeza" of the Lago Agrio litigation for the LAPs, Donziger's responsibilities included: (1) obtaining money to fund the litigation and related activities, including public relations and media, and (2) disbursing, or causing the disbursement of, the funds thus raised to vendors and to recipients in Ecuador, most notably Selva Viva, which managed most of the money sent there. To whatever extent he (1) obtained money from outside the

United States or (2) sent or caused money to be sent from the United States to another country, in each case with the requisite intent and to promote the carrying on of a RICO predicate offense, he committed money laundering.

The record in this case contains persuasive evidence of a number of such offenses by Donziger.[1449] The following are illustrative.

Donziger on March 23, 2007 received in his Chase attorney account in New York $1.75 million from a Gibraltar account controlled by Russell DeLeon, a law school friend Donziger recruited to help fund the case.[1450] He promptly transferred $1 million of that money to the Kohn firm in Philadelphia, where it was controlled by ***592** Donziger and Kohn pending its use for case-related expenditures.[1451] Donziger then caused that money to be transmitted to entities in the United States and Ecuador.[1452]

In the United States, that money paid in part for the production of the Cabrera Report: both Stratus and Cristobal Villao, an author of one of the Report's annexes, through his American employer, Uhl, Baron, Rana and Associates, received payments from Kohn, the money for which came from DeLeon's contribution to the case.[1453]

[52] Some of the funds were used in Ecuador to pay Cabrera through both the Lago Agrio court and the secret account the LAPs established to pay Cabrera outside the court process. For example, on August 14, 2007, after receiving a request from Yanza,[1454] Donziger asked Kohn to send $50,000 to the secret account in Ecuador.[1455] The Kohn firm did so on the following day.[1456] On August 17, 2007, $33,000 was transferred from that account to Cabrera.[1457] That process was repeated in the following month: Yanza emailed Donziger to request disbursement of an additional $50,000 for Cabrera,[1458] Donziger ***593** directed that Kohn deposit the money into the secret account,[1459] and the transfer was subsequently made to the secret account.[1460]

In sum, Donziger received money from overseas and caused it to be used in this instance in at least these two ways: (1) to fund in part the ghostwriting of the Cabrera Report, which was used in an attempt to extort Chevron; and (2) to pay Cabrera in violation of the Travel Act. In so doing, Donziger committed acts indictable for money laundering.

4. Obstruction of Justice and Witness Tampering

a. Obstruction of Justice

i. The Elements of Obstruction of Justice

Criminal Code Section 1503[1461] provides that "[w]hoever ... corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" is guilty of an obstruction of justice. "[T]he [plaintiff] must establish (1) that there is a pending judicial ... proceeding constituting the administration of justice, (2) that the defendant knew or had notice of the proceeding, and (3) that the defendant acted with the wrongful intent or improper purpose to influence the judicial ... proceeding, whether or not the defendant is successful in doing so."[1462] "[A] defendant does not need to know with certainty that his conduct would affect judicial proceedings ... [i]nstead, the defendant's conduct must only have the natural and probable effect of interfering with the due administration of justice."[1463] Section 1503 requires also proof of "a connection between the defendant's intentional acts and the likelihood of potentially affecting the administration of justice."[1464] That is, " 'the act must have a relationship in time, causation, or logic with the judicial proceedings.' "[1465] Obstruction of justice is a predicate act under RICO in cases where, as here, a defendant's efforts were "designed to prevent detection and prosecution of the organization's illegal activities [and] were part of a consistent pattern that was likely to continue for the indefinite future, absent outside intervention."[1466]

***594** *ii. Donziger Obstructed Justice*

As thoroughly recounted above, Donziger and the LAPs' U.S. counsel submitted the deliberately misleading Fajardo Declaration first to the court in Denver and then to many other courts throughout the country, including this one.[1467] The LAPs' American lawyers—including Donziger—were involved in drafting the declaration.[1468] They debated extensively the extent to which it would reveal the truth about the LAPs' "contacts" with Cabrera.[1469] And they decided that Fajardo rather than

Donziger should sign it for fear that Donziger, a U.S. resident and thus subject to compulsory process, would be deposed.[1470] Finally, the declaration, as discussed earlier,[1471] was misleading at best.

[53] Donziger's conduct with respect to the Fajardo Declaration was obstruction of justice, plain and simple.[1472] The declaration was drafted while the Stratus Section 1782 proceeding was pending, as Donziger was acutely aware.[1473] Its purpose—in Donziger's words—was to "prevent Stratus' role relative to the Cabrera report from coming out."[1474] Donziger was involved in the communications as to what it would and would not say. He knew that it was false or misleading. His conduct was intended to "impede ... the due administration of justice," and it fell squarely within the federal obstruction of justice statute.[1475]

b. Witness Tampering

i. The Elements of Witness Tampering

The federal witness tampering statute[1476] prohibits knowing attempts to *inter alia* "hinder, delay, or prevent the communication to a ... judge of the United States information relating to the commission or possible commission of a Federal offense."[1477] "The section was written broadly to encompass non-coercive efforts to tamper with a witness."[1478] Thus, one ***595** violates Section 1512 if one is "motivated by an improper purpose."[1479] Improper purposes include causing a witness to withhold relevant facts about a defendant's wrongful acts[1480] or to provide false testimony to the court.[1481]

ii. Donziger Tampered with the Testimony of Mark Quarles

[54] Donziger attempted to have Mark Quarles alter materially the declaration he submitted to Judge Sand in an earlier proceeding in this district between Chevron and the ROE.[1482] As discussed previously, Donziger urged Quarles to assert that Cabrera neither had entertained suggestions from nor even met with the LAPs regarding his work plan, both of which Donziger knew were false.

Although Donziger knew that the statements he sought to have Quarles make were false, he urged Quarles to adopt them to prevent exposure of the truth regarding Cabrera and to mislead the court. Donziger's effort to influence Quarles's testimony constitutes witness tampering.[1483]

5. Violation of the Travel Act Through Furtherance of Violation of the Foreign Corrupt Practices Act

The Travel Act,[1484] an enumerated RICO predicate,[1485] prohibits the use of "any facility of interstate or foreign commerce" in furtherance of, or with the intent to promote unlawful activity.[1486] "Unlawful activity" is defined in Criminal Code Section 1952(b)(2)[1487] as, *inter alia,* "bribery ... in violation of the laws ... of the United States." Chevron asserts that Donziger violated the Travel Act through the use of facilities of interstate or foreign commerce with the intent to facilitate violations of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA"). He did so by using email and by causing money to be wired to Ecuador to further the payment of money to Cabrera, a court appointee.[1488]

***596** *a. The Elements*

The FCPA's anti-bribery provisions apply where: (1) a "domestic concern," such as a U.S. resident or a resident's agent, (2) uses the "mails or any means or instrumentality of interstate commerce" (3) "corruptly" (4) "in furtherance of an offer, payment, promise to pay, or authorization" to pay money or "anything of value" to any person, (5) "knowing that all or a portion of" the payment would be "offered, given, or promised" to a "foreign official" (6) in order to influence any official act or decision, induce an action or an omission to act in violation of a lawful duty, or to secure any improper advantage, and (7) the making of the payment or offer to assist in obtaining or retaining business for any person or company or directing business to any person or company.[1489] Because all of the conduct material to elements of the Travel Act occurred within the United States,[1490] the presumption against extraterritoriality does not apply.

b. The Conduct

i. Donziger Was a "Domestic Concern"

"The term 'domestic concern' means ... any individual who is a citizen, national, or resident of the United States" and "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States ..."[1491] Donziger is a U.S. citizen, a member of the New York Bar, and maintains his office here.[1492]

ii. Donziger Used Instrumentalities of Interstate Commerce in Furtherance of the Payments

Under both the Travel Act and the FCPA, a domestic concern must "make use of the mails or any means or instrumentality of interstate commerce" in furtherance of the payments.

[55] Donziger's "use of the Internet to send emails in furtherance of [the Cabrera] bribery scheme [was] sufficient to satisfy the interstate commerce requirement of the FCPA"[1493] and Travel Act, as was his transfer of funds to a bank account.[1494] Specifically, Donziger used email to cause Kohn to transfer funds to the secret account in order to pay Cabrera from that account.[1495] Kohn complied with Donziger's ***597** requests and wired the money.[1496] Donziger, Fajardo, Yanza, and others discussed the details of the scheme via email.[1497]

iii. Donziger's Use of the Wires Was Corrupt and Intended to Influence Official Action

"Corruptly" means to act "knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor."[1498]

[56] As this Court has found,[1499] Cabrera often was referred to by a code name. Donziger was instrumental in arranging for him to be paid, over and above the payments that went through the normal court process, from a secret account. The Court has found that Donziger intended that at least part of the payments via the secret account would ensure that Cabrera did what Donziger and his confederates wanted him to do as is confirmed by the multi-year effort to conceal the truth concerning the relationship among Cabrera, Stratus and the LAPs.[1500] Indeed, Donziger would not go along with the suggestion to pursue the possibility of using a global expert until he was satisfied that he and the LAPs would control the expert. The report Cabrera signed was written for him by Stratus and the LAPs. Donziger's actions were corrupt and intended to influence official action.

iv. The Offers, Promises, and Payments to Cabrera Were of Value

The FCPA prohibits corrupt payments of "money" and corrupt "offer[s], gift[s], promise[s] to give, or authorization[s] of the giving of anything of value."[1501] The term "anything of value" is construed broadly to include such benefits as employment offers,[1502] travel expenses,[1503] and charitable contributions.[1504] Cabrera received tens of thousands of dollars directly from the secret account.[1505]

***598** *v. Donziger Facilitated the Payments Knowing They Would Be Given to Cabrera, a Foreign Official*

The FCPA prohibits domestic concerns from using email or wire transfers "in furtherance of ... [a] payment ... or authorization of the payment of any money ... to" "any person, while knowing that all or a portion of such money ... will be offered, given, or promised, directly or indirectly, to any foreign official ...."[1506] For the purposes of the FCPA, a "foreign official" is defined as:

> "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or ... any person acting in an official capacity for or on

behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organization."[1507]

The statute provides further that "[a] person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result" where the "person is aware that ... such circumstance exists, or that such result is substantially certain to occur."[1508]

The Court's findings make clear that Donziger caused the use of the secret account for the purpose of paying Cabrera,[1509] that he asked Kohn to wire money to that account,[1510] and that he knew the money was intended to pay Cabrera.[1511] It has found further that the money in fact was used to pay Cabrera.[1512] The Court therefore finds that Donziger was "aware" that it was "substantially certain" that Cabrera would be paid from the funds he wired to the secret account. Furthermore, as an expert appointed by the Lago Agrio court, Cabrera was an officer or official of the Ecuadorian court.[1513]

vi. The Payments Were for a Business Purpose

[57] "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for ***599** some person ...."[1514] The SEC and the Department of Justice interpret the FCPA to prohibit payments to court officials and regularly find that such payments satisfy the business purpose test.[1515] This Court agrees.

Here, the payments increased the likelihood that Donziger's business—that of contingency litigation—would benefit from a favorable judgment. Roughly 30 percent of the 20 percent contingency fee owed to the litigation team accrues to Donziger. He stood to benefit directly from any judgment and, accordingly, from any act that improved the likelihood that such a judgment would issue and its amount. The improper payments to Cabrera were intended to do, and did, exactly that.

E. There Is A Related, Continuous and Domestic Pattern

[58] [59] The pattern requirement is well defined. The racketeering activity must include "at least two [predicate] acts" within a ten-year period.[1516] The predicate acts must be "related," and they must "amount to or pose a threat of continued criminal activity."[1517] The predicate acts cannot be "isolated events"—instead, they must "have the same or similar purposes, results, participants, victims, or methods of commission."[1518] In addition, " 'a plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (*i.e.,* past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (*i.e.,* past criminal conduct extending over a substantial period of time).' "[1519] Open-ended continuity requires the "threat of continuing criminal activity beyond the period during which the predicate acts were performed."[1520] Closed-ended continuity requires "predicate acts extend[ed] over a substantial period of time," with two years generally considered the minimum duration necessary.[1521]

[60] The pattern at issue in this case comprises, at the very least, a five-year effort to extort and defraud Chevron through the series of predicate acts described above. These acts of racketeering satisfy the pattern requirement whether viewed as an open- or closed-end pattern. The number and variety of predicate acts, the duration of the period over which they have been committed, the fact that they all targeted Chevron and its money, and the fact that the overall scheme continues all demonstrate criminal activity over a substantial period of time and a threat that it will continue into the future. That threat is particularly acute in view of the defendants' failure thus far to achieve their goal.

***600** [61] This pattern of racketeering is domestic and satisfies the analysis required under *Morrison.* Each of the predicate acts described above is indictable and/or chargeable under statutes enumerated in Section 1961(1).[1522] In some instances, conduct that occurred abroad was indictable, notwithstanding the general presumption against extraterritorial application, because the presumption was overcome by the underlying statute (for example, money laundering, which by its terms applies to money sent to and from the United States). In others, the presumption against extraterritorial application applies to the underlying statute, but the focus or "the object of the statute's solicitude" is in the United States (for example, the attempts to extort money from Chevron, a U.S. company, by fears generated as part of a scheme conceived, run, and financed principally from the United States).

Although certain of defendants' actions took place abroad, this is a case in which "the conduct of the [affairs of the] enterprise within the United States was key to its

success."[1523] Further, many of the enterprise's participants, whose actions were quite material to the execution of the pattern of racketeering, live and work in the United States. Donziger, the head of the enterprise and the center of its decision-making power, resides and mostly operates within the United States (with the exception of a few trips each month to Ecuador). Its principal funders—Kohn and then Burford—operated entirely or in relevant part in the United States. Hinton, Lehane, and Amazon Watch—important actors in the pressure campaign—operated from Washington, D.C., and California. Donziger employed Colorado-based Stratus and other U.S.-based scientists to produce the fraudulent Cabrera Report and then used American law firms to attempt to prevent the disclosure of the truth regarding the Cabrera episode. Unlike the situation in *Norex,* these were not incidental, sporadic, or immaterial contacts with the United States.[1524] They have been sustained and significant. As a result, the Court finds that *Morrison* is satisfied.

F. Chevron Was Injured by the Pattern of Racketeering Activity and, Absent Equitable Relief, Will Continue to be Injured

Chevron now seeks, as against these three defendants, only equitable relief designed to prevent them from benefitting in any way from the Judgment. It seeks that relief both on nonstatutory state law grounds and under RICO. In order to obtain that relief on its RICO claims, it must establish that the RICO violations it has proved, actual and threatened, bear an appropriate causal connection to the relief sought. And though Chevron no longer seeks damages against these defendants, RICO's explicit provision for civil damages actions is a useful starting point in seeking to address the nature of the required causal connection.

[62] RICO explicitly provides a cause of action for "[a]ny person injured in his business or property by reason of a violation of" the RICO statute.[1525] Damages ***601** therefore are available only "to those persons injured by reason of the defendant's predicate acts."[1526] The predicate acts must be both the factual and the proximate cause of the injury.[1527] Equitable relief under RICO is constrained by the same causation requirements.

[63] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the ... violation led directly to the plaintiff's injuries."[1528] A "plaintiff must prove only ... an injury directly resulting from some or all of the activities comprising the violation," however, and need not prove that every predicate act constituting the pattern injured the plaintiff in some way.[1529]

Among the predicate acts that Chevron has proved are (1) multiple extortionate acts including, among others, (a) the ghostwriting of the Judgment and the promise of $500,000 to Zambrano for signing it, and (b) the ghostwriting of the Cabrera Report upon which the author(s) of the Judgment relied for the pit count that underlies more than $5 billion of the damages award, as well as the false portrayal of Cabrera as a neutral, impartial and independent expert, and the payments and other inducements to Cabrera to ensure that he "played ball," (2) multiple acts of wire fraud in furtherance of fraudulent schemes with respect to all of the foregoing, (3) money laundering to promote racketeering acts, including with respect to the ghostwriting of the Cabrera Report by Stratus and payments to Cabrera, and (4) violations of the Travel Act to facilitate violations of the anti-bribery provision of the FCPA by payments to Cabrera.

[64] Defendants contend that Chevron has not demonstrated that its injuries "flow" from the Judgment and that the Judgment's enforcement breaks the chain of causation because it is the result of an independent actor's discretion.[1530] Defendants' efforts to attenuate the chain of causation leading to Chevron's harm fail.

"The mere recitation of the chain of causation alleged by [Chevron] is perhaps the best explanation" of why that injury satisfies RICO's direct causation mandate.[1531] The attachment of Chevron's property, including the arbitration award, in Ecuador,[1532] was a product of the predicate acts just described. The threat of enforcement of the Judgment elsewhere is as well. Notwithstanding defendants' assertions to the contrary, the appellate decisions and the orders attaching Chevron's assets were not truly the "independent actions of third ... parties,"[1533] for the ***602** reasons discussed below.[1534] Significantly, Chevron's injuries are not attributable to a cause independent of defendants' ghostwriting, bribery and other misconduct.[1535] As the most "directly injured victim [ ]," there is no party better situated "to vindicate the law as private attorney[ ] general."[1536] Finally, Chevron's injuries are not indirect, incidental, or unintended—they were the very result Donziger sought by his predicate acts.

Not only are Chevron's injuries proximate consequences of the racketeering acts, but Donziger has realized gains from them at Chevron's expense and threatens to realize more. Donziger's retainer agreement[1537] with the LAPs

and the ADF, which is governed by New York law,[1538] provides that Donziger is entitled to be paid (a) 6.3 percent of all amounts collected in respect of the Lago Agrio litigation,[1539] plus (b) any arrearages in his monthly retainer,[1540] plus (c) reimbursement for expenses.[1541] Donziger's contingent fee is payable only out of "Plaintiff Collection Monies," which the retainer agreement defines as "amounts paid ... whether from Chevron Corporation ..., any other party listed as a defendant in respect of the Litigation ... or any other party added or joined to the Litigation as a defendant...."[1542] Thus, the Judgment directly resulting from Donziger's fraud is the indispensable predicate of his right to collect a contingent fee with respect to the Lago Agrio case. This is true also with respect to other property already seized from Chevron. Its intellectual property rights in Ecuador, which are worth between $15 and $30 million, are being held pending sale preparatory to the distribution of the cash proceeds to the Judgment creditors and their investors, subject to Donziger's right to his share of the recovery.[1543]

All of the property that Donziger now has and which he hereafter may receive as a result of the Judgment are and will be the products of the Judgment obtained in consequence of his predicate acts of racketeering. To the extent he has been enriched by property taken from Chevron, Chevron has lost that property as a proximate consequence of those predicate acts. Moreover, to the extent the Judgment is enforced in the future, Donziger will be enriched further at Chevron's expense to the extent of 6.3 percent of the property thus obtained.

***603** *V. Donziger Conspired to Conduct the Affairs of the Enterprise Through a Pattern of Racketeering Activity in Violation of Section 1962(d)*

RICO Section 1962(d) makes it unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]." Chevron asserts that Donziger conspired to violate Section 1962(c).

1. The Elements

[65] The elements of a Section 1962(d) violation are plain:

> "The 'straightforward language of § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.' " *Id.* (quoting 18 U.S.C. § 1962(d)). A RICO conspiracy charge 'is proven if the defendant "embraced the objective of the alleged conspiracy," and agreed to commit ... predicate acts in furtherance thereof." *Id.* (quoting *United States v. Neapolitan,* 791 F.2d 489, 495 (7th Cir.1986)). Assuming that a RICO enterprise exists, the government must prove only " 'that the defendant[s] ... know the general nature of the conspiracy and that the conspiracy extends beyond [their] individual role[s].' *United States v. Rastelli,* 870 F.2d 822, 828 (2d Cir.1989). In applying this analysis, we need inquire only whether an alleged conspirator knew what the other conspirators 'were up to' or whether the situation would logically lead an alleged conspirator 'to suspect he was part of a larger enterprise.' [*U.S. v.*] *Viola,* 35 F.3d [37] at 44–45 [(2d Cir.1994)]; *see also Salinas,* 118 S.Ct. at 478 (upholding conviction under Section 1962(d) where defendant 'knew about and agreed to facilitate the scheme')."[1544]

Thus, "[t]he RICO conspiracy provision ... is even more comprehensive than the general conspiracy offense" in that it does not require an overt act "to effect the object of the conspiracy."[1545] Indeed, one may be convicted of conspiracy to violate RICO without agreeing "to commit the two or more predicate acts requisite to the underlying offense."[1546]

2. The Conduct

Chevron's amended complaint names ten "RICO Defendants" and twenty-one non-parties as participants in the alleged RICO conspiracy. The RICO Defendants include Donziger, Fajardo, Yanza, Selva Viva, and the ADF.[1547] The non-parties include Stratus, Beltman, Maest and others. With the Stratus defendants having settled and all of the RICO Defendants other than Donziger having defaulted, the only alleged RICO conspirator who went to trial was Donziger.

The Court finds that at least Donziger, Fajardo, and Yanza conspired to violate RICO by conducting the affairs of the enterprise through a pattern of racketeering. Donziger was aware of far more than the "general contours" of the conspiracy—he was its primary architect and key to its viability.[1548]

VI. Chevron's Other State Law Claims

Chevron makes two other state law claims, viz. that defendants defrauded persons other than Chevron with consequent ***604** injuries to Chevron and that Donziger violated Section 487 of the New York Judiciary Law.[1549]

As the foregoing discussion makes clear, Donziger's pressure campaign included a plethora of false and misleading representations to persons and entities—including among others members of the media, the New York Attorney General, the SEC, the New York State Comptroller, and Chevron shareholders—often in efforts to pressure Chevron into settlement. Likewise, Donziger, a member of the New York Bar, attempted to deceive the judges of this Court. Among other things, he suggested that Mark Quarles include statements that Donziger knew to be false in a declaration before the Honorable Leonard Sand to deceive the court into believing that Cabrera was an independent expert.[1550] In attempting to explain away the Prieto email, he offered a deliberately false explanation to this Court that contradicted his prior sworn testimony in an obvious attempt to avoid sanctions for failing to produce documents from Ecuador.[1551] But these claims have been transformed radically by events.

Chevron has waived its claim for damages and seeks only injunctive relief. With respect to its claims premised on reliance by third parties (other than the Ecuadorian courts) on false or misleading statements, it seeks only an injunction against "[c]ommitting, aiding, abetting, inducing, or directing any acts of fraud."[1552] With respect to Section 487, it seeks only an injunction barring Donziger "from engaging in any deceit or collusion, or consenting to any deceit or collusion, with intent to deceive any court within the state of New York" and requiring him to attach a copy of the order to any initial appearance in any state or federal action in this state.[1553]

It is debatable whether the injunctive relief sought by Chevron with respect to these claims would be sufficiently specific to satisfy Rule 65(d)(1).[1554] It is debatable also whether it makes practical sense to subject every future public statement by these defendants, or every future action by Donziger in connection with litigation in courts in New York, to the possibility of contempt proceedings for violating an injunction barring "acts of fraud" and any "deceit or collusion." Moreover, the professional consequences of Donziger's behavior, past and future, may be addressed quite adequately by other bodies. Accordingly, the Court, in the exercise of discretion, declines to grant equitable relief on Chevron's claims of third party fraud and violation of Judiciary Law Section 487.

VII. Neither the Judgment Nor the Appellate Decisions in Ecuador Foreclose Liability

At the outset of the case, defendants pleaded the Ecuadorian Judgment as collateral estoppel. They subsequently conceded that the recognizability and enforceability of the Judgment under the Uniform Recognition of Foreign Country Money ***605** Judgments Act, codified in New York as Article 53 of the CPLR, is an essential element of their collateral estoppel defense.[1555] So, in an effort to avoid a determination of that issue, they now purport to disavow reliance on the collateral estoppel defense.[1556]

This disavowal is disingenuous. Defendants now argue that (1) the Court effectively is bound by statements or assertions contained in the Judgment and in the appellate decisions in Ecuador or, at least, that these statements and assertions have evidentiary significance; (2) the appellate decisions break the chain of causation between the bribery, ghostwriting, and other fraud in the Lago Agrio court and the injuries suffered by and threatened to Chevron; and (3) the Court should extend comity to the Ecuadorian decisions.[1557] Thus, defendants seek to breathe conclusive or, at least, substantial legal effect into these Ecuadorian court decisions without calling their arguments what in substance they are: a collateral estoppel defense or an effort to gain legal recognition of these decisions. Their arguments all are entirely without merit.

A. The Ecuadorian Decisions and Rulings Are Not Admissible for the Truth of the Matters Asserted Therein

To start at the most basic level, the statements and conclusions set forth in the Ecuadorian decisions lack evidentiary significance in this case. The Judgments, the decisions of the Ecuadorian appellate courts, and a few other rulings were received in evidence but only for the fact that they were rendered and contain the statements that they contain. In no case was any received for the truth of the matters stated. Thus, none properly may be relied upon for the truth of its statements. The defendants nevertheless relied in their post-trial submissions upon one or more of these documents as evidence of facts or conclusions they stated.[1558] It therefore is important to be clear as to their evidentiary status and the basis for the

Court's rulings.

The principal decisions and rulings that are in evidence are the (1) Judgment (PX 399 (Spanish), PX 400 (English)), (2) trial level clarification order (PX 429), (3) intermediate appellate court decision (PX 430), (4) intermediate appellate court clarification order (PX 431), and (5) National Court of Justice decision (DX 8095). In each case, however, the exhibit was received only for purposes other than the truth of the matters they asserted.[1559] Although defendants made a few allusions to an intention to offer one or more of these documents at a subsequent time for the truth of the matters asserted, no such offer ever was made.

In these circumstances, any contention that these decisions and rulings should have been received for the truth of the matters asserted has been waived. But even if it had not been waived, the documents ***606** would not have been admissible for their truth.

[66] The statements and conclusions contained in these decisions and rulings were out of court statements. Thus, if offered to prove their truth, they would have been inadmissible absent the existence of an applicable exception.[1560] Defendants never identified any allegedly applicable hearsay exception. The only one that seems even remotely relevant is the public records exception.[1561] But that exception does not apply to judicial findings.[1562]

B. The Appellate Decisions in Ecuador Do Not Break the Chain of Causation

Defendants assert that the Judgment was affirmed by two appellate courts and that there is no evidence "that every one of these [appellate] judges ... are [*sic*] corrupt or unqualified."[1563] This, they say, cleansed the case of the fraud perpetrated in Lago Agrio—in their words, they say it broke "the chain of causation" between the bribery, ghostwriting, and other fraud in the Lago Agrio court and Chevron's injuries.[1564] They are mistaken.

1. The Intermediate Decision

[67] The *sine qua non* of defendants' argument that the intermediate appellate court's decision broke "the chain of causation" is that it undertook a *de novo* review of the Judgment, affording no deference to the findings and conclusions below. Defendants, however, offered no evidence to support that proposition. Moreover, it is abundantly clear that the Ecuadorian appellate court did not conduct a review of that nature. The intermediate appellate decision and clarification order thus did not cleanse the Lago Agrio Judgment of its impropriety for at least two reasons.

First, the appellate court expressly declined to examine Chevron's allegations of fraud and corruption. The appellate panel stated that it "should not refer at all" to these allegations "except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America ... and this [court] has no competence to rule on the conduct of counsel, experts or other officials ***607** ... if that were the case."[1565] In its clarification order, the appellate court stated again that it was "stay[ing] out of these [fraud] accusations, preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America."[1566] Moreover, the appellate court could not have evaluated Chevron's bribery claim or any of its allegations related to or supported by Guerra, as Guerra had not yet disclosed what he knew to Chevron before the appellate decision was rendered.

Second, contrary to defendants' assertion, the appellate court did not review the record *de novo.* Under Ecuadorian law, the appellate court was required to "rule on the merit of the record."[1567] Defendants contend that this required (and resulted in) a *de novo* review of the Judgment.[1568] But a review of the intermediate appellate decision makes clear that is not what transpired. Apart from the fact that the appellate court explicitly stated that it would not pass on Chevron's fraud allegations, it declined also to analyze the evidence of overlap between the Judgment and the LAPs' internal files. The court failed entirely to address the overlap between the Judgment and the Fusion Memo, the Index Summaries, and the Fajardo Trust Email.[1569] And while the appellate court stated that it had "been able to confirm first hand that the record include[d]" certain "information" in the Judgment that appeared also in the unfiled Selva Viva Database,[1570] it did not identify the specific "information" to which it referred, where it had found it within the record, or why the Judgment differed from the Filed Lab Results but matched the Selva Viva Database. Further, the appellate court failed to address the fact that the errors it identified in the Judgment—inaccurate reporting of mercury and PAH levels—were present also in the LAPs' unfiled internal work product but nowhere in the Lago Agrio record.[1571] The appellate court thus declined to

address the fundamental implication of the overlap between the Judgment and the LAPs' unfiled work product—that the LAPs had written, or at least assisted Zambrano in writing, the Judgment.

It bears mention also that it would have been impossible for any court to have conducted a *de novo* review of the 188–page Judgment and the trial record in the time the appellate court rendered its decision. ***608** The record included more than 200,000 pages of trial evidence, 62,000 scientific laboratory analyses, testimony from dozens of witnesses, and more than 100 judicial fields inspections.[1572] Nevertheless, on January 3, 2012—only five weeks after the three member appellate panel was selected[1573]—the appellate court affirmed the Judgment.[1574] Even assuming that the judges began working on the decision as soon as they were selected, they could not have conducted a *de novo* review of this case—at least not in any meaningful sense of the term—in such a short time.[1575] This Court finds that it did not do so.

2. National Court of Justice

[68] Nor did the opinion of the National Court of Justice "break [ ] the chain of causation."

The National Court of Justice is a cassation court, *i.e.,* it reviews legal arguments only.[1576] It dismissed Chevron's claim that the proceedings should have been nullified due to the underlying fraud because "it is not possible to seek the cassation of a judgment by making these kinds of allegations" where the "appeal does not indicate which law has been violated" or "which legal rules have been infringed."[1577] It refused to "re-evaluate the evidence through a cassation appeal, because to do so would be to diminish the independence of trial judges,"[1578] even though a vital part of Chevron's appeal was the destruction of Judge Zambrano's independence by permitting the LAPs to draft his judgment.[1579]

C. In Any Case, the Ecuadorian Decisions May Not Be Afforded Comity or Other Recognition Because They Were Rendered In a Judicial System That Does Not Provide Impartial Tribunals or Procedures Compatible with Due Process in Cases of this Nature

[69] [70] United States courts may not give comity to or recognize the judgment of a foreign state if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law."[1580] As the Ninth Circuit succinctly ***609** stated: "We are aware of no deviation from that principle."[1581] In determining whether a foreign legal system "provide[s] impartial tribunals [and] procedures compatible with due process of law," a court considers not only the structure and design of the judicial system at issue, but also "its practice during the period in question."[1582] Courts essentially are tasked with one question: whether the foreign procedures are "fundamentally fair" and "do not offend against basic fairness."[1583] Moreover, they are not confined by the rules of evidence in answering that question.[1584]

[71] The Court is far from eager to pass judgment as to the fairness of the judicial system of another country, but it of course is obliged to do so.[1585] Vladimiro Álvarez Grau[1586] testified credibly at trial ***610** regarding Ecuador's political, governmental, and legal situation in recent years, the undue influence of the executive branch over the judiciary, and his conclusion that the Ecuadorian judiciary "does not operate impartially, with integrity and fairness in the application of the law and the administration of justice."[1587] Defendants offered no evidence to rebut Álvarez's testimony. Donziger and Ponce themselves stated in a *Crude* out take that all Ecuadorian judges are corrupt, doubtless an exaggeration but nonetheless probative. According to Donziger, the judicial system is "utterly weak" and lacks integrity. The State Department's Human Rights Reports indicate also that Ecuadorian judges sometimes decide cases based on substantial outside pressures, especially in cases of interest to the government. There is abundant evidence that, at the time the Ecuadorian courts' decisions in the Lago Agrio case were rendered, the judicial system was not fair or impartial and did not comport with the requirements of due process. The Ecuadorian decisions therefore are not entitled to recognition here.

The Ecuadorian judiciary has been in a state of severe institutional crisis for some time. Matters have deteriorated in recent years. From 1979 to 1998, judges of the Supreme Court of Justice, the highest court in Ecuador at that time, were appointed by the National Congress for six-year terms and therefore were susceptible to political influence.[1588] Ecuador's Nineteenth Constitution, in effect from 1998 until October 2008, overhauled the appointment system, providing that Supreme Court justices would serve life terms and that the Supreme Court *en banc* would appoint new justices.[1589] A brief period of stability and judicial independence followed these reforms.[1590]

1. The 2004 and 2005 Judicial Purges

This changed dramatically when the Ecuadorian Congress in 2004, just after the Lago Agrio litigation was filed, purged the three highest judicial tribunals in Ecuador.[1591] In December 2004, the Congress, at the instigation of then-President Gutierrez, unconstitutionally replaced 27 of the 31 justices of the Supreme Court with new justices elected by Congress.[1592] Just five months later, President Gutierrez declared a state of emergency and removed all of the Supreme Court justices, including those then recently elected.[1593] As a result, Ecuador was left without a Supreme Court for most of a year during which the Lago Agrio case was pending.[1594]

Ecuador's judiciary never has recovered from these events. In November 2005, ***611** following President Gutierrez's downfall, new justices selected by a new qualification committee established by Congress were appointed.[1595] In May 2006, that new Supreme Court purported to limit lower-court judges to four-year terms and arrogated to itself the power to appoint and reappoint lower court judges.[1596] In consequence, Supreme Court justices serve at the will of Congress, and lower court judges' futures depend on whether their rulings coincide with the positions of the higher-court judges.

2. The Election of President Correa

Rafael Correa was elected president of Ecuador in 2006. At his inauguration, he refused to swear to respect and submit to the Constitution of the Republic.[1597] President Correa's stated view was that "the Judicial Branch depends on the Executive Branch. If I don't give it money it has no means to act...."[1598]

Shortly after assuming office, President Correa commanded the Supreme Electoral Tribunal, with threats of violence, to set a date for a referendum to create a Constituent Assembly to draft a new Constitution.[1599] When the Tribunal obeyed, 57 of the 100 congressional representatives challenged the constitutionality of the Tribunal's proceedings and voted to remove the president of the Tribunal.[1600] The Tribunal, by then subservient to the President, dismissed these 57 representatives—all of whom had been elected—and called on 57 alternate representatives loyal to the president to fill their seats.[1601] The representatives who had been dismissed brought suit in the Constitutional Tribunal, which ruled in their favor and ordered that they be reinstated. President Correa immediately condemned that decision and sent the National Police to block the representatives from returning to the Congress building.[1602] That very day, the newly appointed congressional majority unconstitutionally removed all of the judges of the Constitutional Tribunal and appointed new judges.[1603] The new Constitutional Tribunal reversed its previous decision with respect to the 57 original representatives and from that day forward consistently has backed the administration's decisions.[1604]

In April 2007, Ecuador voted to draft a new constitution, and a Constituent Assembly was formed. It issued "Mandate No. 1," which among other things proclaimed that it enjoyed full powers, threatened removal and criminal sanctions to any judge who ruled contrary to its decisions, and eliminated Congress.[1605] When this was challenged before the Constitutional Tribunal, that body ruled that no judge could contravene the Constituent Assembly.[1606]

The new October 2008 constitution further concentrated power in the hands of President Correa. It extended the term of ***612** the president and, though it provided for a Congress, it granted him the authority to dissolve it and hold new elections.[1607] It subjects certain decisions of the Supreme Court (renamed the National Court of Justice) to review by the Constitutional Tribunal (renamed the Constitutional Court).[1608] In addition, it terminated the appointments of 31 Supreme Court justices and subjected them to a lottery from which 21 randomly would be selected to serve on the National Court of Justice. Most of the 31 justices refused to submit to the lottery and resigned in protest, causing a gap of several months before the government was able to appoint interim justices.[1609] Moreover, the Constitutional Court is subject to the *de facto* control of the political branches,[1610] most notably the LAPs' stalwart supporter, President Correa.

Since his initial re-election in November 2008, President Correa has continued to interfere in judicial matters of interest to the Ecuadorian government.[1611] In a number of recent cases, judges have been threatened with violence, removed, and/or prosecuted when they ruled against the government's interests.[1612] The Correa administration has targeted large foreign companies in particular.[1613] In 2009, Ecuador withdrew from the International Centre for Settlement of Investment Disputes, and President Correa soon thereafter requested that Congress terminate 13

bilateral investment treaties that prescribed fair treatment toward foreign companies.[1614]

The president of the Civil and Criminal Commission of the National Assembly stated in 2009 that "[w]e have a justice administration system that has entirely collapsed."[1615] And in June 2010, the Judicial Council publicly declared that "the Judicial Branch is not independent," and noted "serious risks" "that affect the ability to dispense justice."[1616] Among those risks, the Judicial Council raised "the threat of impeachment,", the lack of "economic and financial autonomy," and outside "influence in matters that are the exclusive domain of the purveyors of justice."[1617]

3. The 2011 Judicial "Reorganization"

In January 2011, President Correa asserted the need to hold a referendum "to get my hands on the justice system."[1618] The referendum, which passed by a majority vote, resulted in, among other things, the dissolution of the nine-member Judicial Council, creation of a three-member Transitional Judicial Council to be appointed by government branches under President Correa's influence, and the restructuring of the entire judiciary by the Transitional Judicial Council.[1619] Shortly after its creation, the Transitional Judicial Council began evaluating judges and subjecting each ***613** to a psychological examination, which provided an opportunity to exclude judicial officers who did not support the interests of the government.[1620] Hundreds of judges were fired and many resigned.[1621] On September 5, 2011, President Correa declared a state of emergency and permitted the Transitional Judicial Council not only to remove judges and justices, but also to designate their replacements.[1622] Many of the Council removals were of judges who had criticized the reorganization process, including judges who were involved in cases in which the administration or President Correa had an interest.[1623] An International Oversight Committee—appointed in 2011 by President Correa and the Transitional Judicial Council—acknowledged that "suspension[s] of judges ... sometimes[ ] become strictly discretional, especially when they originate from the administrative review of a jurisdictional decision."[1624]

On January 18, 2012, the Transitional Judicial Council appointed the 21 judges of the National Court of Justice.[1625] Legal scholars reported that the candidates who were awarded the highest scores in their final evaluation interviews were those closest to the Correa administration.[1626] Members of the National Judicial Council were appointed on January 9, 2013, for a term of six years.[1627] The Council, headed by President Correa's former secretary, appoints and evaluates judges and substitute judges of the National Court of Justice and the provincial courts.[1628]

While there are many examples of President Correa's influence over the Ecuadorian judiciary, Álvarez's description of the lawsuit against the Ecuadorian newspaper, *El Universo,* bears mention in greater detail. President Correa filed impairment and defamation charges in 2011 against *El Universo,* its columnist, and certain of its directors regarding an editorial piece on the president's alleged lies.[1629] Five different judges temporarily presided in that proceeding.[1630] Within two days of Judge Paredes' appointment, he entered a 156–page judgment against the defendants.[1631] Each defendant was ordered to serve a three-year prison sentence and they collectively were to pay $30 million to President Correa as compensation, plus attorneys' fees.[1632] President Correa appealed the judgment on the grounds that he had not been awarded the full $80 million he had requested.[1633] Computer experts repeatedly confirmed the accusation that Judge Paredes had not written the judgment.[1634] Notwithstanding that information, the intermediate appellate court rejected ***614** defendants' appeals.[1635] The day prior to defendants' hearing before the National Court of Justice, Judge Encalada—who had served temporarily on the trial court—came forward with the following information: (1) Judge Paredes told her that President Correa's lawyer had written the judgment, and (2) Judge Paredes offered Judge Encalada 25 percent of the attorneys' fees awarded to President Correa if she presided over the trial and signed the judgment.[1636] Nonetheless, the newly-appointed National Court of Justice unanimously affirmed the judgment.[1637] It was only after national and international criticism that President Correa publicly pardoned *El Universo,* its directors, and the columnist.[1638]

All this has led numerous independent commentators, identified by Álvarez, to conclude that the rule of law is not respected in Ecuador in cases that have become politicized.[1639] Álvarez himself concludes that "the Judiciary can no longer act impartially and with integrity where the matter or dispute to be decided involves important political, social, or economic issues, and is instead subjected to constant pressure and threats that influence its decisions.

4. U.S. Department of State Reports

Álvarez's portrayal of the Ecuadorian judiciary is consistent also with the U.S. Department of State's Country Reports in recent years. According to the 2010 and 2011 Investment Climate Statements, "[c]orruption is a serious problem in Ecuador," and there were concerns that the Ecuadorian courts were "susceptible to outside pressure" and were "corrupt, ineffective, and protective of those in power."[1640] Those same reports indicated that neither legislative oversight "nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges."[1641]

***615** Likewise, the Human Rights Reports for Ecuador recognized that the judiciary was "susceptible to outside pressure and corruption," particularly in cases of interest to the government.[1642] In fact, the 2008 Human Rights Report described "the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature."[1643]

5. Donziger and His Colleagues Admitted the Weakness, Politicization, and Corrupt Nature of the Ecuadorian Judiciary

The outspoken opinions of Donziger and his colleagues are in line with those held by Álvarez. Ponce, one of the Ecuadorian lawyers for the LAPs, had the following conversation with Donziger in a *Crude* outtake:

> "DONZIGER: Where's the judge? They're all weak.
>
> "PONCE: All the judges here are corrupt. Even ...
> "DONZIGER: They're all corrupt! It's—it's their birthright to be corrupt."[1644]

According to Donziger, the only way to secure a fair trial in Ecuador is by causing disruption because the judicial system is plagued by "utter weakness" and lacks "integrity."[1645] Donziger's understanding of the Ecuadorian judiciary was that judges "make decisions based on who they fear the most, not based on what the laws should dictate."[1646] He viewed the Lago Agrio litigation "not [as] a legal case," but rather "a political battle that's being played out through a legal case."[1647] In discussing the Lago Agrio case with Ponce and others, Donziger said: "You can solve anything with politics as long as the judges are intelligent enough to understand the politics.... [T]hey don't have to be intelligent enough to understand the law, just as long as they understand the politics."[1648]

Accordingly, Donziger and his colleagues repeatedly have pressured the Ecuadorian judges "to let [them] know what time it is," to send a message that they cannot "fuck with us anymore—not now, and not—not later, and never."[1649] When one individual suggested to Donziger and Ponce that the judge would be "killed" for ruling against the LAPs, Donziger responded that the judge "might not be [killed], but he'll think—he thinks he will be ... [w]hich is just as good."[1650] Donziger ***616** and his colleagues's statements—all of which were captured on video—evidence their acknowledgment that the Ecuadorian judiciary does not provide impartial tribunals.

6. President Correa's Influence in the Lago Agrio Litigation

The "political battle" in Ecuador was made possible by President Correa who consistently has expressed strong feelings about, and demonstrated great interest in, the LAPs' suit against Chevron. President Correa pledged his full support to the LAPs in a 2007 meeting with Yanza, Ponce, and others.[1651] The LAPs' media agent reported to Donziger the following day that President Correa "GAVE U.S. FABULOUS SUPPORT. *HE EVEN SAID THAT HE WOULD CALL THE JUDGE.*"[1652]

A month later, after meeting again with members of the LAP team, President Correa broadcast a call for the criminal prosecution of the "Chevron–Texaco ... homeland-selling lawyers" in addition to the prosecution of PetroEcuador officials.[1653] In a *Crude* outtake, Donziger states: "This is incredible.... Correa, the President of Ecuador, just said that anyone in the Ecuadorian government who approved the so-called remediation is now going to be subject to litigation in Ecuador. Those guys are shittin' in their pants right now."[1654] When the Prosecutor General found no basis to support criminal charges, he was removed from office and replaced by President Correa's former college roommate who—unsurprisingly—agreed several months later that the criminal case should be reopened.

President Correa's public support for the LAP team in the

Lago Agrio litigation grew even stronger over the next few years. In separate radio broadcasts in 2009, President Correa announced that he "really loathed the multinationals," and "he want[ed] our indigenous friends to win."[1655] When the Judgment issued in 2011, President Correa praised it as an "historic" ruling.[1656] In press releases, speeches, and other public forums, President Correa has continued to attack Chevron.[1657] And a month after Zambrano provided the defendants with a declaration contesting the bribery and ghostwriting allegations, he started a new job as a legal adviser that is majority owned by PetroEcuador, the Ecuadorian national oil company.[1658]

***617** In sum, this Court finds that Ecuador, at no time relevant to this case, provided impartial tribunals or procedures compatible with due process of law.[1659] The decisions of its courts in the Lago Agrio case are not entitled to recognition in courts in the United States. The defendants' reliance on them, as well as their collateral estoppel defense, therefore fail.[1660]

VIII. This Court Has Personal Jurisdiction Over the LAP Representatives

A. The Personal Jurisdiction Defense Has Been Stricken

Lack of personal jurisdiction is an affirmative defense. Camacho and Piaguaje—the LAP Representatives—pled that the Court lacks personal jurisdiction over them. The Court struck this defense as a sanction for their failure to produce documents relevant to their personal jurisdiction defense. Accordingly, there is no need to address the merits of the stricken defense. Nevertheless, against the possibility that a reviewing court might disagree with the sanctions ruling, the Court concludes that it would have had personal jurisdiction over these defendants in any case.

B. In Any Case, This Court Would Have Personal Jurisdiction At Least Under N.Y. CPLR 302(a)(1)

[72] In determining whether a court has personal jurisdiction over an out-of-state defendant, it "must determine whether the plaintiff has shown that the defendant[s] [are] amenable to service of process under the forum state's laws; and [ ] it must assess whether the court's assertion of jurisdiction under these laws comports with the requirements of due process."[1661]

1. Relevant Facts

[73] Donziger lives and works on Manhattan's Upper West Side. His family and law practice are here. It is here that he long has spent the majority of his time.[1662]

The LAP Representatives have engaged in activities in New York through Donziger—their attorney and agent—and otherwise since as far back as 1993 and extending up to and beyond February 2011, when this action was filed.

Donziger has pursued his quest to hold Texaco and later Chevron accountable for the alleged pollution in Ecuador, first through *Aguinda* in this Court and then in the Lago Agrio case, for over twenty ***618** years. He has done little else in that time. The only other client he has represented has been Russell DeLeon, an investor in the Ecuador litigation.[1663]

That he has had time for little else is not surprising considering the scope of the campaign in which Donziger and others acting at his direction have carried out against Chevron. He has run a three-pronged strategy that included litigation, lobbying, and a media campaign.

All of this is spelled out in Donziger's January 2011 retainer agreement,[1664] which simply codified in black and white what had been going on for years. Its terms are instructive, as it makes clear the scope of the activity, including extensive activity in New York, that the LAPs hired Donziger to perform. Among the key points are these:

- The recitals define the "Litigation" to include the Lago Agrio case; the Section 1782 actions; enforcement proceedings in Ecuador, the United States and elsewhere.[1665]
- They acknowledge that "the Plaintiffs previously engaged [Donziger] to provide legal services to pursue and defend, as the case may be, the Litigation to its conclusion" and reflect the desire "to document and define the economic compensation to which [Donziger] is entitled to receive [*sic*] for [his] representation of the Plaintiffs in connection with the Litigation."[1666]
- The agreement fixed Donziger's compensation as a

monthly retainer plus expenses plus a contingent fee equal to a percentage of the amount collected in the Litigation.[1667]

• It stated that Donziger had "acted as the primary United States attorney on behalf of the Plaintiffs to date,"[1668] continued the engagement,[1669] and designated Donziger as the "Plaintiffs' U.S. Representative."[1670]

• It designated Donziger "to exercise overall responsibility for the strategic direction ... and the day-to-day management of the Litigation" including

• "coordinating the overall legal strategy of the Plaintiffs to pursue and defend all aspects of the Litigation,"

• "*coordinating the efforts to procure funding* .... for the Litigation ... (including, without limitation ... obtaining and evaluating bids from third parties in respect of such funding ..., making recommendations to the Plaintiffs in respect of such bids and preparing and negotiating on behalf of the Plaintiffs the definitive transactional documents and agreements with each funder ...)."

• "*assembling and organizing the various non-legal advisors, experts, service providers and others* who or which from time to time will assist the Plaintiffs in pursuing and/or defending various aspects of the Litigation, and coordinating the efforts and undertakings of such advisors, ***619** experts, service providers and others."

• "*coordinating the media, public affairs and public relations activities on behalf of the Plaintiffs (including, without limitation, retaining lobbyists, public affairs advisors and public relations advisors on behalf of the Plaintiffs).*"[1671]

• It designated New York law as governing the entire relationship.[1672]

Many of Donziger's and his associates' actions in support of that strategy took place in New York. His office—run out of his apartment in Manhattan—has been the functional equivalent of the LAPs' New York office.[1673] He had numerous New York bank accounts, including an "Ecuador Case Account," a law firm account, and a Chase account in his name.[1674] These bank accounts were used to support the litigation and related efforts by, among other means, receiving deposits from investors and paying lawyers and expenses in Ecuador.[1675]

Donziger has managed the fundraising efforts for the LAPs—which have been integral to keeping the LAP team afloat—largely from New York. Acting from his New York base, he reached out to and entered into agreements with numerous investors. Most of the agreements among the LAPs, the investors, and others contain New York governing law clauses,[1676] and some provide for the giving of notice to the LAPs by giving notice to Donziger at his New York Office.[1677] Some of the investors too have been from New York. In one instance, for example, Donziger informed Yanza of "two possible investors in New York who can help us quite a bit with money now through the upcoming years" with a potential investment of $10 million.[1678] He solicited the help of and was in frequent communication with the New York based firm H5 in so doing,[1679] and he secured a substantial financing commitment from Burford Capital, which had New York employees and an office ***620** here.[1680] To ensure Burford's financial commitment, which was absolutely crucial to the LAP team, Donziger, Burford, and Patton Boggs crafted the Invictus Memo, which was discussed and circulated in New York.[1681] Fajardo and Yanza attended a meeting in New York to discuss the Invictus Memo in mid–2010.[1682]

Donziger micromanaged the Stratus operation in major part from New York.[1683] As we know, that operation led to the Cabrera Report, which was an integral weapon in Donziger's pressure campaign. Donziger regularly emailed with the Stratus consultants to oversee the drafting of the report and ultimately edited the report and annexes.[1684] Among other things, he discussed with Beltman the results of water contamination tests and the claim that the contamination in Ecuador was substantially worse than the Exxon Valdez oil spill,[1685] conspired to limit Clapp's public statements about the Cabrera Report,[1686] and coordinated a press release concerning the LAPs' comments on the Cabrera Report.[1687]

Donziger orchestrated the LAP team's efforts first to conceal and later to minimize the Cabrera fraud after the truth about it started coming to light. Fajardo ***621** traveled to Donziger's Manhattan apartment in order to "deal with various issues relating to the Lago Agrio case," including drafting Fajardo's Declaration used in the Section 1782 proceedings.[1688] Donziger was extensively involved in the drafting and editing of that declaration, which was used in attempts in sixteen federal courts including this one to obfuscate the fraud.[1689] And he hired New York counsel to represent the LAPs in the Section 1782 proceedings related to Cabrera.[1690] Donziger met with Shinder in Manhattan in 2009 to discuss Shinder's potential representation of the LAPs in those Section 1782 proceedings also.[1691]

Donziger has directed many aspects of the Lago Agrio case itself from his New York office. For example, the first meeting between Donziger and David Russell, who was the LAPs' first scientist and whose cost estimate the defendants misused, took place in New York.[1692] In late 2004, Donziger and Russell participated in a strategy meeting in New York in which they discussed test results indicating that PetroEcuador, not Chevron, may have been responsible for some of the contamination.[1693]

Beyond securing investors, coordinating strategy, and working with experts, Donziger controlled, largely from New York, the extraordinary media campaign waged against Chevron[1694] and reached out to financial and political bodies in New York to support and further publicize the litigation and to exert pressure on Chevron to settle. He arranged for New York's then Attorney General, who sent Chevron a letter requesting follow up about the veracity of Chevron's public disclosures respecting liability in Ecuador.[1695] Donziger arranged ***622** also for the New York State Comptroller to make a similar inquiry to Chevron.[1696] He persuaded Berlinger, another New York resident, to film and produce *Crude*.[1697]

Finally, the LAP Representatives themselves participated repeatedly in litigation in New York courts either as parties or as volunteers. Piaguaje was a plaintiff in *Aguinda*.[1698] Both he and Camacho were plaintiffs in an action before Judge Sand to enjoin Chevron's BIT arbitration against the ROE.[1699] They have appeared voluntarily by counsel in both of the Section 1782 proceedings[1700]—although they were not named as parties—to oppose the discovery that Chevron there sought, first from Berlinger and then from Donziger.

2. Section 302—Specific Jurisdiction

a. Legal Standard

i. Transacting Business

[74] This Court has jurisdiction over the LAP Representatives under New York CPLR Section 302(a)(1), which provides "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: ... transacts any business within the state...." This is because the LAP Representatives, principally through their agent Donziger, "avail[ed] [themselves] of the privilege of conducting activities within New York."[1701]

[75] In determining whether a defendant transacts business in New York, courts typically consider the totality of the circumstances.[1702] An out-of-state defendant need not enter the forum state, and a single contact in some circumstances may be sufficient to support jurisdiction.[1703] Moreover, a defendant's agent's contacts with New York also may provide the basis for finding that personal jurisdiction exists. "Among the factors considered" in evaluating agency based jurisdiction "are whether the nondomiciliary consented to the actor's conduct, whether the nondomiciliary benefitted from that conduct, and whether the nondomiciliary exercised 'some control' over the agent."[1704]

***623** Both commercial and non-commercial activities may support jurisdiction under Section 302(a)(1).[1705] Courts have enumerated several relevant commercial activities in a non-exhaustive list, including "(i) whether the defendant has an on-going contractual relationship with a New York corporation; (ii) whether the contract was negotiated or executed in New York and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship; (iii) what the choice-of-law clause is in any such contract...."[1706] The existence of a New York choice of law clause in a contract is significant because "the parties, by so choosing, invoke the benefits and protections of New York law."[1707]

Other actions by defendants, such as having their New York-based agent make multiple contacts with a plaintiff,[1708] sending a single shipment to New York while employed by an out-of-state business that regularly sells products to buyers in the forum state,[1709] or purposeful and repeated use of a New York correspondent bank account by a foreign bank[1710] satisfy the "transacting business" requirement as well. New York courts typically find, in the context of fee dispute cases, that an out of state entity's retention and use of the services of a New York lawyer constitutes transaction of business.[1711] This is so regardless of where the litigation, for which the New York lawyer was retained, took place.[1712] In addition, the act of litigating a case as a plaintiff in New York has been held sufficient to confer jurisdiction over a subsequent action to enforce a judgment rendered in the initial

case.[1713]

This is not to say that limited activities in New York to further the aims of foreign litigation necessarily are sufficient to find personal jurisdiction. Merely sending a cease and desist letter or serving documents upon a New York entity, for example, have been held insufficient because such actions do not "invoke the privileges or protections of our State's laws."[1714]

***624** *ii. "Arising Out of"*

[76] [77] In order to establish personal jurisdiction under CPLR 302(a)(1), a plaintiff must prove also that its cause of action arises out of the defendant's transaction of business in New York.[1715] This requires " 'an articulable nexus,' or a 'substantial relationship,' between the claim asserted and the actions that occurred in New York."[1716] It "does not [, however,] require a causal link between the defendant's New York business activity and a plaintiff's injury."[1717] It is enough that "at least one element [of the cause of action] arises from the New York contacts."[1718]

For example, in *PDK Labs,*[1719] the defendant's attorney—acting as his agent—"initiated from New York persistent, vexing communications" with the plaintiff for approximately three months.[1720] These communications apparently included threats of a lawsuit alleging patent violations and false advertising and attempts to compel the plaintiff into investing in defendant's product.[1721] The plaintiff then filed a declaratory judgment action against the defendant seeking a declaration that the defendant lacked standing to sue for patent violations or false advertising, and the defendant asserted personal jurisdiction as a defense.[1722] Relying on the New York communications, the Second Circuit there held that the plaintiff's declaratory judgment action was adequately related to activities in New York to confer personal jurisdiction even though the central issue in the case was whether the defendant—a Georgia resident—would have had standing to sue for harms he allegedly suffered in Georgia.[1723]

b. Discussion

i. The LAP Representatives Transacted Business in New York

As an initial matter, Donziger was the LAP Representatives' agent both under general principles of agency law[1724] and the analysis used in determining agency for the purposes of personal jurisdiction.

Finding that an agency relationship exists in these circumstances comports with *Elman v. Belson,*[1725] in which the Appellate ***625** Division held that an attorney was the defendant-client's agent even though the client denied having knowledge of or control over the attorney's actions.[1726] It held that a lawyer's activities in attempting to secure a judgment favorable for its client naturally are conducted for the client's benefit. Where a client effectively delegates certain tasks to an attorney, the "attorney has the implied authority to take all steps necessary in an action which he has been hired to bring."[1727] Indeed, "[a] company [or individual] cannot deputize another to take certain actions on its behalf and then disclaim knowledge or interest when those actions give rise to a legal dispute."[1728]

That Donziger acted for the LAP Representatives' benefit is without question. All of the actions he took in New York relating to the Ecuador litigation and pressure campaign were designed to secure a substantial judgment in their favor. Although the LAP Representatives did not consent to or control case management and strategy minutiae, their views were considered through the Assembly, which "me [ ]t on a regular basis and [ ] monitor[ed] the lawsuit and [ ] work[ed] with the lawyers to make [the affected communities'] views known about how they thought the lawsuit should be litigated, or whatever issues that they wanted to express ...."[1729] Moreover, the LAP Representatives repeatedly testified that they "trusted their attorneys" and delegated tasks, including fundraising and hiring, to those attorneys.[1730] They cannot now disclaim responsibility for the actions that those attorneys took on their behalf and in their interest.[1731]

The LAP Representatives' very retention of Donziger constituted transacting business in New York.[1732] That their retainer agreement and numerous other agreements to which they are parties contain New York governing law clauses further demonstrates that the LAP Representatives transacted business in the state and availed themselves of the benefits and protections offered by New York's laws.[1733] Additionally, they took repeated advantage of New York law and New York courts. Filing suit in New York in the *Aguinda* case, suing to enjoin the BIT arbitration, and appearing in the New York 1782 actions qualify also as transacting business in the state

under the reasoning of *SEC v. Softpoint.*[1734]

***626** Moreover, the LAP Representatives conducted business in New York and enjoyed the advantages offered by its position as the largest city in the United States and the center of the country's financial system. Donziger's work principally was done here. His associates worked out of his kitchen. He had multiple bank accounts in New York in which funds to support the litigation were deposited and from which payments to lawyers and for expenses were made. He spent a considerable amount of his time in New York, conducting the Stratus operation and pressure campaign, among activities, at least in part from New York. And it is no coincidence that Donziger conducted many of his litigation, fundraising, and public relations activities from and in New York. That he recruited investors, lawyers, and experts in and from New York shows not only that New York was central to the case because Donziger was located here, but also because many of those investors and lawyers themselves were located in New York. Understanding the unique role that New York state and local officials could play in influencing the company, he arranged for the state's attorney general and the city comptroller to exert pressure on Chevron.

There can be no serious doubt that the LAP Representatives transacted business in New York. Donziger was not merely a lawyer hired by an out-of-state resident to prosecute or defend litigation in a New York court or, for that matter, to do so elsewhere. These defendants engaged Donziger to run litigation in Ecuador, New York, and elsewhere. They explicitly designated him as their U.S. Representative. They put him in charge of raising money to finance the operation over a period of years; to plan and execute complex public relations and lobbying strategies in New York, elsewhere in the United States, and abroad; and to select and hire all manner of non-legal advisors, experts and service providers.

ii. The Claims in This Suit Arise Out of the Transaction of Business in New York

Having found that the LAP Representatives transacted business in New York, the Court turns now to whether that transaction of business arises out of the claims asserted in this action. Unquestionably, it does.

The nexus here is greater than that in *PDK* and at least equivalent to that in *Licci.* Chevron's fraud claims arise out of many of Donziger's activities in New York, including orchestrating the Cabrera Report, retaining Russell and later misusing his work, recruiting Berlinger, coordinating and supervising Stratus, supervising the Ecuadorian lawyers, meeting with Shinder concerning his Section 1782 representation, drafting and editing Fajardo's misleading declaration in the Section 1782 proceedings, work on the Invictus Memo, and engaging in a public relations pressure campaign against Chevron. And much like in *Licci,* Donziger's maintenance and use of New York bank accounts was essential to support the very operation that proximately caused Chevron's injury. The alleged fraud does not, as the LAP Representatives suggest, arise solely out of the bribe, ghostwriting, or other actions that took place exclusively in Ecuador.

This action arises as well out of the *Aguinda* action, action to enjoin the BIT arbitration, and Section 1782 proceedings in which the LAP Representatives appeared as well. The facts here loosely are analogous to those in *Softpoint,* where this court held that personal jurisdiction was proper in an action to enforce a judgment against the party who brought the original action. Past litigation in this forum forms a part of Donziger and the LAPs' overall ***627** strategy to secure the judgment against Texaco/Chevron which Chevron now challenges. The *Aguinda* litigation raised the same principal factual allegations as the Ecuador litigation that ultimately gave rise to the fraudulently obtained judgment. In the action to enjoin the BIT arbitration, the LAPs sought to have the Court enjoin Chevron from collaterally attacking the Ecuador litigation through arbitration. Chevron's claims here form part of the same protracted legal battle to obtain relief from the fraudulent judgment in Ecuador. Finally, the Section 1782 proceedings represent Chevron's attempt and the LAPs' strenuous efforts to avoid producing inculpatory documents from Berlinger and Donziger. The facts ultimately uncovered in the documents that Berlinger and Donziger did produce are central to the issues in this case.

For all these reasons, the LAP Representatives' claims in this action arise out of their extensive transaction of business in New York since 1993 and extending up to and beyond commencement of this lawsuit. Jurisdiction is proper under Section 302(a)(1).[1735]

3. Due Process

The Court still must determine that exercising jurisdiction

over the LAP representatives comports with the constitutional requirements of fair play and substantial justice.[1736] Such a determination rests on whether the defendants have had adequate minimum contacts with the forum state and whether exercising jurisdiction over them would be reasonable.

[78] The Court first must consider the nature and quality of the defendants' contacts with the forum state based on the totality of the circumstances. It is said that "[w]here the claim arises out of, or relates to, the defendants' contacts with the forum—i.e., specific jurisdiction [is asserted]—minimum contacts [necessary to support such jurisdiction] exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there."[1737] The Court has found already that Chevron's claims arise out of the LAP Representatives' contacts with New York. It has found that the LAP Representatives purposefully have availed themselves of the benefits of New York and its laws and could foresee being haled into court here. Having brought or joined in multiple lawsuits in this jurisdiction spanning many years and having secured legal representation plus public relations and fundraising services from an agent dedicated solely to their cause demonstrates their purposeful availment of the forum state and this action's foreseeability.

Next, the Court considers whether exercising jurisdiction would comport with fair play and substantial justice.[1738] Relevant considerations here include "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) ***628** the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies."[1739] As to the first prong, the Second Circuit has recognized that "[e]ven if forcing the defendant to litigate in a forum relatively distant from its home base were found to be a burden, the argument would provide defendant only weak support, if any, because the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago."[1740]

The LAP Representatives' primary due process argument against the exercise of jurisdiction is that they have been disadvantaged in this litigation because they were unable to obtain testimony or documents from Fajardo, Yanza, Sáenz and Prieto.[1741] Fajardo, Sáenz, and Prieto are the LAP Representatives' lawyers. In fact, Fajardo sought an extension of time on their behalf in this case[1742] and is their attorney-in-fact under broad powers of attorney. Yanza is their case coordinator. Yet, through three years of litigation, the LAP Representatives have evidenced not the slightest interest in procuring the testimony of these individuals or the relevant documents they possess in Ecuador. They did not seek their depositions or the evidence they possess, either through this Court or through letters rogatory. They did not revoke Fajardo's power of attorney.[1743] There is no evidence that they threatened to fire them if they would not cooperate. They simply did nothing. They did nothing because their lawyers and advisers concluded that participation in this case by Fajardo, Sáenz, Prieto and Yanza would hurt far more than it could help, if indeed it would help at all. The idea that the LAP Representatives were disadvantaged by litigating in New York because their own lawyers would not cooperate with them is absurd.

Finally, the fact that New York is a long way from Ecuador avails the LAP Representatives not at all. Piaguaje appeared regularly in court during the trial. Moncayo and Humberto Piaguaje, witnesses whom the defendants thought would be helpful, had no trouble coming here, just as Donziger has had no trouble going to Ecuador on a monthly basis for years. Fajardo has come to the United States in general and New York in particular on several occasions.

The exercise of personal jurisdiction over the LAP Representatives would be entirely consistent with the Due Process Clause even if the LAP Representatives had not forfeited their personal jurisdiction defenses.

IX. The Other Affirmative Defenses

A. The Judicial Estoppel Defense is Without Merit

[79] Donziger argues in substance that Chevron is judicially estopped to proceed with this case because it allegedly agreed in *Aguinda* to being sued in Ecuador, offered to satisfy any judgment rendered there except in limited circumstances, and extolled the supposed virtues of the Ecuadorian ***629** legal system in order to procure the *forum non conveniens* dismissal.[1744] He simply ignores the fact that Chevron was not a party to *Aguinda*, proceeding instead on the basis of the obvious inaccuracy. The LAP Representatives make essentially the same argument, although they in some but not all places in their brief recognize that Texaco—not Chevron—was the defendant in *Aguinda* and argue that Chevron is bound by Texaco's alleged promises.[1745]

The judicial estoppel argument is both shopworn and unsupported by sufficient facts. It was made and rejected in the Count 9 Action in an extensive opinion.[1746] Defendants have made no effort whatever to address that decision. There is no need to cover again the ground covered there. But there are three points that warrant mention.

First, for reasons previously set forth, the statements concerning the characteristics of the Ecuadorian courts, even if binding on Chevron, pertained to an entirely different time period and entirely different circumstances and thus could not be controlling here.

Second, the principal basis of the attempts to bind Chevron to statements allegedly made by Texaco was the proposition that Chevron "merged" with Texaco and therefore succeeded to its obligations. Alternatively, it depends heavily on piercing the corporate veil or otherwise disregarding the separate corporate existence of Texaco, which now is an indirect subsidiary of Chevron.

The record in this case establishes, and the Court finds, that Chevron did not merge with Texaco. To the contrary, "[o]n October 9, 2001, Texaco Inc. merged with a wholly-owned subsidiary of Chevron Corporation, Keepep Inc., and emerged from that transaction as the surviving corporation and a direct subsidiary of Chevron.[1747] After 2001, however, Texaco continued operating independently of Chevron; and it has been maintained as a separately-constituted corporation ever since."[1748] Moreover, despite the Court's observations in the prior decision that defendants had not alleged any basis for disregarding Texaco's separate corporate existence and that the key facts relating to such an argument were disputed,[1749] defendants neither alleged ***630** nor proved any such basis at trial. Indeed, defendants failed even to cross-examine the Chevron witness, Reis Veiga, who testified about Chevron's acquisition of the shares of Texaco through a reverse triangular merger, which left Texaco as the surviving company, concerning any of these matters. Accordingly, the Court holds that (1) Chevron is not bound by any of the statements made in *Aguinda* by Texaco and relied upon by defendants by virtue of any merger, and (2) defendants failed to establish any basis for disregarding the separate corporate existence of Texaco and attributing the statements relied upon to Chevron.[1750]

Third, the Texaco statements upon which defendants rely were made in briefs and declarations in *Aguinda* and were to the effect (1) that the Ecuadorian courts were neither corrupt nor unfair and, allegedly, (2) that Texaco would satisfy any judgment for plaintiffs, reserving its right to contest its validity in the circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act.[1751]

The allegation that Texaco promised that it would satisfy any judgment for the plaintiff as indicated above mischaracterizes the record and what actually transpired.

We start with the most recent. Donziger's post-trial memorandum leads into this subject with the following statements:

> "To obtain dismissal, Chevron then 'unambiguously agreed in writing to being sued on [the plaintiffs'] claims (or their Eucadorian equivalent) in Ecuador. *Aguinda v. Texaco, Inc.,* 142 F.Supp.2d 534, 539 (S.D.N.Y.2001).... Sure that it would prevail in Ecuador, Chevron 'also offered to satisfy any judgments in Plaintiffs' favor, reserving its right to contest their validity *only in the limited circumstances* permitted by New York's Recognition of Foreign Country Money Judgments Act.' *Id.* (emphasis added)."[1752]

In fact, the language he quoted about a promise to satisfy any judgments does not appear in Judge Rakoff's cited decision. It comes from somewhere else. Here is what actually happened.

Texaco did initially offer to make satisfaction of any judgment. One of a package of proposed conditions of the *forum non conveniens* dismissal it sought, subject to its rights to contest in some circumstances such a judgment.[1753] Defendants ***631** have offered no evidence that they accepted that offer or that any court relied upon any such proposal or promise. Certainly neither Judge Rakoff in granting the *forum non conveniens* dismissal, nor the Second Circuit in substantially affirming it, did so.[1754] Indeed, the stipulation that the *Aguinda* parties signed to evidence satisfaction of the conditions, a prerequisite to the *forum non conveniens* dismissal, contained no promise to satisfy any Ecuadorian judgment.[1755] Hence, there could be no judicial estoppel.

But let us assume *arguendo* that Texaco's offer had been accepted, or that the court had relied upon it in granting the dismissal, and that Chevron stands in Texaco's shoes to that extent. Even on those generous assumptions, the judicial estoppel argument would fail. A promise to satisfy any Ecuadorian judgment, subject to the right to contest it in the circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act, would have preserved the right to contest the validity of any such judgment on any *ground* permitted by the New

York Recognition Act in any forum, not merely to contest validity in an enforcement action brought in New York. Any other view would have rendered the reservation nonsensical, as it would have stripped Texaco of any defense to enforcement of a judgment on any ground anywhere in the world save in New York.[1756] Indeed, that is precisely the view previously taken by the Circuit.[1757]

***632** As Chevron's arguments here all would be defenses to enforcement of the Judgment under the New York Recognition Act, there could be no estoppel even if Texaco had made the promise inaccurately attributed to it, and even if Chevron were bound by it.[1758]

B. Defendants Have Abandoned All Other Pleaded Affirmative Defenses, Which in Any Case Lacked Merit

The defendants' answers contained long lists of purported affirmative defenses, most of them pleaded in conspicuously conclusory terms.[1759] Apart from those dealt with above, defendants' closing arguments and post-trial briefs mentioned none of them, with the exception that the LAP Representatives' post-trial memorandum argues that Chevron's amended complaint failed to allege fraud with the particularity required by Fed.R.Civ.P. 9(b).[1760] Nor, with the exception of a supposed unclean hands defense, was any evidence introduced to prove them. Accordingly, the pleaded affirmative defenses not dealt with above are rejected on the grounds that they have been abandoned and in any case would be unsupported by sufficient credible evidence.[1761] We pause here only to address, briefly, the Rule 9(b) argument and the lack of merit of the unclean hands defense.

1. Rule 9(b)

Donziger made no Rule 9(b) argument before trial and makes none now. The LAP Representatives, however, moved before trial for judgment on the pleadings dismissing the amended complaint[1762] and made a brief Rule 9(b) argument as part of that motion,[1763] which the Court denied in relevant part long ago.[1764] They now contend that Chevron waived at least part of its fraud claims because the amended complaint did not comply with the particularity requirement of Rule 9(b).[1765]

***633** At no point during the trial did any of the defendants object to the receipt of any evidence on the ground that any lack of specificity in the amended complaint surprised or prejudiced them. Nor did they seek a continuance during trial to meet any allegedly unexpected evidence. Indeed, no such application would have been persuasive, as the LAP Representatives knew Chevron's contentions inside and out from extensive discovery, the pretrial orders, and four voluminous motions for partial summary judgment.

In these circumstances, the LAP Representatives' Rule 9(b) argument is baseless. The notice and other functions of the rule were more than served here.[1766] Moreover, Rule 15(b)(2) provides in relevant part that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Given the lack of any objection to proof at trial based on any Rule 9(b) deficiency and the lack of any claim of consequent surprise or prejudice, all of the issues were tried by consent even if all were not specifically raised in the pleadings. Indeed, the complaint in these circumstances became irrelevant as to any such issues.[1767] In any case, the amended complaint is deemed amended to conform its allegations to the proof.[1768]

2. Unclean Hands

[80] The defendants all pleaded, albeit Donziger only in conclusory terms, that Chevron's claims were barred by alleged unclean hands.[1769] The LAP Representatives opened on it at trial.[1770] All defendants relied upon it, at one time or another, ***634** in urging the relevancy of evidence.[1771] But the pleaded defense disappeared from the case when the defendants barely even mentioned it in their post-trial submissions.[1772] Accordingly, they abandoned it. In any case, it is well established that unclean hands is not a defense to fraud on the court.[1773] Nevertheless, it is appropriate to find also that there was no credible evidence to support any such defense even if it had been pressed and even if proof of unclean hands would have been a defense in this case.[1774]

The one point upon which the Court thinks it appropriate to elaborate in this final regard is the defendants' claim with respect to the so-called Nuñez bribe scandal. The gist of the assertion is Chevron, through Diego Borja, an employee of one of its contractors, schemed to have Judge Nuñez removed from the case.[1775] The allegation, however, has not been proved.

It is undisputed that in May and June of 2009, Borja had a

series of secret videotaped meetings with Judge Nuñez and Patricio Garcia, who was affiliated with the Republic of Ecuador's ruling party,[1776] in which they discussed the Ecuador litigation.[1777] Borja later provided the tapes to Chevron, which turned them over to the Republic of Ecuador[1778] and released them publicly in August 2009.[1779]

Chevron claimed that the recordings showed that Judge Nuñez was implicated in a $3 million bribery scheme and would ***635** rule against the company.[1780] Donziger and the LAPs, in turn, accused Chevron of attempting to entrap Judge Nuñez in a bribery scandal and "undermine the trial process so the company c[ould] avoid paying a judgment."[1781]

The effect of these public pronouncements were many. Borja and his wife relocated to the United States, seeking asylum out of fear that they would be persecuted by the ROE for Borja's involvement.[1782] Once in the United States, Chevron paid for Borja's and his wife's living expenses for at least two years.[1783] In addition, Judge Nuñez recused himself from the case.[1784]

Defendants now hold fast in their claim that Chevron created the scandal in an attempt to disqualify Judge Nuñez.

As an initial matter, defendants point to Borja's one-time position as a contractor for the company and Chevron's later financial support of Borja in contending that Chevron put Borja up to the scheme that resulted in the recorded conversations. But the fact that Borja once worked for a contractor used by Chevron is not persuasive evidence that he acted at the company's behest when he recorded the meetings in question. Likewise, Chevron's payments to Borja upon his arrival in the United States suggest that the company had some interest in him as a witness. But they do not prove that Chevron was involved in or even knew of his efforts with respect to Judge Nuñez until after the fact.

Defendants next rely on recorded statements Borja made to his friend, Santiago Escobar, in which Borja purportedly admitted that the bribe scheme was illusory. But the recordings of Borja speaking to Escobar are inadmissible hearsay.[1785] And while defendants initially claimed that they intended to call Escobar at trial, they never did so.

Finally, defendants are correct that the recordings of the meetings with Judge Nuñez and others do not conclusively demonstrate that Judge Nuñez was offered or accepted a bribe, although they do show that a bribe was discussed outside of his presence and that Judge Nuñez made several statements that at least arguably indicated his intention to rule for the LAPs.[1786] But Chevron's misunderstanding or even misrepresentation of the content of the conversations would not show unclean hands, which requires "a transgress [ion of] equitable standards of conduct"[1787] that has an "immediate and necessary relation to the equity that the [plaintiff] seeks in ***636** respect of the matter in litigation."[1788] Even a deliberate misrepresentation of the content of the tapes, and the defendants have failed to prove that, would not remotely have approached in gravity the misconduct by the defendants proved in this case. This is particularly so in light of the fact that Chevron released the tapes to the ROE and the public, which were in a position to reach their own conclusions about what the tapes did and did not prove.

In the last analysis, the defendants have adduced no admissible evidence that Chevron committed a "willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct." Indeed, the LAPs' own investigator concluded that "it seems clear from the tapes that Chevron is telling the truth when they claim not to have instructed Borja to make the first 3 tapes and not to have even known about these conversations until June" 2009, after the events occurred.[1789]

X. Relief

A. Chevron Has No Adequate Remedy at Law and is Threatened With Irreparable Injury

Chevron has suffered injury—and is threatened with additional and irreparable injury—in consequence of defendants' fraud and their efforts to enforce the Judgment that they fraudulently obtained. It has no adequate remedy at law.

[81] Defendants resist this conclusion. Donziger argues that there Chevron has other remedies that could result in modification or vacatur of the Judgment. Donziger and the LAP Representatives all contend that Chevron may raise its claim that the Judgment was procured by fraud wherever and whenever they seek to enforce the Judgment.[1790] These contentions are baseless.

1. Further Proceedings in Ecuador, If Any Even Theoretically Were Available, Would Offer No Adequate Remedy

Donziger claims that "Chevron has had, and continues to have, available remedies in Ecuador by which the judgment could be modified or vacated, including appeal to the Constitutional Tribunal."[1791] The claim is unpersuasive.

The Court understands and assumes that there is a theoretical possibility of review—limited to "fundamental constitutional rights violations"—by the Constitutional Court of Ecuador.[1792] But the possibility of such review is not adequate for at least two reasons.

First, Ecuador does not provide impartial tribunals or procedures compatible with due process in cases of this nature. The evidence of political control of the Constitutional Court is highly persuasive and that of the partiality of the political branches to the LAPs irrefutable. Moreover, Donziger for years has described Ecuadorian judges as "corrupt,"[1793] "not ***637** very bright,"[1794] and "utter[ly] weak[ ]."[1795] He has made clear that the entire judiciary is beholden to the executive, that "this [case] is a political battle that's being played out through a legal case," and that one cannot win the legal case without politics on its side.[1796] When President Correa took office, Donziger bragged that the LAP team had gotten politics firmly on its side.[1797] Donziger's contention that Chevron may not obtain relief from this Court because there are remedies available to it in Ecuador is ironic and without merit.[1798]

Second, the Judgment has been enforceable in Ecuador, and elsewhere, at least since the intermediate appellate court ruled. Assets already have been seized in Ecuador. Given the size of the Judgment and the comparative impecuniousness of the defendants, there is no assurance that Chevron could recoup property applied to the Judgment between now and any decision by the Constitutional Court even if it prevailed. Defendants, moreover, have taken extensive steps to ensure that any funds recovered are held offshore and beyond the reach either of U.S. or Ecuadorian courts.[1799]

No other potential Ecuadorian remedy has been identified. Any that may exist on paper would be inadequate for the same reasons.

2. Defense of Multiple Enforcement Actions Would Not Provide An Adequate Remedy at Law

Neither would defense of multiple enforcement actions provide Chevron an adequate legal remedy.

First, the LAP team's enforcement strategy contemplates attacks on Chevron, its assets, and subsidiaries in multiple jurisdictions outside the United States followed by proceedings here.[1800] It already has sued in Ecuador, Argentina, Brazil, and Canada. The Invictus Memo and other evidence makes clear that the enforcement battle will not be limited to these four actions. The LAPs intend to pursue additional actions both abroad and in the United States. Moreover, the purpose of this multi jurisdictional attack is to "increase[ ] the odds of obtaining expedient and significant recovery, [and to] ... keep[ ] Chevron on its heels."[1801] Thus, the legal remedy the defendants tout is the defense of a multitude of lawsuits. The multiplicity of suits, moreover, is entirely unnecessary and thus vexatious. It is attributable in significant measure to the defendants' desire to profit by the coercive effect of the added burden and risks thus imposed. They certainly could have brought one enforcement action either in California or in Delaware, where Chevron is headquartered and incorporated, respectively, ***638** and been sure of collecting the entire Judgment if they prevailed without subjecting Chevron to the added burdens and risks of their strategy.

[82] [83] "The fact that there is [some] remedy at law, ... does not preclude equitable relief."[1802] Equitable relief is appropriate where a legal remedy is "incomplete and inadequate to accomplish substantial justice."[1803] The defense of a multiplicity of suits—in circumstances like these—does not afford an adequate remedy.[1804]

Second, defense of multiple enforcement actions would not avert interim harm to Chevron even if it ultimately prevailed in every proceeding. The LAPs seek to grab as many of Chevron's and its subsidiaries' assets as they can until the Judgment has been paid. And even if Chevron were to win every enforcement action outside Ecuador, it would not be afforded complete relief. Chevron's injuries go well beyond the Judgment itself—indeed, they include among other things the payment of legal fees to defend against the enforcement actions and harm to reputation and goodwill. Success in the enforcement actions would not remedy these harms.

3. Money Damages Are Not, and Could Not Have Been, an Adequate Remedy

Finally, defendants contend that "any 'injury' Chevron *might* suffer could be remedied by money damages.... If the injury is that Chevron may have to pay on the judgment, that payment would be a monetary award that can be repaired in kind."[1805]

[84] This argument does not withstand analysis. The LAP Representatives are indigenous people living in the Ecuadorian rainforest. Both they and Donziger repeatedly have cited their "lack of resources" as reasons to delay this action.[1806] Donziger's claim, in particular, is strikingly at odds with innumerable representations to this Court concerning his claimed lack of resources.[1807] In such circumstances, the theoretical availability of an action for damages is and always was entirely immaterial. As Justice Scalia has written, while economic injury usually "is not considered irreparable, ... that is because money can usually be recovered from the person to whom it is paid. If the expenditures cannot be recouped, the resulting loss may be irreparable."[1808] That is this case.

***639** A final point. The equitable relief the Court now grants would not provide a complete remedy for Chevron's injuries, existing and threatened. It does not set aside the Judgment. It does not enjoin foreign enforcement proceedings. But that does not preclude the Court from granting equitable relief that would solve the problem in part. Defendants have cited no authority standing for the proposition that equitable relief is unavailable if it does not provide a complete remedy to an injury that is not redressable at law.[1809] That would make no sense at all. It essentially would close the courts entirely to litigants who are threatened with injuries that are not compensable by money damages nor *wholly* preventable or redressable in equity. The relief granted here—relief that would prevent Donziger and the LAP Representatives from profiting from the Judgment or seeking to enforce it in this country—would partially remedy and partially prevent the injuries, existing and threatened, that cry out for relief. Certainly it is far better than pursuing fruitless claims for money damages against these three defendants.[1810]

B. Chevron Is Entitled to Equitable Relief Preventing These Three Defendants From Benefitting From the Fraud on the Court and Donziger From Profiting From the RICO Violations

1. Constructive Trust

[85] Chief Judge (later Justice) Cardozo stated the governing principle years ago in words cited many times since:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee (*Moore v. Crawford,* 130 U.S. 122, 128, 9 S.Ct. 447, 32 L.Ed. 878 [(1889)]; Pomeroy Eq. Jur. sec. 1053)."[1811]

Among the circumstances in which a constructive trust may be imposed are those in which the defendant stands to receive a benefit by virtue of fraud.[1812] In this context, ***640** moreover, fraud "may mean misrepresentation giving rise to a cause of action for deceit or it may imply the acquisition of property by some other type of wrongdoing or by any type of inequitable conduct."[1813] The imposition of a constructive trust on Donziger's right to a contingent fee, among other property traceable to the Judgment, and the other defendants' rights to recovery fits this mold to a tee.

Donziger's retainer agreement[1814] with the LAPs and the ADF, which is governed by New York law,[1815] provides that Donziger is entitled to be paid (a) 6.3 percent of all amounts paid in respect of the litigation,[1816] plus (b) any arrearages in his monthly retainer,[1817] plus reimbursement for expenses.[1818] His contingent fee is payable only out of "Plaintiff Collection Monies," which the retainer agreement defines as "amounts paid ... whether from Chevron Corporation ..., any other party listed as a defendant in respect of the Litigation ... or any other party added or joined to the Litigation as a defendant."[1819] Thus, the Judgment is the indispensable predicate of his right to collect a contingent fee with respect to the Lago Agrio case. That Judgment is the direct result of fraud by Donziger. Moreover, his right to a contingent fee and the fee itself are property subject to execution and attachment[1820] and certainly to the imposition of a constructive trust.

***641** This is true also with respect to other property already seized from Chevron. Its intellectual property rights in Ecuador, which are worth between $15 and $30 million, are being held pending sale preparatory to the distribution of the cash proceeds to the Judgment creditors and their investors, subject to Donziger's right to his share of the recovery. Moreover, Donziger owns, directly or through a nominee, shares of a Gibraltar company, Amazonia, through which the property collected on the Judgment is to be funneled.[1821] Those shares too are subject to a constructive trust, as whatever value they now

or hereafter may have is a direct function of the fraud perpetrated by Donziger.

Accordingly, the Court will impose a constructive trust for Chevron's benefit on Donziger's contractual and other rights to fees and other payments and upon his Amazonia shares. In addition, it will issue injunctive relief to ensure that Donziger, regardless of the ultimate efficacy of the constructive trust and disgorgement order discussed below, never benefits in any material way from the Judgment in the Lago Agrio case.

2. Other Equitable Relief to Prevent These Defendants From Benefitting from the Fraud

[86] Equity is confined by no rigid formula in framing relief. "A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."[1822] Moreover, "[a] court may grant more than one type of relief to a wronged" party.

In the circumstances, an order will be entered requiring Donziger and the other defendants to pay over and assign to Chevron all fees and other payments, property, and other benefits that they have received or hereafter receive, directly or indirectly, in consequence of the Judgment.

C. Injunction Against Enforcement in the United States

As demonstrated above, courts of equity enjoin the enforcement of judgments procured by fraud where there is no full, complete and adequate remedy at law and where the plaintiff would be injured irreparably in the absence of such relief.

Here, the Court has found that defendants always have intended to seek to enforce the Judgment in the United States. They have delayed doing so temporarily for tactical reasons: (1) the desire to avoid even the slightest risk that any U.S. enforcement action would be transferred to the undersigned, and (2) pursuit of their "keystone strategy" which rests in part on the belief that obtaining a foreign judgment recognizing the Ecuadorian Judgment might smooth their path to its recognition in this country. Their intent ultimately to pursue enforcement in the United States, where Chevron is incorporated and based (and where problems about reaching assets of Chevron subsidiaries in efforts to enforce the Judgment against Chevron could be avoided entirely by proceeding directly against Chevron), is clear.

[87] Given the Court's findings that Chevron has no adequate remedy at law ***642** and that the expansion of the multiplicity of enforcement actions already pending (four are pending in other countries already) would cause it additional irreparable injury, these defendants will be enjoined from instituting any enforcement proceedings in the United States.

D. This Relief Is Consistent with Naranjo

In March 2011, this Court issued a preliminary injunction temporarily barring enforcement of the Judgment anywhere outside Ecuador. In April 2011, the Court bifurcated, and later severed, Chevron's declaratory judgment claim (the "Count 9 Action") and stayed most proceedings in the first eight counts pending its resolution.[1823]

In September 2011, the Second Circuit vacated the preliminary injunction. Its subsequent opinion—*Chevron Corp. v. Naranjo*[1824]—did not pass, one way or the other, on this Court's findings with respect to the nature of the Ecuadorian tribunals or the evidence of fraud in the procurement of the Judgment. Rather, it explained that the panel had vacated the preliminary injunction on the ground that:

> "the procedural device [Chevron] has chosen to present those claims [in Count 9] is simply unavailable: The [New York Recognition of Foreign Country Money Judgments Act ("Recognition Act")] nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor."[1825]

In its view, a declaration with respect to the alleged unenforceability or non-recognizability of the Judgment could not be had because the Recognition Act (1) "does not authorize a court to declare a foreign judgment null and void for all purposes in all countries,"[1826] and (2) could not justify a declaration with respect to recognizability and enforcement in New York alone because there was no indication that the LAPs ever would seek to enforce the Judgment here.[1827] The panel noted also that "[c]onsiderations of international comity provide additional reasons to conclude that the Recognition Act cannot support the broad injunctive remedy granted by the district court."[1828] The Circuit remanded Count 9 to this

Court with instructions to dismiss it in its entirety,[1829] a direction that was carried out at once.

Defendants contend that *Naranjo* forecloses the relief Chevron here seeks. Donziger argues that "this Court cannot give Chevron what it wants without transgressing basic principles of international comity, as articulated by the Second Circuit in ... *Naranjo* ...."[1830] In so arguing, he misrepresents the relief Chevron seeks, misconstrues the holding in *Naranjo,* and attempts to broaden the panel's international comity discussion well beyond the confines of the statute it was interpreting.

First, the holding in *Naranjo* was limited to the panel's interpretation of New York's Recognition Act and its determination that that statute could not be used ***643** preemptively to attack a judgment. The Court of Appeals declined explicitly to pass on the "separate proceedings between these parties on other causes of action before" this Court.[1831] Those "other causes of action" were the ones Chevron pressed at trial. None of them invokes the Recognition Act, and *Naranjo* simply does not apply to them.[1832]

Chevron here seeks a determination that the defendants procured the Judgment by fraud and through violation of the RICO statute. It asks this Court for, among other things, a constructive trust over the proceeds to these defendants of that Judgment and an injunction barring these defendants from profiting from their fraud, including by seeking to enforce the Judgment in the United States. While the Count Nine Action under the New York Recognition Act implicated some of the same *questions* as those at issue here—most significantly, whether the Judgment was procured by fraud—the claims in this case involve an entirely different statute, RICO, and nonstatutory state law causes of action about which the *Naranjo* panel said nothing substantive. Indeed, as Judge Parker noted at oral argument on defendants' most recent petition for a writ of mandamus (the basis of which was that this Court supposedly had violated the "spirit" of *Naranjo*): "Judge Kaplan is [here] adjudicating a different case" from that at issue in *Naranjo.*[1833] "He is ... not adjudicating the Recognition Act.... He may be looking at the same problem, but he's looking at it from a decidedly different vantage point."[1834]

Second, the international comity concerns expressed in *Naranjo* were tied to the panel's discussion of the Recognition Act.[1835] Defendants' attempt to apply *Naranjo's* language more broadly is misguided. The *Naranjo* panel determined that "[n]othing in the language, history, or purposes of the [Recognition] Act suggests that it creates causes of action by which disappointed litigants in foreign cases can ask a New York court to restrain efforts to enforce those foreign judgments against them, or to preempt the courts of other countries from making their own decisions about the enforceability of such judgments."[1836] But it recognized, however, that "[t]o resolve the dispute before [it], [it] need only address whether the statutory scheme announced by New York's Recognition Act allows the district court to declare the Ecuadorian judgment non-recognizable, or to enjoin plaintiffs from seeking to enforce the judgment."[1837] Defendants now ask the Court to apply the Second Circuit's analysis of the precise language and legislative intent behind a New York statute to (1) an utterly different statute adopted by Congress, and (2) centuries-old non-statutory causes of action. They have offered no persuasive reason why it should do so.

Third, even if the international comity concerns voiced in *Naranjo were* more ***644** broadly applicable, they would not be implicated here. This Court does not here "set aside the Ecuadorian Judgment." It does not grant worldwide injunction barring any efforts to enforce the Judgment in other countries. And it does not, as Donziger claims, issue "a worldwide anti-*collection* injunction."[1838] It prevents the three defendants who appeared at trial—over whom it has personal jurisdiction—from profiting from their fraud. This does not "disrespect the legal system ... of the country in which the judgment was issued" or those of "other countries" in which the LAPs now, or later may, seek to enforce the Judgment.

It should be noted also that, although it does not pursue one here, Chevron's amended complaint sought a worldwide injunction as relief for Chevron's RICO and common law fraud claims. The *Naranjo* panel was keenly aware of that fact. And counsel for Chevron confirmed at oral argument that, if the Second Circuit were to lift the preliminary injunction (as it ultimately did), it would ask this Court "to reactivate the RICO claims and seek the same injunction under those claims[.]"[1839] Although one member of the panel explicitly contemplated providing this Court with "instructions ... with respect to what [kind of relief] might be appropriate under RICO,"[1840] the opinion in *Naranjo* provided no such instruction. Instead, the Court of Appeals pointedly "express[ed] no views on the merits of the parties' various charges and counter-charges regarding the Ecuadorian legal system and their adversaries' conduct of this litigation[, nor the relief Chevron sought,] which may be addressed as relevant in other litigation before the district court or elsewhere."[1841] Thus, even if Chevron still were seeking an injunction preventing Donziger and the LAP Representatives from enforcing the Judgment anywhere in the world—which it is not—nothing in *Naranjo* would

prevent it from doing so.

Conclusion

The saga of the Lago Agrio case is sad. It is distressing that the course of justice was perverted. The LAPs received the zealous representation they wanted, but it is sad that it was not always characterized by honor and honesty as well. It is troubling that, in the words of Jeffrey Shinder, what happened here probably means that "we'll never know whether or not there was a case to be made against Chevron."[1842]

But we have come full circle. As the Court wrote at the outset, "[t]he issue in this case is not what happened in the Orienté more than twenty years ago and who, if anyone, now is responsible for any wrongs then done. The issue here, instead, is whether a court decision was procured by corrupt means, regardless of whether the cause was just."

The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.

The foregoing, together with the appendices to this opinion, constitute the Court's findings of fact and conclusions of law. Defendants' motions to dismiss [DI 1860, DI 1862] are denied.

SO ORDERED.

***645 APPENDICES TO OPINION**

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***646** Appendix I—The LAP Internal Work Product Found in the Judgment Was Not in the Court Record

In order to determine whether LAP internal work product was contained in the Lago Agrio case record, we must begin by defining the record, which involves consideration both of Ecuadorian law and of evidence.

I. The Record in the Lago Agrio Case

A. The Official Record

Chevron and the defendants provided expert submissions under Federal Rule of Civil Procedure 44.1 on what constitutes the official record of a case under Ecuadorian law. Both parties' experts agreed that Ecuadorian law clearly defines what makes up the record, but they differed on whether and when a judge may consider anything outside of it.

Chevron's expert, Dr. Santiago Efraín Velázquez Coello explained that parties in Ecuador may submit materials to the court only by presenting them for filing in the official record. He cited two provisions of Ecuadorian law to support his conclusion:

> "in Ecuador, any documents must be added to the record according to the law; otherwise, the judge cannot consider them at the time of his decision. So states Article 117 of the Code of Civil Procedure, which indicates, '[o]nly evidence that has been properly taken i.e., that has been requested, presented and obtained in accordance with the law will be valid in court.' Article 2 of the Regulation on the Arrangement of the Process and Judicial Proceedings states: 'Chronology of the record. Submissions and documents that the parties file will be added to the record chronologically. [Nonparty] case documents will be added the same way. Each page must be numbered with digits and longhand, and the clerk shall validate this with his initials.' Only by proceeding as indicated is it legally possible to introduce documents and materials into a case in Ecuador and, therefore, the documents that are presented to the judge in violation of these rules have no legal value and the judge cannot consider them in his judgment."[1]

Defendants' expert, Juan Pablo Albán Alencastro, acknowledged that "[u]nder Ecuadorian law if a document has not been formally incorporated into the case in accordance with the provisions of Regulation on the Settlement Process and Judicial Proceedings of June 19, 1981 ... [it] is not part of the record."[2]

Thus, the record in the Lago Agrio case consists of the submissions and documents that the parties filed, the pages of which were numbered, initialed by the clerk, and

added chronologically to the *cuerpos*—booklets or files of about 100 pages.[3]

B. The Lago Agrio Court Was Obliged to Decide Based Solely on Materials In the Record

The parties made submissions also on whether an Ecuadorian trial judge properly may consider documents and evidence that is not part of the record.

***647** Dr. Velázquez stated that the court may consider only materials that are included in the formal record and facts that are "public and well-known"—a concept akin to facts that would be subject to judicial notice in the United States.[4] In addition, judges research case law and legal scholarship, but "[w]hat is not permitted to the judge is to consider information or evidence that does not appear in the record and to use that as a basis for his judgment, erroneously claiming their public and well known nature."[5]

Dr. Albán took a slightly different position. He said that "[i]t is not unusual ... that in high-profile cases, the parties and even third parties not directly involved in the dispute, try to emphasize their positions and views on the trial in various ways, the media exposure of the details of the case is the most common form, but the anonymous sending of documents also occurs in an attempt to convince the authority responsible for the processing and decision of the case on the legitimacy or importance of a given argument."[6] He stated that "Article 335 of the Organic Code of the Judiciary ... which establishes prohibitions for lawyers in the representation of cases, says nothing about these informal remissions of documentation."[7] He did not say, however, that consideration of such documents would be appropriate.

Dr. Velázquez responded that the alleged practice adverted to by Dr. Albán "has never been a normal practice" in Ecuador[8] and that it would "be contrary to express provisions of Ecuadorian law.... [I]f this were a common practice in Ecuador it would have no relevance whatsoever to the present analysis, as a custom is not law unless statute expressly says so."[9]

Dr. Velázquez's view found support in the testimony of Zambrano, who said that "the official record of the case is that which is contained in the cuerpos."[10] Moreover, Zambrano stated that he decided the Lago Agrio case[11] "[a]ccording to the evidence that is part of the record...."[12] Finally, he testified that, while documents related to the case that were not incorporated into the court record occasionally were left at the door of his office in the court,[13] he "always matched [those documents] up with what already existed in the [record of the] case."[14] If the documents were different from what was in the record, he discarded them because they were not "useful" to him.[15] Thus, according to Zambrano, he considered only documents that were contained within the formal ***648** court record—that is, officially filed by the parties and added by the clerk to the *cuerpos*—in writing the Judgment.

C. This Court's Conclusions and Findings

The Court concludes and finds that the record in the Lago Agrio case consists of the documents duly filed with the clerk and added to the *cuerpos*. Consideration of any other materials, including any materials provided to a judge or court official informally or *ex parte,* would have been improper under Ecuadorian law.[16]

II. Chevron's Experts' Examination of the Record and the LAP Internal Work Product to Identify Commonalities

Dr. Robert Leonard—a professor of forensic linguistics—compared the Lago Agrio Judgment[17] to documents Chevron received from the defendants in discovery (the "LAPs' internal work product") to determine whether the "[ ]Ecuadorian Judgment[ ] and the Ecuadorian Plaintiffs' unfiled work product contain[ed] matching or similar word strings and strings of symbols whose presence [was] not explainable either as set phrases or by chance...."[18] In other words, Dr. Leonard was retained to determine whether the LAPs' internal work product had appeared in the Judgment.

Dr. Leonard analyzed the Ecuadorian Judgment "to determine whether it was 'plagiarized' in whole or in part from the Ecuadorian Plaintiffs' unfiled work product"[19]—that is, whether it contains material taken from LAPs' work product that was not part of the record in the Lago Agrio case. Three computational experts, working under his direction, "perform[ed] searches ... comparing the Ecuadorian Judgment to documents which [Dr. Leonard understood] were produced by the Ecuadorian Plaintiffs' consultants, lawyers, or affiliates."[20] Using results from those searches, Dr. Leonard identified a number of documents obtained in discovery "as having potential plagiaristic overlap to the Ecuadorian court record so as to evaluate whether or not

the overlap was attributable to a filed [*i.e.,* record] document."[21] He concluded:

> "that portions of the Ecuadorian Judgment and the Ecuadorian Plaintiffs' unfiled work product contain matching or similar word strings and strings of symbols whose presence is not explainable either as set phrases or by chance, and that those portions of the Ecuadorian Judgment [were] therefore plagiarized from Plaintiffs' unfiled work product."[22]

Specifically, he found at least 32 matches between the Judgment and six of the LAPs' unfiled, internal work product documents and concluded that the parts of the Judgment containing these matches likely "had their origin in the Ecuadorian Plaintiffs' unfiled work product."[23] The six documents, parts of which appear in the Judgment, are the Fusion Memo,[24] the ***649** January and June Index Summaries,[25] the Fajardo Trust Email,[26] the Draft Alegato,[27] and the Clapp Report.[28]

Dr. Patrick Juola, who worked in conjunction with Dr. Leonard, then compared each of these six documents as well as the Selva Viva Database, a group of spreadsheets,[29] to the entire Lago Agrio record to determine whether each document's text appeared anywhere within the record.[30] Dr. Juola converted each of the 236,000 pages of the Lago Agrio record to OCR,[31] text-searchable documents.[32] He then broke the entire record into groups of five consecutive words and did the same with each of the LAPs' unfiled internal work product documents.[33] Dr. Juola was provided also with every specific linguistic overlap Dr. Leonard found between the LAPs' internal work product and the Judgment (the "overlap examples").[34] He broke the overlap examples into five word groups as well. Dr. Juola then used computer software to identify any five word group in the overlap examples that matched any five word group in the Lago Agrio court record.[35] He ran the same analyses for overlaps between the LAPs' internal work product documents and the Judgment.[36] "Based on [those] comparisons, [Dr. Juola was] able to find any documents in the court record that contained an exact match ... of at least five words with one of the [overlap e]xamples."[37]

For each match the computer identified, Juola "first verified the match by visually comparing the matching phrase and the corresponding part of the court record. [H]e then checked whether the match was a direct quotation. Finally, [h]e analyzed the match to determine whether it was a common or stereotyped phrase, judging partially on the phrase's frequency and distribution across documents and partially on [his] understanding of the phrase's meaning."[38] He excluded from his results common five-word phrases, such as "en el Ecuador como una."[39] He concluded that "the Fusion Memo, the Clapp Report, the ***650** Index Summaries, the Fajardo Trust email, the Draft Alegato, and the Selva Viva Data Compilation [we]re not in the trial court record."[40]

Dr. Juola and his team used computers to compare the Lago Agrio record to the LAPs' internal work product. The next Chevron expert, Samuel Hernandez, the director of Morningside Translations, did so by hand.[41]

Hernandez and his team of bilingual reviewers were given the Fusion Memo, excerpted portions of the January and June Index Summaries, the Fajardo Trust email, the Moodie Memo,[42] and the LAPs' Draft *Alegato,*[43] as well as excerpts from each document.[44] They compared each document to every document in the Lago Agrio record that had been filed by the LAPs or a third party, as well as every document in the Lago Agrio record that had been filed by Chevron after the date on which Chevron first received documents from the LAPs in discovery proceedings in the United States.[45] Hernandez's team reviewed the documents in three stages—any overlap identified in the first stage then was reviewed again in the second, and again in the third.[46] At the second stage, reviewers were informed that "the name of a person, the name of a place, and one word or two unconnected words were not, by themselves, enough for a document to be considered potentially responsive."[47] At the third stage of review, any documents that "contained only general topical similarities, without any close relationship between the actual text of the document in the ... Record and the actual text of" the LAPs' internal work product were excluded.[48]

The Court finds that the methodologies used by the Chevron experts were reliable and admissible, credits their testimony, and adopts their findings.

***681** Appendix II—Portions of Fusion Memo, Draft Alegato, Index Summaries, Clapp Report, and Fajardo Trust Email in Judgment (PX 2164)

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***682** Appendix III—The Cabrera Report Was Material to the Judgment

Donziger contended at trial that the Cabrera events—the coercion of Judge Yánez, the inducement of Cabrera to work for the LAPs, the ghostwriting of the Cabrera Report, and the misrepresentation to the Lago Agrio court and others of Cabrera's relationship with the LAPs and his purported independence—were not material to the Judgment[49] because the Judgment said that it did not consider the Cabrera Report in reaching the decision.[50] This argument fails. The Judgment itself establishes that its professed disclaimer was not accurate.

To be sure, the Judgment states that it did not take the Cabrera Report "into account to issue [the] verdict."[51] The Court has concluded elsewhere that this disclaimer statement, including its repetition by the appellate courts, is inadmissible hearsay.[52] Even if it were admissible, however, it would be no more than some evidence on that point.

Chevron has pointed to evidence suggesting that the Judgment in fact relied upon the Cabrera Report—either directly or indirectly—in four distinct ways: (1) to determine the number of waste pits, which was an essential input on which more than half of the $8.646 billion damage award rests; (2) to calculate potable water damages; (3) by relying on reports of the cleansing experts, which in turn relied upon the Cabrera Report (hence the defendants' use of the term "cleansing experts"); and (4) to determine the eight categories of damages for which Cabrera recommended monetary awards against Chevron.

Having considered the evidence, the Court finds that Chevron proved the most important, but not all, of these contentions.

I. The Pit Count

The largest single component of the $8.646 billion award against Chevron was the $5.4 billion award for remediation of soil at waste pits. The Judgment purported to explain that figure by (a) finding that there were 880 waste pits in the Concession area, then (b) multiplying 880 by an assumed amount of soil per pit requiring remediation, and (c) multiplying the product of those figures by a cost per unit of soil to be remediated.[53] Thus, the $5.4 billion figure is a linear function of the pit count as well as assumptions as to pit size and depth. To put it in the clearest terms, an overstatement of the pit count by 10 ***683** percent would have increased the amount of the judgment by about $540 million. Chevron contends that the critical count of 880 pits comes only from the Cabrera Report.[54]

Before addressing Chevron's argument, it is important to understand what that argument is and what it is not. Some might characterize the discussion that follows as an effort by this Court to review the merits of the Ecuadorian Judgment. But any such characterization would be wrong. The point here is not whether the Judgment was right or wrong on this point. It instead is whether the Judgment, right or wrong, took the 880 pit count—the importance of which cannot be overstated—from the Cabrera Report, notwithstanding the Judgment's disclaimer of reliance on that document.

We begin with the Judgment's explanation for its 880 pit finding. It initially claimed to have derived the 880 figure from "[1] aerial photographs [of the Concession] certified by the Geographic Military Institute which appear throughout the record, analyzed together with [2] the official documents of Petroecuador submitted by the parties and [3] especially by the expert Gerardo Barros,"[55] which are in the Lago Agrio record. But neither the Judgment nor the defendants have identified any such "official documents of Petroecuador," whether in the record or otherwise, that support the pit count of 880.

Following the entry of the Judgment, Chevron moved for expansion and clarification, *inter alia,* of the basis for the conclusion that there were 880 pits:

> "What is the basis for concluding that there are 880 pits, as is indicated on page 125 of the Judgment: '*considering that we have 880 pits* '? * * * In that regard, I hereby request that you expand your judgment, mentioning the page numbers from which all this information was obtained."[56]

In the Lago Agrio court's subsequent clarification order, the court dropped its former references to unspecified PetroEcuador documents and to the Barros report. It stated only that "the Court analyzed the various aerial photographs that form a part of the record and that were certified by the military Geographic Institute."[57] Thus, the 880 pit count figure purportedly rests exclusively on analysis of aerial photographs in the record that were obtained from the Military Geographic Institute.

Against this background, Chevron called two witnesses whose testimony, the Court finds, collectively established that the count of 880 pits could not have come from the aerial photographs and must have been drawn from the Cabrera Report and nothing else.

The first was Spencer Lynch, who addressed the fact that the Judgment used a figure of 880 pits whereas the figure in Cabrera Report Anexo H–1 was 916.[58] ***684** The difference, he pointed out, was that the 916 pit figure in the Cabrera Report included a total of 36 pits that either had been operated by PetroEcuador or at which there had been "no impact" and for which, therefore, no remediation was necessary.[59] With those pits excluded, the net pit count in the Cabrera Report was 880.[60]

The second witness was Dr. James Ebert, an expert in "scientific methods and techniques of photogrammetry, photo analysis, digital imaging and image processing, and digital mapping technologies."[61] Dr. Ebert examined the photographs and the "various documents that contained aerial photographs in the" Lago Agrio record, including the Cabrera Report and anexos, the "Hidden Pits Report," the "Judicial Inspection Reports' aerial photographs, and other various expert reports."[62] For a variety of reasons, he concluded that it would have been impossible for Zambrano accurately to have interpreted the aerial photographs in the record.[63] He explained that Anexo E to the Cabrera Report was the primary source in the Lago Agrio record that used aerial photographs to map pit locations and count specific pits. But these aerial photo scans—all of which were in black and white—were of such low resolution that it would have been "difficult for even an experienced photogrammetrist to identify and map pits,"[64] much less someone with no special training or equipment. Even more important, he concluded that "it is impossible that the authors of the Ecuadorian judgment and the Cabrera report independently reached the same 880 pit count by use of aerial photography."[65]

In sum, Lynch and Ebert collectively testified that (1) the 916 pit count in the Cabrera Report, once adjusted in a very common sense way to eliminate the 36 "pits" that either were those of PetroEcuador or required no remediation, was 880, (2) the pit count in the Judgment was 880, and (3) neither the pit count in the Judgment nor that in the Cabrera Report could have been determined accurately from the aerial photographs upon which each purported to rely. They further concluded that, as a practical matter, it is impossible that these two documents could have reached the net count of 880 pits independently on the basis of examination of the ***685** aerial photographs, which was the sole stated foundation of each.

Although the defendants never made the point, there is one potential weakness in Chevron's argument and the experts' conclusions on this score. Chevron has not provided conclusive evidence that the 880 pit count is nowhere in the Lago Agrio record. In contrast to its analysis with respect to the identity of language in and other characteristics of the Judgment and the LAPs' internal work product, Chevron did not offer a witness who testified that the witness had reviewed the entire record and found no reference to 880 pits except in or simply derived from the Cabrera Report.

On the other hand, defendants have not identified any possible source in the Lago Agrio record for the Judgment's 880 pit count, other than the Cabrera Report, save for the claim that Zambrano reached that figure independently by counting what appeared to him to be waste pits on low resolution aerial photographs. The Court finds that hypothesis to be incredible given both the quality of the photographs and Zambrano's lack of credibility.

Nor did the LAPs' submissions to the Lago Agrio court, its *alegatos,* point to any record support for the pit count that wound up in the Judgment, although it referred extensively to the Cabrera Report. In fact, their December 17, 2011 *alegato* claimed that there were 916 pits—the same figure as the Cabrera Report—and cited only the Cabrera Report as support for that proposition.[66]

This failure to cite any other record support for this or any other pit count is telling. The LAPs were worried that their relationship with Cabrera would impugn the credibility of any judgment that relied on it. Indeed, they successfully had petitioned the court to allow them to submit the cleansing reports to provide alternative bases upon which the ultimate decision could claim reliance. If there were a source in the record other than the Cabrera Report that supported the pit count figure—which was the basis for the largest component of damages—the LAPs would have cited it. But they did not. And that logically suggests that there was nothing in the Lago Agrio record to support the pit count except the Cabrera Report, adjusted to eliminate the PetroEcuador and the "no impact" pits.

The Court finds that the 880 pit count in the Judgment came directly out of the Cabrera Report, adjusted only for the PetroEcuador and "no impact" pits. It further finds that the circumstances discussed by Ebert and Lynch, whom the Court credits, make it impossible that the pit count in the Judgment came from anything but the Cabrera Report.

II. Potable Water Damages

Chevron next contends that the Judgment's $150 million award for potable water damages is based on the Cabrera Report.[67]

The Cabrera Report recommended the award of $428 million in damages for potable water.[68] A report filed by Chevron expert Gerardo Barros, which is cited in the Judgment,[69] stated that the Cabrera ***686** Report had awarded $430 million for potable water, and that this figure was "[g]rossly [e]xaggerated and [f]raudulent."[70] The Judgment, citing Barros, agreed that the "430 million is too high," and therefore reduced it.[71] It found that 35 percent of the relevant population lacked access to potable water and awarded $150 million to remedy that problem.[72] The $150 million figure is 35 percent of the $430 million, rounded down by $500,000 to an even million, recommended in the Cabrera Report. Moreover, the Judgment cited no evidentiary basis for the $150 million figure.[73]

Once again, the point here is not whether the Judgment was correct in awarding damages in respect of potable water or, if so, whether the figure it selected was well founded. Those questions are not before this Court. Rather, the point is that the figure awarded was derived directly from the $428 million recommendation contained in the Cabrera Report, as this Court finds.

III. The Cleansing Experts

As noted, the LAPs successfully petitioned the Lago Agrio court to permit them to submit additional expert reports that were intended to "cleanse" the Cabrera Report. The Judgment cited several of them. Chevron contends, however, that the Judgment relied on the Cabrera Report by virtue of its reliance on the cleansing experts. For example, the Judgment cites only one source to support its $200 million award to restore flora and fauna in the Concession area: the report prepared by Dr. Lawrence Barnthouse.[74] This is so despite the fact that the Judgment recognized that "Dr. Barnthouse testified that he reviewed expert Cabrera's report, but did not prepare a damage report himself" and concluded that "the plaintiff committed fraud by using work of Dr. Barnthouse."[75] Moreover, the Judgment cited the report of Douglas Allen as a basis for its awards of $5.4 billion for soil remediation and $600 million for groundwater restoration.[76] But Allen admitted in a deposition that he "relied on parts of the Cabrera Report" and that he did not attempt independently to verify Cabrera's data.[77]

Chevron's argument with respect to the cleansing experts falters at least with respect to Allen. As a preliminary matter, it is not clear that the Judgment actually purported to rely on the Allen report for the groundwater restoration figure. In awarding $600 million for groundwater restoration, the Judgment noted that the figure is "lower than the average according to economic criterion estimated by Douglas C. Allen, expert contracted by the plaintiffs ... which is not in any way obligatory or binding for this Court, but rather a simple reference that is not accepted...."[78] Thus, although the Judgment ***687** used Allen as a reference point, it is not clear that it purported to rely on his report—and only his report—to come up with the $600 million figure. Moreover, although Allen testified in his deposition that his report relied on parts of the Cabrera Report, he did not say that he relied on it in his damages assessments for soil remediation and groundwater restoration—the two areas for which he is cited in the Judgment.

With respect to the cleansing experts, then, we are left only with the Judgment's reliance on Barnthouse, who in turn relied on the Cabrera Report, for its $200 million award for restoration to flora and fauna. This alone would be insufficient to deem the Judgment invalid for its reliance on a fraudulent report, particularly in this case, where such a figure is a tiny drop in a very large bucket. Combined with the pit count and the potable water damages, however, it supports the conclusion that the Judgment relied on the Cabrera Report notwithstanding its purported disclaimer of such reliance.

IV. Eight Categories of Damages

Finally, Chevron argues that the Judgment "awards damages for the same eight categories that were developed by Defendants and ghostwritten into the Cabrera Report."[79] These categories are: soil restoration,[80] restoration of groundwater,[81] damages to the ecosystem,[82] loss of indigenous culture,[83] punitive damages,[84] healthcare system,[85] potable water,[86] and excess cancer deaths.[87] These damage categories, Chevron contends, "are supported by nothing else in the record except the LAPs' final alegato, which itself cites throughout to the Cabrera Report."[88] Chevron posits also that the Judgment's punitive damages award "matched the Cabrera Report's 'unjust enrichment' award in rationale

and effect ... and had no other record source."[89] There are several problems with Chevron's arguments on this point.

First. The Cabrera Report identified seven categories of damages, not eight like the Judgment. It did not recommend an award of damages for soil restoration. Chevron effectively admits this fact, as it cites without explanation a November 2007 filing by Cabrera as support for the fact that Cabrera awarded damages for soil restoration. But (1) the filing is in Spanish and an English language version was not provided, and (2) the filing—whatever it may be—is not part of the Cabrera Report.

Second. Although the LAPs did identify soil restoration as the eighth damages category in their *alegato,* Chevron has failed ***688** to prove that it did so in reliance only on Cabrera. In fact, Chevron did not even offer the *alegato* in evidence. Moreover, the fact that the *alegato* identified eight categories of damages makes it just as likely that the Judgment relied on the LAPs' final brief.

Third. Chevron is incorrect in its assertion that the Judgment's punitive damages award is the same "in rationale and effect" as Cabrera's recommended unjust enrichment award. The Cabrera Report recommended an award of $8.31 billion for "unjust enrichment." It stated that "in other countries, unjust enrichment is used to determine the amount of punitive damages. Although the Court can decide to use the calculation of unjust enrichment in that way," the Cabrera Report instead calculated it by comparing the " 'savings' gained by Texpet by not using adequate environmental controls; and ... the current value of those savings based on the defendant's profits from capital investments."[90] By contrast, the Judgment imposed a "punitive penalty equivalent to additional 100% of the aggregate values of the reparation measures."[91] In effect, it simply doubled the damages figure.

In sum, the Court finds that the Judgment, although it is purported not to rely on the Cabrera Report, did so rely at least (1) for the pit count—which drove its largest damages award, (2) for the potable water damages award, and (3) by virtue of its reliance on the Barnthouse report. The Court thus finds that the Cabrera Report was material to the Judgment at least in those respects, which collectively were very important indeed.

***689** Appendix IV—Aerial Photograph Example (PX 4021)

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Appendix V—Evidentiary Issues

I. Admissibility of the Bank Records and Identity Cards

Guerra testified that in the fall of 2009 he entered into an agreement with Donziger, Fajardo, and Yanza to draft orders favorable to the defendants under Zambrano's name in exchange for $1,000 per month, to be paid by Fajardo and the LAPs.[92] Chevron offered documentary evidence ***690** to corroborate Guerra's story. It included bank statements[93] and deposit slips purporting to show a series of $1,000 deposits into Guerra's account including two allegedly made by a Selva Viva employee named Ximena Centeno on December 23, 2009 and February 5, 2010.[94] It includes also additional deposit slips dated October 24, 2009,[95] November 27, 2009,[96] and January 6, 2011[97] each showing a $1,000 deposit into Guerra's bank account,[98] although none of these three bears Centeno's signature. Finally, Chevron offered copies of two of Centeno's national identity cards,[99] both of which bear her signature and *cedula* (or identification number).[100] These were provided as means of authenticating the purported Centeno signatures that appear on the December 23, 2009 and February 5, 2010 deposit slips and to prove that the *cedula* on one of these belonged to Centeno.

A. The Bank Statements

Defendants objected to the admissibility of the bank statements,[101] citing principally hearsay.[102] Those exhibits are admissible ***691** under either the business records exception[103] or the residual hearsay exception.[104]

[88] The business records exception provides that a record of a "regularly conducted activity" is admissible for the truth of the matter where the record was made contemporaneously by someone with knowledge, the record was kept in the regular course of business and as a regular practice, a qualified witness testifies to those facts, and the records are trustworthy.[105] Courts have recognized, however, that neither a qualified witness nor a certification is necessary to provide the foundation in all instances. Instead, "the requirements for qualification as a

business record can be met by documentary evidence, affidavits, or admissions of the parties, *i.e.,* by circumstantial evidence, or by a combination of direct and circumstantial evidence."[106] Courts have acknowledged also that "[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements."[107]

[89] [90] The Court takes judicial notice that banks routinely produce periodic statements for their customers and that those periodic statements reflect any and all deposits, withdrawals, debits and credits during stated periods of time. This is done in the regular course of business by bank employees with knowledge of the computer systems used to track customers' account activity. Having taken judicial notice of these facts, and having considered also Guerra's testimony regarding the source of the bank statements,[108] the Court finds that the bank statements are admissible under Rule 803(6). There is no reason to believe those records untrustworthy.

Even if the technical requirements of Rule 803(6) were not satisfied, the Court would receive the bank statements under the residual hearsay exception. In *Karme v. C.I.R.,*[109] the Ninth Circuit held that a bank statement was admissible under the residual hearsay exception due to its "circumstantial guarantees of trustworthiness," the fact that it was more probative of a material fact than other obtainable evidence, and that "admitting it will best serve the purposes of these rules and the interests of justice."[110] This Court agrees.

As discussed above, the bank statements are probative of whether defendants paid Guerra as he claimed. Coupled with the ***692** "puppeteer" emails and the deposit slips, *infra,* the bank statements are more probative of that fact than any other evidence that Chevron has or reasonably could have obtained. There is no reason to doubt their trustworthiness. They appear in the exact manner that one would expect, and Guerra testified as to how he obtained them directly from the bank, testimony that the Court credits.[111] Thus, "[g]iven the circumstantial guarantees of trustworthiness which were present here, the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be," the bank statements are admissible under the residual hearsay exception as an alternative to the business records exception.[112] Moreover, Rule 807(b)'s notice requirement is satisfied because Chevron produced Guerra's bank statements for December 2009, February 2010, and June 2011 in January 2013—months before trial began,[113] and Chevron disclosed all of its trial exhibits to defendants approximately six weeks before trial began, on August 30, 2013.[114]

B. The Identity Cards

Chevron offered two of Centeno's national identity cards, which purport to bear her signature and her *cedula* number. They were offered as signature exemplars to authenticate the signature that appears on two of the deposit slips. Defendants objected to the admission of the identification cards on the bases of relevance and best evidence.

The cards are relevant to the question of whether Centeno made the deposits to Guerra's bank account, as the signatures on the identity cards permit a determination as to whether the signatures on the deposit slips were affixed by Centeno.

Defendants' best evidence argument likewise is without merit. There is no genuine question about the authenticity of the original identity cards. Nor is there anything about the circumstances that makes it unfair to admit the copies. Indeed, Centeno was an employee of Selva Viva, which must have had ready access either to copies of her cards or other information permitting defendants to verify the authenticity of the signatures on the copies of the identity cards offered at trial.[115]

Accordingly, the identity cards[116] were received properly. Centeno's signatures on them are exemplars against which to compare the signatures found on the deposit slips dated December 23, 2009 and February 5, 2010.

C. The Deposit Slips and Centeno's Signatures

1. The Deposit Slips

The defendants initially objected to the deposit slips on hearsay, authenticity, best evidence and relevancy grounds. They then explicitly waived any hearsay objection to the deposit slips save for their hearsay objection to the purported Centeno signatures and the *cedula* number of the person who allegedly made the December ***693** 23, 2009 and February 5, 2010 deposits.[117] What remains, therefore, are the authenticity,

best evidence, and relevancy arguments and the hearsay objection with respect to the signatures and *cedula* number on the December 23, 2009 and February 5, 2010 deposit slips.

[91] The authenticity, best evidence, and relevancy objections are speedily dispatched. Authenticity of the deposit slips, putting to one side the authenticity of the Centeno signatures on the December 23, 2009 and February 5, 2010 slips, was proved by multiple means, including without limitation the distinctive characteristics of bank deposit slips,[118] the corroboration of the information on the deposit slips by the bank statements, the testimony of Guerra, and, with respect to the December 23, 2009 and February 5, 2010 deposit slips, a Chevron investigator's affidavit stating that he obtained copies of each of them directly from the bank.[119] The best evidence objection is baseless because there was no genuine question as to the identity of the copies offered to the originals from which they were copied and there was no unfairness in admitting the copies.[120] The relevance of the deposit slips is obvious—they were offered to prove that the LAPs paid Guerra for ghostwriting at least some of Zambrano's Chevron orders. The existence of deposit slips corresponding in timing and amount to the alleged payments makes it more likely that such payments were made than in the absence of such evidence.[121] This is especially true of the December 23, 2009 and February 5, 2010 deposit slips, provided that they bear Centeno's signatures as they purport to do.[122]

Finally, even if the technical requirements of Rule 803(6) were not satisfied, the deposit slips, putting to one side the purported signatures of Centeno and the ***694** *cedula* number, are admissible under the residual hearsay exception for the same reasons discussed in relation to the bank statements' admissibility under the same rule.[123]

2. Centeno's Signatures and Cedula

Defendants object on authenticity and hearsay grounds to the admission of the purported Centeno signatures and *cedula* number on the bottom of the December 23, 2009 and February 5, 2010 deposit slips. The Court begins with the authenticity issue.

Defendants argue that there is no evidence that Centeno, as opposed to the bank teller or some other person, actually signed the deposit slips and wrote Centeno's *cedula* number on them, and that the admissibility of the statements hinges on the author's identity. The argument is not persuasive.

The Court has before it two Centeno national identity cards, each of which bears her signature. It has compared these exemplars with the signatures on the two deposit slips in question, as it of course may do for this purpose.[124] The signatures are extremely similar and share obvious common characteristics. Each contains loops around each the first and last names and all are consistent in size, style, and lettering. In all the circumstances, the Court finds that Centeno signed the deposit slips for the December 23, 2009 and February 5, 2010 deposits and in fact made those deposits to Guerra's account. As she did so as an employee of Selva Viva,[125] which is controlled by the defendants,[126] the information on those two deposit slips, to the extent if any that it might be characterized as one or more statements offered to prove the truth of the matters asserted, are admissible against the defendants as non-hearsay pursuant to Rule 801(d)(2).[127]

II. The Hearsay Objections to Certain Guerra–Zambrano Conversations Are Overruled

Donziger—but not the LAP Representatives—objected to Guerra's in-court direct ***695** testimony, although not his written direct testimony, with respect to (a) Guerra's conversation with Zambrano in which Zambrano allegedly instructed Guerra to propose to the LAPs that he would allow them to draft the judgment and would sign and issue it as his own in exchange for at least $500,000, and (b) Guerra's conversation with Zambrano following the ensuing meeting at which Guerra allegedly repeated the proposal to Fajardo, Yanza, and Donziger. The latter was the conversation in which Zambrano allegedly told Guerra that he had been in touch with Fajardo, that the LAPs had agreed to pay Zambrano $500,000 from the proceeds of the judgment, and that Zambrano would share that money with Guerra once it was received.[128]

The Court overruled Donziger's hearsay objection as to Zambrano's alleged statement in conversation (a) on the ground that the statements were admissible at least for nonhearsay purposes, viz. "to explain the sequence of events regardless of whether it was true" and promised a later ruling as to the full scope of admissibility.[129] It overruled also their hearsay objections as to the alleged statements by Fajardo and Zambrano in conversation (b).[130] The Court has reviewed these rulings and adheres to them.

Zambrano's statement in conversation (a) clearly was

admissible, regardless of its truth, "to explain the [ensuing] sequence of events" and, in addition, to demonstrate the relationship between Zambrano and Guerra.

The Zambrano statements to Guerra in the post-meeting conversation, conversation (b), require analysis at two levels because they include statements as to what Fajardo allegedly told Zambrano. For the reasons that follow, everything said in conversation (b) also was admissible against Donziger (and would have been admissible against the LAP Representatives had they objected to it).

[92] [93] The Fajardo statement to Zambrano—*i.e.,* Fajardo's statement that the LAPs had agreed to pay Zambrano $500,000 from the proceeds of the judgment was not hearsay because it was offered to prove that Fajardo made the statement, which was relevant to show why Zambrano thereafter did what he did. The same is true of part of Zambrano's subsequent statement to Guerra—*i.e.,* that Zambrano would share with Guerra part of any money he received from the LAPs—as it explains why Guerra assisted in the preparation of the judgment. Thus, the only hearsay in either conversation was Zambrano's relation to Guerra of what Fajardo allegedly had said to Zambrano, which was offered to prove the truth of Zambrano's account of what Fajardo had said. But this was an admissible co-conspirator declaration.[131] Indeed, the same would be true of the entirety of the conversation even if every statement were offered for the truth of the matters asserted.

[94] [95] The guiding principles are these:

> "To admit a statement under the coconspirator exception to the hearsay definition, ***696** a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of that conspiracy. * * * The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment. [citation omitted] In addition, while the hearsay statement itself may be considered in establishing the existence of the conspiracy, 'there must be some independent corroborating evidence of the defendant's participation in the conspiracy.' *United States v. Tellier,* 83 F.3d 578, 580 (2d Cir.1996)."[132]

As the Federal Rules of Evidence apply both to criminal and civil cases[133] and do not differentiate as to the standards governing admissibility of co-conspirator declarations, these principles apply here.[134]

In this case, the Court finds, as is explained in the text, that there was a conspiracy among Zambrano, Guerra, Fajardo, ***697** and Donziger for Zambrano to decide the case in the LAPs' favor and to sign a judgment prepared by their lawyers and pass that judgment off as his own in exchange for $500,000. There is ample evidence, independent of the alleged hearsay statements, both of the existence of that conspiracy and of the participation of Donziger and Fajardo in it. In addition to the circumstantial evidence described in the text, this includes (1) Guerra's changing his "*modus operandi* regarding [his] role as ghostwriter in the Chevron case,"[135] (2) the "brief meeting" in Zambrano's apartment among Guerra, Fajardo and Zambrano during which the latter two handed over Fajardo's laptop, containing a draft of the judgment, for Guerra "to fine tune and polish" it,[136] (3) Guerra's call to Fajardo for clarification during the "fine tuning" of the judgment,[137] (4) Fajardo's provision to Guerra of the "memory aid" to assist him in revising the draft,[138] (5) Guerra's assistance to Zambrano in preparing the supplemental and clarification order,[139] (6) Donziger's responses to Guerra at the meeting at which the bribe was proposed, including particularly his inquiry as to how he could be sure that Zambrano would "not deviate from the agreement and ... keep it secret" and his statement that the LAPs "did not have that sum of money [*i.e.,* $500,000] ... at [that time],"[140] which were attempts to negotiate the terms of the proposal by delaying payment (the LAPs then were short of cash) and by seeking to ensure that Zambrano would have to deliver the promised *quid pro quo* before any money changed hands, and (7) the enormous amount of independent evidence, including Donziger's own statements, that Donziger was in overall charge of the entire LAP effort, and Fajardo's statements.

Finally, the Court finds that Zambrano's relation to Guerra of what Fajardo told Zambrano was in furtherance of the conspiracy. Zambrano thereby induced Guerra to contribute his efforts to the joint project—the preparation of a judgment prepared principally by the LAPs in exchange for a future payment. Making clear to him that Fajardo had conveyed the LAPs' agreement to pay the money, out of which Guerra would receive his cut, furthered the overall plan. The "in furtherance" requirement, moreover, is satisfied as to every statement made by Zambrano in his conversation with Guerra and every statement made by Fajardo in his conversation with Zambrano.

III. Beltman and Maest Witness Statements

Douglas Beltman and Ann Maest were employed by

Stratus. Beltman was in charge of the Lago Agrio engagement for the firm. Both were principal authors of the Cabrera Report and other materials. Prior to the commencement of this action, and thus at a time when their interests were aligned with those of the defendants, Beltman and Maest were deposed in Chevron's Section 1782 proceeding. They and Stratus originally were defendants in this action, but they and Stratus settled with Chevron. In connection with the settlement, each signed and provided to Chevron a declaration that is at odds with that ***698** given in their depositions.[141] Neither side, it appears, sought to take their depositions in this case.

During the trial, Chevron and the defendants stipulated that the Beltman and Maest declarations would be received in evidence, but not for the truth of the matters asserted, and that the defendants would waive cross-examination of Stratus' president, Joshua Lipton. Subsequently, defendants designated testimony of Beltman and Maest given in the Section 1782 depositions.[142] Chevron responded by offering their declarations. Defendants objected to receipt of those declarations to the extent they were offered for the truth of the matters asserted. Chevron argues that these declarations are admissible for their truth under Fed.R.Evid. 106, 806 and 807.

A. Rule 106—The Rule of Completeness

The rule of completeness states that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."[143]

[96] Only evidence that is "necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion" is admissible under the rule.[144] Thus, portions of the declarations that are necessary in fairness or to explain the admitted depositions would be admissible under Rule 106.

The purpose for which the admitted portions of the declarations may be used is less clear. The Second Circuit in *United States v. Pierre*[145] noted that "Rule 106 is silent as to the permissible uses of the document offered for completeness."[146] It acknowledged that "if the original evidence was admitted only for a limited purpose, then the additional material should be similarly limited."[147] Thus, "[w]here the first document is introduced not as substantive evidence but only to impeach credibility, the document offered for completeness would seem to be appropriately introduced also not as substantive evidence but only to rehabilitate credibility."[148] Logically it may well follow that where the original evidence was admitted for the truth, as is the case here, the Rule 106 evidence similarly would be admitted for the truth. Indeed, the Second Circuit in *Johnson* stated that "even though a statement may be hearsay," an omitted portion may be put in evidence where necessary.[149]

[97] *Phoenix Assocs. III v. Stone,*[150] and *United States Football League v. National* ***699** *Football League,*[151] however, suggest a different conclusion. They hold that "Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence....' "[152] Accordingly, Rule 106 does not support Chevron's contention that the Beltman and Maest declarations are admissible for their truth.

B. Credibility—Rule 806

Chevron relies also on Rule 806 as an alternative basis for admissibility. The rule provides:

> "When a hearsay statement ... has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it."[153]

A deposition is a hearsay statement.[154] The declarations therefore are admissible for the purpose of impeaching Beltman and Maest's credibility to the extent they are inconsistent with their deposition testimony to the same extent it would be admissible "if the declarant had testified as a witness."[155] "To be inconsistent, statements 'need not be diametrically opposed.' The inconsistency requirement is satisfied 'if there is any variance between the statement and the testimony that has a reasonable bearing on credibility.' "[156]

C. Residual Hearsay—Rule 807

[98] Chevron contends also that the Beltman and Maest declarations should be received for the truth of the matters asserted under the residual hearsay exception. The rule does not provide a sound basis for admitting the

declarations.

Some of the Rule 807 criteria are satisfied here. In the last analysis, however, it declines to receive them under the residual exception. Given the divergence between what these witnesses said under oath at their depositions and what they said under oath in the declarations, one is hard pressed to say that either is trustworthy. Even more to the point, Chevron knowingly agreed to the receipt of the declarations for non-hearsay purposes only in exchange for defendants' agreement not to cross-examine Dr. Lipton. While the Court recognizes that Chevron may have regarded defendants' subsequent designation of the Beltman and Maest deposition testimony as a breach of the spirit of the agreement, a view upon which it expresses no opinion, it is questionable whether Chevron thus was free to offer the declarations for their truth. Moreover, Beltman and Maest were obliged by their settlement agreements to testify at trial at Chevron's request, so Chevron could have called them live in any case. In all the circumstances, the right course is to leave the parties where their mid-trial stipulation put ***700** them—the defendants had the deposition testimony in evidence for what it was worth given the impeachment provided by the declarations.

* * *

Accordingly, PX 5208 and PX 5210 are in evidence for impeachment purposes to the extent inconsistent with these witnesses' deposition testimony. In all the circumstances, the Court has disregarded as untrustworthy and unreliable all of the deposition testimony of Beltman and Maest, except to whatever extent it is relied upon specifically in this opinion. The Court has considered and rejected Chevron's other contentions on this point.

IV. Missing Witness Inferences

Each side contends that the Court should draw inferences unfavorable to its adversary or adversaries from the latter's failure to call certain witnesses. Defendants argue that such inferences are appropriate with respect to Chevron's failure to call Beltman, Maest, and Calmbacher. Chevron argues that such inferences are appropriate with respect to defendants' failure to call Fajardo, Yanza, Sáenz, and Prieto.[157]

A. The Legal Standard

[99] [100] [101] "A missing witness charge permitting the jury to infer that the testimony of an unproduced witness would have favored one party is appropriate if production of the witness is 'peculiarly within [the] power' of the other party."[158] Such an inference is equally permissible in bench trials.[159] Hence, where one party alone could produce a material witness but fails to do so, an inference that the testimony would favor the opposing party may be appropriate. Such an inference is warranted also where a party to the action is, in effect, a missing witness.[160] By parity of reasoning, an adverse inference may be appropriate based on the failure to testify of someone closely allied with or related to a party, such as an employee.[161] In the event that a witness is available equally to both sides, "the failure to produce is open to an inference against both parties"[162] or ***701** neither party.[163] Where the missing witness's testimony would be cumulative, however, the inference is not available.[164]

[102] In determining whether a witness is uniquely available to an adverse party, courts in this circuit consider whether that witness is available to the party seeking the adverse inference,[165] as the availability of the witness to an opposing party makes an adverse inference against the party with the closer relationship to the witness less appropriate. An adverse inference is not warranted, for example, where the controlling or related party makes the missing witness available to its opponent, the party seeking the adverse inference equally could obtain the missing witness's testimony, or the party seeking the adverse inference made no attempt to obtain the witness's testimony.[166] Such a rule prevents a party from manipulating the system by choosing not to call a witness while claiming that the witness's testimony would be favorable. The availability determination rests on "all the facts and circumstances bearing upon the witness's relation to the parties."[167]

B. Defendants' Absentees

Fajardo, Yanza, Sáenz, and Prieto all are Ecuadorian "local counsel" who work under Donziger's supervision and whose compensation often has come through and been influenced or determined by Donziger.[168] Donziger has close personal relationships at least with Fajardo and Yanza. Fajardo holds a power of attorney from all of the LAPs, is their counsel of record in the Ecuadorian courts, and was instrumental in arranging for the testimony or, in some cases, anticipated testimony of other Ecuadorian witnesses on the LAPs' behalf.[169] Yanza is the case "coordinator" for them. Sáenz submitted a declaration on

the LAPs' behalf earlier in this case.[170] Fajardo, Yanza, and Sáenz all traveled to the United States in connection with the Lago Agrio case when they thought it expedient.[171] Fajardo has a large contingent fee interest in the Judgment.

[103] [104] Given the relationships between each of the defendants and these four individuals[172] and their obvious possession of material, non-cumulative information going to the heart of the case, the ***702** defendants' failure to produce them warrants, and the Court draws, an inference that the testimony of each of Fajardo, Yanza, Sáenz, and Prieto would have been adverse to defendants had they testified. The Court emphasizes, however, that it would have made the same findings in the absence of those inferences.

C. Plaintiff's Absentees

Defendants seek to have the Court draw adverse inferences from Chevron's failure to call Beltman, Maest, and Calmbacher.

Chevron's settlement agreement with Stratus, Beltman, and Maest required Beltman and Maest to testify at trial if so requested by Chevron. Chevron included them on its witness list but ultimately did not call them either on its direct case or, once it stipulated with the defendants that their witness statements would be received for non-hearsay purposes in exchange for a waiver of cross-examination by defendants of Stratus' Dr. Lipton, on its rebuttal case.

[105] There is no question that Beltman and Maest were available to Chevron by reason of the settlement agreements. Nor is there any question that both were beyond the geographical bounds of the Court's subpoena power. Nevertheless, the Court declines to draw an adverse inference from their absence for several reasons.

Beltman and Maest settled with Chevron in March 2013.[173] Their declarations were filed in April 2013,[174] long before the close of the discovery period. Defendants thus were well aware of Beltman's and Maest's quite revised accounts and could have deposed them. But defendants elected not to do so. That alone is sufficient to preclude or, in the exercise of discretion, to decline to draw any adverse inference. A witness is not unavailable to a party that fails to make any effort to seek his or her testimony.[175] Moreover, defendants agreed at trial to the receipt of the Beltman and Maest declarations for non-hearsay purposes. Only afterward did they offer their 2010 Section 1782 depositions for the truth of the statements they then had made, this despite the fact that Beltman and Maest subsequently had recanted much of what they had said in 2010. An adverse inference against Chevron in these circumstances would be neither logical nor just and would risk rewarding gamesmanship.[176]

***703** Although Calmbacher is not Chevron's agent or employee and was not contractually bound to testify, Chevron included his name on its witness list and by all appearances intended to have him testify, which implies that it could have produced him as a witness. However, as was the case with Beltman and Maest, defendants elected not to take Calmbacher's deposition. They made that election notwithstanding that they were quite aware of the nature of his deposition testimony that Chevron offered at trial. Thus, for the reasons discussed above, defendants cannot now claim a benefit from Calmbacher's failure to testify.

Appendix VI—The Trial Record

Exhibits

A complete list of plaintiff's exhibits was marked as Court Exhibit F.[177] A complete list of defendants' exhibits was marked as Court Exhibit D, modified by the Court's February 25, 2014 order.[178] Except to the extent specific exhibits were received or objections sustained during trial or by other orders, all of the exhibits were received subject to the adversary's objections.[179] Some of those objections are ruled upon in this opinion and appendices, many specifically and some by category. Nevertheless, given the volume of exhibits that were provisionally received subject to objections, the Court has not ruled specifically on every objection.

To the extent the Court has relied in this opinion or appendices on exhibits that were objected to, it has overruled the objections. To the extent the Court has not so relied, it should be understood either as having sustained or not ruled on the remaining objections in view of the apparent lack of materiality of the exhibits.

A number of other matters concerning the record warrant explanation.

Direct Testimony
Each party submitted the direct testimony of its witnesses—with the exception of Nicolás Zambrano, Jeffrey Shinder, and to some extent Alberto Guerra—in the form of written declarations ("Witness Statements"). Portions of every Witness Statement were objected to.

The Court ruled from the bench on some of these objections. It issued comprehensive orders ruling on the objections to the Witness Statements of Steven Donziger and Karen Hinton.[180] It received other Witness Statements subject to objection. To the extent the Court has relied in the opinion or appendices on portions of those Witness Statements that were objected to, it has overruled the objections. To the extent it has not so relied, it either has sustained or not ruled on the objections in view of the apparent immateriality of the evidence in question.

Deposition Designations
Each party designated portions of depositions taken in this action and certain related Section 1782 proceedings. Many of these designations were the subject of objections. To the extent the Court has relied in the opinion or appendices on deposition testimony to which objections were made, it has overruled the objections. To the extent it has not so relied, it either ***704** has sustained the objections or not otherwise ruled on them.

Spanish Language Documents
Many of defendants' trial exhibits are in Spanish, in whole or in part, and were placed in the record *en masse,* without English translations, and received, along with many other exhibits, subject to objections. Chevron objected to a great many on the ground, among others, that defendants provided translations of none or only parts of the documents.

On December 2, 2013, the Court directed (1) Chevron to provide a list of defendants' exhibits to which the aforementioned objection was made, and (2) defendants to show cause why the Spanish language exhibits (including any exhibits that are partly in Spanish) submitted without complete English translations should not be excluded.[181]

In response to the Court's order, defendants "ask[ed] that [the Court] exercise its discretion and not strike the Spanish language exhibits [defendants] have offered, and give defendants the opportunity to submit translations of these exhibits if future briefing ... make[s] them relevant and material."[182] The Court on December 13, 2013 struck all exhibits that are entirely or partly in Spanish "except to the extent that defendants, no later than the date on which their reply to Chevron's post-trial brief is due, identif[y] each such document on which [they] rel[y] and provide[ ] Chevron and the Court with complete, certified English translations of the Spanish language content of each."[183] Defendants filed their reply briefs on January 21, 2014. They neither identified any Spanish language documents upon which they relied nor provided the required translations.

Chevron and Donziger then filed a stipulation agreeing to a list of defendants' exhibits that "are entirely or partly in Spanish [for which] the Defendants have not provided Chevron or the Court with complete, certified English translations of the Spanish language content...."[184] The LAP Representatives "d[id] not dispute that the exhibits listed in the Stipulation ... are entirely or partly in Spanish," but asked that the Court require Chevron to submit any translations it had of such documents "prior to ordering any remaining exhibits stricken from the record of these proceedings."[185]

The Court declines to shift to Chevron the burden of submitting English language translation of defendants' exhibits, particularly in light of the defendants' failure to identify specific Spanish language documents upon which they relied. Defendants filed their proposed pretrial order on August 31, 2013, which included most if not all of the Spanish language documents now in question.[186] They had five months after the filing of their proposed pretrial order in which to provide translations for those documents and one month after the Court ordered them to do so. They have declined. The exhibits identified at pages 2–3 of DI 1864, Exhibit 1 were, and remain, ***705** stricken pursuant to the Court's December 13, 2013 order.

Donziger's Improperly Amended Exhibit List
Donziger moved on September 13, 2013 to amend his trial exhibit list.[187] He sought to add 27 exhibits to the list identified on his proposed pretrial order, fifteen of which (DX 1094–1108) were described as entire websites. The Court denied the motion with respect to those exhibits.[188] In contravention of that order, Donziger included certain of these exhibits in the mass offer of exhibits, subject to objection.[189]

Two of those exhibits appear to be pages from a Chevron web site, which the Court will allow to remain in the record in view of their apparent authenticity.[190] The remainder all appear to be press releases or other materials prepared by the defendants which, to the extent offered for the truth of the matters asserted, are hearsay. They all are stricken.[191]

All Citations

974 F.Supp.2d 362, RICO Bus.Disp.Guide 12,464

Footnotes

1 Tr., Sept. 26, 2013, at 25:3–15, *Naranjo v. Chevron Corp.,* No. 13–772–cv (2d Cir.) [DI 1496–2].

2 PX 1279 (Mar. 30, 2010 Email from J. Prieto to S. Donziger, P. Fajardo, L. Yanza, and J. Sáenz).

3 PX 210 (Napo Joint Operating Agreement); PX 3000 (Reis Veiga Direct) ¶ 14.

4 *Id.*

5 PX 211 (Agreement among the ROE, TexPet, and Gulf Oil); PX 3000 (Reis Veiga Direct) ¶ 14.

6 PX 212 (Agreement among the ROE, Ecuadorian Government Petroleum Corporation, and Gulf Oil); PX 3000 (Reis Veiga Direct) ¶ 14.

7 PX 3000 (Reis Veiga Direct) ¶ 19.

8 PX 222 (Dec. 14, 1994 MOU among the ROE, PetroEcuador, and TexPet), at 3; PX 3000 (Reis Veiga Direct) ¶ 29.

9 PX 3000 (Reis Veiga Direct) ¶ 26; PX 247 (Certificate # 052–RAT–98).

10 PX 223 (March 1995 Contract among TexPet, ROE, and PetroEcuador); PX 3000 (Reis Veiga Direct) ¶ 30.

11 PX 3000 (Reis Veiga Direct) ¶ 33; *see also e.g.,* PX 224, PX 225, PX 226, PX 237, PX 238, PX 240, PX 242, PX 243, and PX 245 (*actas*).

12 PX 246 (*Acta* Final by and between the Government of the ROE, PetroEcuador, Petroproduccion, and Texaco Petroleum Company).

13 *Id.*

14 *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (filed Nov. 3, 1993) (hereinafter "*Aguinda* "); *see also Republic of Ecuador v. ChevronTexaco Corp.,* 376 F.Supp.2d 334, 341 (S.D.N.Y.2005).
The Court takes judicial notice of its own records. Fed.R.Evid. 201(b); *I. & I. Holding Corp. v. Greenberg,* 151 F.2d 570, 572 (2d Cir.1945).

15 *Aguinda v. Texaco, Inc.,* 945 F.Supp. 625, 626 (S.D.N.Y.1996) *vacated sub nom. Jota v. Texaco, Inc.,* 157 F.3d 153 (2d Cir.1998).

16 The defendants include not only Steven Donziger, but his law firm, variously referred to as the Law Offices of Steven Donziger and Steven R. Donziger & Associates, PLLC. The sole proprietorship is not a legal entity and is indistinguishable from Donziger personally for all legal purposes. *E.g., Holland v. Fahnestock & Co.,* 210 F.R.D. 487, 500 (S.D.N.Y.2002); *Anti–Hydro Co. v. Castiglia,* 92 A.D.2d 741, 461 N.Y.S.2d 87 (1983). It is undisputed that Donziger's professional company, Steven R. Donziger & Associates, PLLC, is liable to the same extent as Donziger because Donziger was its agent and acted within the scope of his employment by it. *See In re Klenk,* 204 A.D.2d 640, 612 N.Y.S.2d 220, 220 (1994) ("The attorney['s] fraudulent scheme occurred

while he was a partner acting in the ordinary course of business of each law firm and therefore each law firm is liable for the attorney['s] misconduct to the same extent as he is."). Accordingly, references to Donziger (unless otherwise stated) include the sole proprietorship and the professional company for ease of expression except if otherwise specifically stated.

17 Bonifaz Dec. 30, 2010 Dep. Tr. at 37:19–22.

18 DX 1750 (Donziger Direct) ¶ 20.

19 PX 631 (June 27, 1993 Retention Agreement Between Bonifaz, Kohn, and plaintiffs in the *Aguinda* Litigation).

20 DX 1750 (Donziger Direct) ¶ 2.

21 *Id.* ¶¶ 2–5.

22 *Id.* ¶ 2.

23 Unless otherwise stated, "Donziger" hereafter refers collectively not only to Donziger himself, but also to defendants The Law Offices of Steven R. Donziger and Donziger & Associates PLLC. As noted, the first is a sole proprietorship indistinguishable as a legal matter from Donziger. The second is responsible for Donziger's personal actions because everything he did was done as its agent and within the scope of his authority.

24 *Id.* ¶ 1.

25 *Id.* ¶ 3.

26 *Id.* ¶ 21.

27 *Id.* ¶¶ 22, 25.

28 *Id.* ¶

29 *Id.* ¶ 29.

30 PX 2442 (Dec. 30, 2008 Email from K. Hinton to S. Cohen and H. Glaser attaching Dec. 30, 2008 *Bloomberg* article), at 10.

31 PX 5600 (Kohn Direct) ¶ 1; *see also* PX 2350 (Dec. 21, 1994 Ltr. from Bonifaz to Kohn reflecting fee sharing agreement in *Aguinda* and *Ashanga v. Texaco*); PX 631 (June 27, 1993 Retention Agreement Between Bonifaz, Kohn, and plaintiffs in the *Aguinda* Litigation).

32 PX 2350 (Dec. 21, 1994 Ltr. from Bonifaz to Kohn reflecting fee sharing agreement in *Aguinda* and *Ashanga v. Texaco*), at 1.

33 PX 2350 (Dec. 21, 1994 Ltr. from Bonifaz to Kohn reflecting fee sharing agreement in *Aguinda* and *Ashanga v. Texaco,* another case brought on behalf of residents of Peru), at 2–3.

34 Mot. to Dismiss, *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (S.D.N.Y. filed Dec. 28, 1993) [DI 10], at 3.

35 Pls.' Mem. of Law in Opp. to Defs.' Mot. to Dismiss, *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (S.D.N.Y. filed Mar. 10, 1994) [DI 23], at 3 n. 2.

36 *Aguinda v. Texaco, Inc.,* 945 F.Supp. 625 (S.D.N.Y.1996), *vacated sub nom. Jota v. Texaco, Inc.,* 157 F.3d 153 (2d Cir.1998).

37 *Aquinda v. Texaco, Inc.,* 175 F.R.D. 50, 51 (S.D.N.Y.1997).

38 *Jota,* 157 F.3d at 159.

39 *Id.*

40 *E.g.,* Texaco Inc.'s Supp. Mem. of Law *passim, Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (S.D.N.Y. filed Mar. 10, 2000) [DI 147].
As will appear, there is no necessary inconsistency between seeking a *forum non conveniens* dismissal in order to proceed in a foreign country and later attacking a judgment rendered in that foreign country as fraudulent or on other permissible grounds. The standards governing the availability of an alternate forum for *forum non conveniens* analysis and for a collateral attack on a foreign judgment are quite different. *See infra Discussion* § IX.A.

41 *E.g.,* Pls.' Reply Mem. of law *passim, Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (S.D.N.Y. filed Apr. 24, 2000) [DI 151].

42 *Aguinda v. Texaco, Inc.,* 142 F.Supp.2d 534, 537 (S.D.N.Y.2001) *aff'd as modified,* 303 F.3d 470 (2d Cir.2002).

43 PX 684 (Waiver of Rights Between C. Bonifaz and J. Kohn in *Aguinda v. Texaco,* No. 93 Civ. 7527 (S.D.N.Y.)), at 1–2.

44 Bonifaz later testified that "this idea of an agreement not to sue arose following statements by Judge Rakoff ... that if the Government of Ecuador intervened in the *Aguinda* litigation, that Texaco might bring counterclaims against it." Bonifaz Mar. 1, 2011 Dep. Tr. at 14:16–22. Bonifaz said that, at his suggestion, the ROE had agreed to intervene in the *Aguinda* case, but that it wanted an assurance from Bonifaz that it would not be sued if it did so. According to Bonifaz, "the Procurador [Attorney General] ... said that he will be happy to do whatever we wanted with respect to the case. Then, following that conversation, whatever it was, I talked to a woman at his office ... in which she said 'Well, the Procurador wants this document signed by you guys that you're not going to sue Ecuador,' because Judge Rakoff raised the issue in court that 'If you guys do that, you're going to get sued.' So they freaked out, and so then they wanted this document signed." Bonifaz Mar. 1, 2011 Dep. Tr. at 16:8–21. (Defendants' objection to this testimony is overruled. The evidence is relevant to the development of the relationship among the ROE and the defendants, which goes among other things to the likelihood that influence improperly was brought to bear on the Lago Agrio court. The statements attributed to the ROE officials are not hearsay because they are not received for the truth of the statements but to explain why the *Aguinda* plaintiffs, most of whom are LAPs, waived claims against the ROE and PetroEcuador.)

45 *In re Aguinda,* 241 F.3d 194, 198 (2d Cir.2001).

46 *Id.* at 198, 206.

47 PX 10A (Mar. 30, 2006 *Crude* Clip).

48 *See infra* § Facts II.A, IV.F.1.

49 DI 29–10 (Hendricks Decl. 1), Ex. 83, at 2.

50 Act 99–37, Registro Oficial No. 245, July 30, 1999.

51 *Id.;* PX 2382 (Invictus Memo), at 29 ("Art. 43. Natural or legal persons or human groups, linked by a common interest and directly affected by the harmful action or omission, may file with the judge of competent jurisdiction actions for monetary damages and for deterioration caused to health or the environment, including biodiversity and its constituent elements.") (citing EMA).
As noted, the issue whether Ecuador permitted class actions was hotly disputed in *Aguinda.*

52 *Chevron Corp. v. Donziger,* 886 F.Supp.2d 235, 243 & nn. 23–25 (S.D.N.Y.2012).

53 *Id.* The EMA is cited in the complaint as creating a right on the part of natural persons and others to sue "for damage and loss and for health and environmental deterioration, including biodiversity." *Id.* at 29, 32.

54 *Id.* at 29–31; PX 5600 (Kohn Direct) ¶ 4.

55 PX 4300X (Callejas Direct) ¶ 24.

56 *E.g.,* Plaintiffs' Reply Mem. of Law, *passim, Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527(JSR) (S.D.N.Y. filed Apr. 24, 2000) [DI 151].

57 As will appear, these statements made on camera were recorded by a documentary film maker whom Donziger recruited to make a film about the Lago Agrio case and for which he procured millions in financing from a friend. The film was released with the title *Crude.*
In these film clips, Donziger frequently sought to justify improper or questionable actions with respect to the Ecuadorian litigation by contending that such behavior was necessary in under the circumstances. But there is no credible evidence to support Donziger's claims of necessity or justification, which often hinged on unsubstantiated suppositions of misconduct by Chevron. The Court finds that Donziger's attempts of self justification best are understood as attempts to make himself look good notwithstanding his conduct. Those attempts are not credible given the entire record of this case and the Court's assessment of Donziger.

58 PX 9A (Mar. 30, 2006 *Crude* Clip).

59 PX 179 (Donziger Notebook).

60 PX 3A (Mar. 9, 2006 *Crude* Clip), at CRS–032–00–CLIP–01.

61 PX 11A (Apr. 3, 2006 *Crude* Clip), at CRS060–00–CLIP–04.

62 PX 7A (Mar. 30, 2006 *Crude* Clip), at CRS–053–02–CLIP–04.

63 PX 8A (Mar. 30, 2006 *Crude* Clip).

64 PX 779 (June 14, 2006 Email from S. Donziger to A. Ponce re "Need plan").

65 PX 67A (June 6, 2007 *Crude* Clip), at CRS–350–04–CLIP–01.

66 PX 81A (Undated *Crude* Clip), at CRS–129–00–CLIP–02.

67 PX 47A (Mar. 4, 2007 *Crude* Clip), at CRS 198–00–CLIP–07.

68 PX 24A (Jan. 16, 2007 *Crude* Clip), at CRS 158–02–CLIP 9.

69 PX 77A (June 13, 2007 *Crude* Clip), at CRS 361–11.

70 PX 43A (Mar. 4, 2007 *Crude* Clip), at CRS–195–05–CLIP–01.

71 N.Y. Rules of Prof'l Conduct, Rule 8.5(a) (effective Apr. 1, 2009); N.Y. Code of Prof'l Resp., DR 1–105 (repealed effective Apr. 1, 2009).

72 PX 68A (June 6, 2007 *Crude* Clip), at CRS–35–04–CLIP–02.

73 PX 2522 (List of Judges on the Lago Agrio Chevron Case).

74 Tr. (Zambrano) 1715:21–23; *see also* PX 4300X (Callejas Direct) ¶ 20.

75 PX 4800 (Guerra Direct) ¶ 4.

76 *Id.;* PX 2522 (List of Judges on the Lago Agrio Chevron Case).

77 PX 2522 (List of Judges on the Lago Agrio Chevron Case).

78 *Id.;* PX 348 (Oct. 3, 2007 Lago Agrio Court Order).

79 PX 2522 (List of Judges on the Lago Agrio Chevron Case).

80 PX 4800 (Guerra Direct) ¶ 21; PX 4300X (Callejas Direct) ¶ 20.

81 Tr. (Zambrano) 1715:1–5; PX 2522 (List of Judges on the Lago Agrio Case).

82 PX 4124 (July 30, 2008 Personnel Action Appointing N. Zambrano as Second Judge of the Superior Court of Nueva Loja); Tr. (Zambrano) 1629:19–1630:7.

83 Tr. (Zambrano) 1716:13–16.

84 *Id.* 1716:22–25.

85 *Id.* 1904:22–1905:2; DX 1561 (Oct. 1, 2010 Order).

86 PX 2522 (List of Judges on the Lago Agrio Case).

87 PX 5600 (Kohn Direct) ¶ 10.

88 Between May 2003 and November 2009, the Kohn firm "was the primary funder of the litigation and related U.S. public relations and other activities. During those nearly seven years, the firm paid over $6 million in litigation expenses. This included ... $1.1 million that [the Kohn firm] provided to Mr. Donziger for legal services and expenses, $1.1 million that [the Kohn firm] paid to U.S. consultants, and $2.2 million that [the firm] transferred by wire from bank accounts in the United States to bank accounts in Ecuador." PX 5600 (Kohn Direct) ¶ 9; *see also* Donziger Nov. 29, 2010 Dep. Tr. at 205:10–206:4. These payments included a monthly stipend that the Kohn firm paid to Donziger. *See* Donziger Jan. 19, 2011 Dep. Tr. at 3547:23–3548:22.

89 PX 5600 (Kohn Direct) ¶ 10.

90 Bonifaz Dec. 30, 2010 Dep. Tr. at 32:16–33:4.

91 *Id.* at 20:21–22; *see also* PX 761 (Feb. 10, 2006 Assembly Resolution Terminating C. Bonifaz).

92 PX 806R (Donziger Book Proposal), at 5.

93 *Id.*

94 *Id.* at 3 ("I am the person primarily responsible for putting this team together and supervising it.").

95 *Id.* at 21.

96 *Id.* at 3.

97 Donziger July 19, 2011 Dep. Tr. at 4764:19–23 ("Q. When you say 'local counsel,' do you mean Pablo Fajardo, Saenz, and Prieto? A. Yes."); Tr. (Donziger) 2477:1–6; PX 7682 (Jan. 28, 2010 Draft Ltr. from S. Donziger to J. Tyrrell) ("It likely will involve regular travel to Ecuador as well to work with local counsel."); Tr. (Donziger) 2470:4–10 ("Q. Isn't it a fact, Mr. Donziger, that you would give directions to local counsel in Ecuador on what to do with the litigation? A. On occasion I would express my opinion as to what they should do, and I would do it in forceful terms.").

98 DX 1306 (Donziger Notebook), at 23 ("Pablo ... [s]till introduces me as the 'cabeza' of the lawsuit which I don't like but that is fixable.").
Chevron offered selected portions of Donziger's personal notebook as a series of individual exhibits but the defendants offered all of it as DX 1306. The portions offered by Chevron all were admissible, even over any hearsay objection, because Donziger's statements in the notebook are nonhearsay when offered by his opposing party, Chevron. Fed.R.Evid. 801(d)(1). The situation is quite different when the entire notebook was offered by the defendants. To the extent it was offered for the truth of the statements, it was hearsay. No hearsay exception was established. Nor did defendants establish that the entire notebook was admissible under the rule of completeness, Fed.R.Evid. 106, which in any case would not have overcome any hearsay objection, *infra Discussion* § VII.C, or that any specific part was admissible for a nonhearsay purpose. Accordingly, DX 1306, except for those portions specifically relied upon in this opinion, which are admissible for the truth of the matters asserted under FED. R. EVID. 801(d)(1), is inadmissible and stricken.

99 Donziger Dep. July 19, 2011 Dep. Tr., at 4912:19–22 ("I think [Yanza's] salary was set by mutual consent between Mr. Kohn and myself on the one hand, and Mr. Yanza on the other, when Mr. Kohn was involved in the case"), *id.* at 4913:10–15 ("Q. Who determined whether or not Mr. Yanza received a bonus? A. I think, again, it was done by mutual consent between Mr. Yanza and myself after Mr. Kohn withdrew from the case."); PX 2396R (Donziger's Responses and Objections to Chevron Corps.' First Set of Requests for Admission), at 21 ("REQUEST FOR ADMISSION NO. 3:Admit that YOU were involved in setting Pablo Fajardo Mendoza's bonuses for his work concerning the LAGO AGRIO LITIGATION. RESPONSE TO REQUEST FOR ADMISSION NO. 3: ... Donziger admits that he was aware of, and at times participated in, discussion concerning Pablo Fajardo Mendoza's compensation."); *id.* at 22 ("REQUEST FOR ADMISSION NO. 5: Admit that YOU were involved in setting Pablo Fajardo Mendoza's bonuses for his work concerning the LAGO AGRIO LITIGATION. RESPONSE TO REQUEST FOR ADMISSION NO. 5: ... Donziger admits that he was aware of, and at times participated in, discussion concerning Pablo Fajardo Mendoza's compensation."); *id.* at 23 ("REQUEST FOR ADMISSION NO. 7: Admit that YOU were involved in setting Luis Yanza's monthly salary for his work concerning the LAGO AGRIO LITIGATION. RESPONSE TO REQUEST FOR ADMISSION NO. 7: ... Donziger admits that he was aware of, and at times participated in, discussion concerning Luis Yanza's compensation."); *id.* at 24–25 (same for Juan Pablo Sáenz); *id.* at 26 (same for Julio Prieto); *id.* at 23–24 ("REQUEST FOR ADMISSION NO. 9: Admit that YOU were involved in setting Luis Yanza's bonuses for work concerning the LAGO AGRIO LITIGATION. RESPONSE TO REQUEST FOR ADMISSION NO. 9: ... Donziger admits that he was aware of, and at times participated in, discussion concerning Luis Yanza's compensation."); *id.* at 25–27 (same for Juan Pablo Sáenz.); *id.* at 26 (same for Julio Prieto).

100 *E.g.,* PX 8057 (Mar. 7, 2010 Email from S. Donziger to L. Yanza, J. Sáenz, J. Prieto, L. Garr, and A. Page), at 5 ("Friends, Today is Sunday but it's urgent that we resolve the following by Monday: 1) The local motion with the court—we need a draft right away with the translation so we can review it here before submitting it in Lago Agrio. The sooner it can be submitted the better; rush if possible friends.... Please friends, we are in a difficult situation; I am asking you to work today."); PX 1065 (Sept. 11, 2008 Email from S. Donziger to J. Sáenz) (" 'No' is not a sufficient answer. If you have too much work, find somebody else to do it and pay them. I need this tonite—no bullshit, and trust me, it will help our clients more than what you are currently doing, as important as what you are doing is."); PX 1038 (June 6, 2008 Email from S. Donziger to J. Sáenz, P. Fajardo, J. Prieto, L. Yanza, R. Garcia) ("Juampa Get this done and don't fuck up please."); PX 2376 (Apr. 19. 2007 Email from S. Donziger to M. Regalado and M. Garcés) ("Friends: I am very, very disappointed that you had already left when I called at 5:20. I'm applying new rules for office communication.... We're paying too much to put up with this type of thing. I send a corrected press release and instead of answering me, you left."); PX 687 (Nov. 19, 2003 Memorandum from Donziger to Team Entitled "Strategic Planning Memo/Ecuador Case"); PX 7670 (Jan. 21, 2008 Email from S. Donziger to J. Prieto, J. Sáenz, L. De Heredia, P. Fajardo, A. Ponce) ("Julio, Juampa, and Pablo, and Alejandro: Please ask Lupita to give you the legal document that I gave her on Friday. It is urgent that you take care of it."); PX 7582 (July 22, 2010 Email from S. Donziger to P. Fajardo) ("Can you send me the summary that I recently asked for? thanks."); PX 7465 (Sept. 20, 2010 Email from S. Donziger to J. Sanez, P. Fajardo, J. Prieto, L Yanza, V.

Barham) ("Friends, Let's talk tonight. Let's not do anything rash please. Let's analyze it first as a group."); PX 3040 (Apr. 3, 2008 Email from S. Donziger to P. Fajardo, L. Yanza, M. Garces. M. Guadalupe de Heredia, J. Sáenz, J. Prieto) ("PERSONALIZE THE REIS [VEIGA] MATTER BECAUSE USING HIM IS A WEAKNESS OF CHEVRON. PLEASE TAKE ADVANTAGE").

101 This of course is not to say that Donziger never consulted his Ecuadorian colleagues, both lawyers and others, and that he did not take account of their views. But It was Donziger who made the important final decisions, giving such weight to any views expressed by others as he thought appropriate.

102 Although Mr. Kohn provided the money through 2009, Donziger largely controlled how and when it was spent. Many of the payments Kohn made to the plaintiffs' team in Ecuador, scientists, consultants, PR strategists, and experts first flowed through Donziger and were subject to his approval. Indeed, Donziger sometimes paid the Ecuadorian legal team from his personal account, for which he later was reimbursed by Kohn. *See, e.g.,* Donziger July 19, 2011 Dep. Tr. at 4925:5–14, 4927:2–4928:2. And while Kohn ultimately bore the cost of the salaries and bonuses of Ecuadorian lawyers and agents during his time on the case, Donziger was involved in setting the amount of each. *E.g., id.* at 4912:18–22 (Q: Who set Mr. Yanza's salary? A: I think it was set by mutual consent between Mr. Kohn and myself on the one hand and Mr. Yanza on the other, while Mr. Kohn was involved in the case.); *id.* at 4913:15–23 ("Q. Did Mr. Yanza receive any bonuses while Mr. Kohn was funding the litigation? A. I believe he did, yes. Q. Did Kohn agree to those bonuses? A. He paid them, so yeah, he agreed to them."). Donziger testified also that he even purchased a home for Yanza. *Id.* at 4917:3–10. While Donziger paid for the home from his personal checking account, he was reimbursed for the payment by Kohn. *Id.* at 4918:12–18; *see also* PX 968 (Feb. 8, 2008 Email from S. Donziger to J. Kohn and K. Wilson) ("Please send your deposit of 20,000 to the following account").

103 Donziger and the other defendants disputed this, at least for the period early 2012 to date, both on a sanctions motion and at trial. The Court previously rejected their argument on the sanctions motion and now rejects it again after trial.

104 *Infra Facts* § VII.D.
In 2010, a new source of funding, Burford Capital, invested millions of dollars in the case, at which point the law firm of Patton Boggs was given some authority, along with Donziger, over the expenditure of the money. *Infra Facts* § VII.E.1.

105 PX 6872 (May 23, 2006 Ltr. from S. Donziger to D. Kuhn), at 7 ("[m]y closest friend in Ecuador and the coordinator of the case for the affected communities [is] Luis Yanza").

106 *Id.*

107 Donziger July 19, 2011 Dep. Tr. at 4912:11–21, 4914:4–24, 4917:3–10, 4918:12–18; *see also* PX 968 (Feb. 8, 2008 Email from S. Donziger to J. Kohn and K. Wilson) ("Please send your deposit of 20,000 to the following account.").

108 Donziger Dec. 23, 2010 Dep. Tr. at 1763:18–23.

109 *See infra Facts* § VI.

110 DX 1900 (H. Piaguaje Direct) ¶ 22; Tr. (Kohn) 1493:10–19.

111 *Id.;* PX 5600 (Kohn Direct) ¶ 3 (Yanza was the representative of the ADF with respect to the Lago Agrio case from the outset); id. ¶ 17 (Yanza was the head of the ADF).

112 Tr. (Donziger) 2635:5–9; Donziger Dec. 23, 2010 Dep. Tr. at 1817:12–17 ("Q. Selva Viva was an Ecuadorian corporation created and run by the representative of the plaintiffs; is that right? A. It was created by Yanza as a mechanism to administer the case funds."); PX 6906 (record of incorporation of Selva Viva, its entry into the Register of Companies, and the designation of Donziger as president); PX 897 (Aug. 14, 2007 Email from S. Donziger to K. Wilson, J. Kohn, and K. Kenny re: "critical money transfer") ("The Frente [ADF] created Selva Viva simply as a pass thru mechanism to administer funds for the litigation; the Frente [ADF] controls Selva Viva.").

113 E.g., Donziger July 19, 2011 Dep. Tr. at 4844:22–4845:14; PX 897 (Aug. 14, 2007 Email from S. Donziger to K. Wilson, J. Kohn, and K. Kenny re: "Critical money transfer") ("Luis Yanza ... runs the Selva Viva account.").

114 PX 897 (Aug. 14, 2007 Email from S. Donziger to K. Wilson, J. Kohn, and K. Kenny re: "critical money transfer") ("The Frente [ADF] created Selva Viva simply as a pass thru mechanism to administer funds for the litigation; the Frente [ADF] controls Selva Viva."); *see also* Donziger Dec. 23, 2010 Dep. Tr. at 1817:12–18 ("Q. Selva Viva was an Ecuadorian corporation created and run

by the representative of the plaintiffs; is that right? A. It was created by Yanza as a mechanism to administer the case funds.").

115 DI 1469.

116 PX 6872 (May 23, 2006 Ltr. from S. Donziger to D. Kuhn), at 7.

117 Tr. (Donziger) 2474:16–20, 2475:17–2476:6; PX 6872 (May 23, 2006 Ltr. from S. Donziger to D. Kuhn), at 9 ("As we surveyed our options, we decided that Fajardo was the best bet to replace Pareja even though he had never run a trial in his life and (as the graduate of an extension school) was not considered a 'real' lawyer by Chevron's legal team.").

118 PX 323 (Special and Judicial Power of Attorney on Behalf of Pablo Estenio Fajardo Mendoza).

119 *Id.*

120 *E.g.,* DX 1500 (Hinton Direct) ¶ 34 ("Pablo Fajardo won the CNN Hero Award....").

121 *E.g.,* PX 1107 (Feb. 24, 2009 Email from P. Fajardo to S. Donziger and L. Yanza) ("I'm in Oregon [and].... I'm supposed to give the opening address at a super important conference in the environmental world...."); PX 5600 (Kohn Direct) ¶ 18 ("In 2006, Mr. Donziger, Mr. Fajardo, Mr. Yanza, and Mr. Ponce met me in my offices to discuss the case."); Donziger Jan. 14, 2011 Dep. Tr. at 2795:11–20 ("Q. Where were you and Mr. Fajardo meeting? A. It was in my apartment. Q. In New York? A. Yes. Q. What was the purpose of Mr. Fajardo's visit to New York in May of 2010? A. To deal with various issues relating to the Lago case.").

122 DI 128 (Feb. 23, 2011 Ltr. from P. Fajardo to Court).

123 DI 469 (Certificate of Default as to Fajardo, Yanza, the ADF, Selva Viva, and the 45 defaulting Lago Agrio Plaintiffs).

124 DX 1601 (Ponce Direct) ¶ 9.

125 *Id.* ¶ 12.

126 *Id.* ¶ 9.

127 E.g., PX 7735 (Apr. 10, 2007 Email From S. Donziger to J. Sáenz and A. Ponce) ("Need some manner to make theory of unjust enrichment part of damages claim. Any ideas of how under Ecuadorian law?"); PX 2493 (Aug. 26 2008 Memorandum from G. Erion and J. Sáenz) ("Re: Chevron's Liability for Texaco in Fact and Law.").

128 PX 8057 (Mar. 7, 2010 Email from P. Fajardo to S. Donziger copying others) ("Juampa [Sáenz] is translating the Callejas statement.")

129 PX 8057 (Mar. 7, 2010 Email from J. Prieto) ("I can start on the motion [to be submitted in Denver]"); PX 7580 (Nov. 7, 2006 Email from S. Donziger to J. Sáenz, L. Schrero, and J. Prieto); PX 7468 (Nov. 11, 2010 Email from J. Sáenz to P. Fajardo and S. Donziger) ("Friends, here's the most recent draft of the Alegato. It still needs some work."); PX 435 (Nov. 15, 2007 Email from J. Sáenz to P. Fajardo, J. Prieto, S. Donziger, and A. Anchundia) ("Colleagues, here's the first version of the famous merger memo, for your review and comments. At the last minute I thought it would be a good idea to add something about piercing the corporate veil, which is still missing.").

130 DX 1900 (H. Piaguaje Direct) ¶ 26; Tr. (Donziger) 2635:11–22 ("The asamblea, I would describe it as a grassroots organization that was created by the affected communities that exist in the Napo concession area, that is where Texaco used to operate. There is about 80 different communities, some indigenous, some farmer communities, that consider themselves to be the class of people that would benefit from any cleanup of the environmental damage. And they organized an assembly in recent years to meet on a regular basis and to monitor the lawsuit and to work with the lawyers to make their views known about how they thought the lawsuit should be litigated, or whatever issues that they wanted to express themselves about they would.").

131 DX 1900 (H. Piaguaje Direct) ¶ 36.

132 *Id.* ¶ 37.

133 *Id.* ¶ 38.

134 *Id.* ¶ 26.

135 The ADF is referred to also as the "Amazon Defense Coalition." *See, e.g.,* DX 1600 (Moncayo Direct) ¶ 6.

136 Charles Calmbacher, one of the first experts Donziger hired to assist in the Lago Agrio litigation, testified that "a big concern of Donziger's was our public appearance. He was convinced that he could win the case in the court of public opinion.... He felt, you know, if we showed any contamination, he could basically bring that out as, you know, something horrible to the people and to the Amazon and get public opinion on his side." Calmbacher Dep. Tr. at 26:1–14.

137 PX 687 (Nov. 19, 2003 Memorandum from Donziger to Team re: "Strategic Planning Memo/Ecuador Case"), at 1.

138 While the financial records are incomplete and do not permit a full and accurate accounting, PX 4900R (Dahlberg Direct) ¶¶ 8, 31–32, Donziger spent, or had primary control over spending by others from whom he raised money, at least several million dollars to make the documentary film *Crude,* to hire public relations personnel and lobbyists, to pay a former presidential speech writer to ghostwrite op-ed pieces for signature by others, and to fund ostensibly independent NGOs that publicly supported the LAPs in various ways. *Id.* ¶¶ 7, 89–112; *see also* PX 607 (Invoices from S. Donziger to Kohn, Swift & Graf), at 58 (June 10, 2010 Invoice reflecting $7,500 fee for Paul Orzulak, West Wing Writers). The public relations personnel and lobbying firms he hired included Karen Hinton, Ken Sunshine, Paul Orzulak, Kerry Kennedy, Lou Dematteis, Mark Fabiani, Christopher Lehane, Ben Barnes Group, and Downey McGrath Group. PX 4900R (Dahlberg Direct) ¶¶ 89, 107. Among the NGOs with which he worked closely, and for which he raised substantial funds, were Amazon Watch, the ADF, the Rainforest Action Network, and Selva Viva. *Id.* ¶¶ 101–06.

139 *E.g.,* PX 1146 (July 2, 2009 Memorandum from "SRD" to "Kohn Team" re: "Activity Going Forward"), at 1 ("The space is occupied by players in the worlds of law, science, environmental activism, politics, the press, lobbying, diplomacy, celebrity, shareholders, financial analysts, regulatory agencies, and many others in Ecuador—including high-level officials in Ecuador's government.... We ... see this as not just a legal case, but a political-style campaign driven by a legal case. The battle takes place on a daily basis, 24/7 per day, with no breaks for the normal rhythms of the typical legal practice.").
In fact, many of Donziger's former co-counsel on the case expressed grave concerns over his "obsession with public relations." PX 1406 (Aug. 9, 2010 Ltr. from J. Kohn to P. Fajardo, L. Yanza, H. Piaguaje, E. Chavez, H. Payaguaje, E. Criollo), at 4; *see also* PX 1157 (Sept. 5, 2009 Email from N. Glazer to S. Donziger) ("We have a team of experienced attorneys who want to be fully integrated into and engaged with the matter.... And we ... learn of case developments not from co-counsel but from press releases.... I feel ... that it is extremely unprofessional, and that too much emphasis is placed on PR and not enough on other aspects.").

140 *Supra Facts* § II.A.

141 PX 184 (Donziger Notebook), at 2 of 5 (emphasis added).

142 PX 77A (Undated *Crude* Clip).

143 PX 1146 (July 2, 2009 Memorandum from "SRD" to "Kohn Team" re "Activity Going Forward"), at 1.

144 DX 1500 (Hinton Direct) ¶¶ 2, 4. In 2009, Donziger described Hinton to one of the case's investors as follows: "Former aid[e] to Andrew Cuomo (Clinton cabinet member and currently [Attorney General] of New York). Responsible for 60 Minutes, Wash Post, Bloomberg, AP, Wall Street Journal, and interest by Andrew Cuomo in investigating Chevron for misleading shareholders." PX 1123 (Apr. 14, 2009 Memorandum from S. Donziger to R. DeLeon re "Estimated 15–month budget, Ecuador case"), at 1–2.

145 DX 1500 (Hinton Direct) ¶ 4; Tr. (Hinton) 2180:22–2181:2.

146 Tr. (Hinton) 2169:14–15.

147 PX 1034 (Apr. 28, 2008 Email from K. Hinton to S. Donziger re "Proposal from Hinton Communications"), at 3.

148 *E.g.,* PX 6817 (Mar. 11, 2009 Email Chain Between K. Hinton and S. Donziger) (Donziger tells Hinton: "do not change headlines ever without telling me .... in the future blind copy me on those emails to quito ... I need to know what is going on for purposes of managing my own staff there and knowing what journalists there have been sent ... I think I asked you that before"); PX 1133 (May 5, 2009 Email from K. Hinton to S. Donziger) ("There are people in this world—other than yourself—who know how to get things done. I know that's hard for you to believe, given your own incredible fascination with yourself."); PX 6814 (Dec. 3, 2009 Email chain Between K. Hinton and S. Donziger) (Donziger: "when I send a final copy of a press release for posting, the issue of the headline is settled. never change it at that point. tks." Hinton: "I said I misunderstood. Why do u always feel the need to rub a mistake in extra hard ... To make sure your authority is respected and acknowledged? It is. Ok!").

149 Donziger June 28, 2013 Dep. Tr. at 845:21–23.

150 PX 728 (Apr. 27, 2005 Email from C. Lehane to S. Donziger and J. Kohn attaching Ecuadorian Issues Outline), at 4.

151 *Id.* at 1 (emphasis omitted).

152 PX 734 (Oct. 1, 2005 Email from S. Donziger to J. Kohn re "Lehane's first press plan"), at 2; *see also* PX 694 (Aug. 16, 2004 Email from C. Lehane to S. Donziger re: "Issues Outline Document"), at 2 ("We must create an ongoing storyline that ChevronTexaco faces hidden purposely concealed economic exposure because of its unresolved role in the Ecuador ... project. Ultimate success will depend on our ability to organize and focus our efforts on impacting the company's bottom line.").

153 June 28, 2013 Donziger Dep. Tr. at 845:24–846:4; *see also* PX 560 (Feb. 2011 Advisory Agreement between LAPs, CSL Strategies, and Mark Fabiani LLC).

154 *See* PX 571 (2005 Amazon Watch Annual Report), at 5.

155 PX 7426 (Feb. 9, 2008 Email from S. Donziger to M. Anderson, P. Paz y Mino, and K. Koenig re: "For Pat Doherty"); PX 754 (Jan. 30, 2006 Amazon Watch Ltr. from A. Soltani and S. Aird to C. Cox).

156 PX 7542 (May 25, 2009 Amazon Watch Letter to Shareholders), at 2.

157 *See, e.g.,* PX 483R (Mar. 6, 2007 Amazon Watch press release) at 2 ("[An] independent damage assessment, by the U.S. firm Global Environmental Operations, estimates clean-up to cost at least $6.14 billion."); PX 472R (Apr. 26, 2006 Amazon Watch press release), at 1 ("Two rainforest leaders sparked a dramatic showdown with Chevron CEO David O'Reilly today over the oil major's devastating $6 billion toxic contamination of their ancestral lands....").

158 *See, e.g.,* June 28, 2013 Donziger Dep. Tr. at 834:2–5 (acknowledging that "[o]n occasions [Donziger] wrote press releases that [Amazon Watch] put out"); Jan. 18, 2011 Donziger Dep. Tr. at 3177:10–13; 3178:10–20 (Q: "You drafted the [SEC] complaint letters for Amazon Watch to send; did you not?" A: "I believe at times I did.").

159 *See, e.g.,* PX 1214 (Jan. 27, 2010 Email from S. Donziger to S. Tegel, A. Soltani, K. Koenig, and M. Anderson re: "another thought"), at 1 ("Suggestions are welcome for any press release we do; final editing authority is something we would never grant to any outsider—especially somebody not in a position to understand the art and feel of this campaign and its daily developments."); PX 808 (Nov. 9, 2006 Email from S. Donziger to J. Ciplet and A. Soltani re: "suggestion"), at 1 ("I also know the press releases on the Ecuador campaign are not a terrible work burden to AW because I am writing most of them."); PX 906 (Aug. 24, 2007 Email from S. Donziger to S. Tegel, M. Anderson, A. Soltani, and K. Koenig re: "follow up on press releases"), at 1 ("[W]e are never going to outsource our editing responsibility to anybody else or any NGO....").

160 *See, e.g.,* PX 996 (Mar. 17, 2008 Email from S. Donziger, M. Anderson, S. Tegel, P. Paz y Mino, and A. Soltani re: "Edited SEC letter/final"), at 1 ("The final SEC letter is attached with all of AW's edits sent to me on Friday plus some additional edits of my own.... I think this letter will really put some heat on them. To submit this, this is what you need to do....").

161 *See, e.g.,* PX 7426 (Feb. 9, 2008 Email from S. Donziger to M. Anderson re: "For Pat Doherty"), at 1 ("Mitch, Attached is the

memo you requested. I put it in your name.").

162 Donziger June 28, 2013 Dep. Tr. at 841:19–22.

163 PX 571 (2005 Amazon Watch Annual Report), at 8; Tr. (Hinton) 2180:1–24.

164 PX 3200 (Russell Direct) ¶ 1. Prior to his involvement with the Lago Agrio case, Russell worked on projects involving remediation and strategic planning related to oil operations in the United States and Latin America. *Id.* ¶ 2.

165 *Id.*

166 *E.g.,* Tr. (Russell) 388:14–18 ("I believe ... that Mr. Donziger was intending to use this cost estimate to get Chevron's attention and to attempt to get them to settle the case.").

167 PX 3200 (Russell Direct) ¶ 5; *see also* DX 1750 (Donziger Direct) ¶ 111; Tr. (Russell) 300:8–10.

168 Tr. (Russell) 304:9–12.

169 PX 3200 (Russell Direct) ¶ 5. Donziger testified, however, that Russell was "provided with and reviewed a considerable amount of data, including historical records and maps." DX 1750 (Donziger Direct) ¶ 111.

170 Tr. (Russell) 309:4–8; PX 3200 (Russell Direct) ¶ 5.

171 DX 1750 (Donziger Direct) ¶ 111; PX 3200 (Russell Direct) ¶ 9.

172 PX 3200 (Russell Direct) ¶ 6; *see also* DX 1750 (Donziger Direct) ¶ 111.

173 PX 2414 (Russell Damages Estimate), at 2.

174 Tr. (Russell) 339:4–7.

175 PX 3201 (Dec. 12, 2004 Email chain including D. Russell, C. Bonifaz, A. Wray, S. Donziger, and M. Pareja).

176 Tr. (Russell) 339:10–11.

177 PX 3200 (Russell Direct) ¶ 38.

178 *Id.* ¶ 14.

179 *Id.* ¶¶ 12–13, 20; *see generally* PX 766 (Feb. 13, 2006 Email chain including D. Russell, L. Salazar–Lopez, and S. Donziger re: "Cease and Desist!"); PX 764 (Feb. 14, 2006 Ltr. from D. Russell to S. Donziger re "Cease and Desist"), at 1–2; PX 766 (Feb. 16, 2006 Email from L. Salazar–Lopez to D. Russell re: "Cease and Desist!") (stating that Amazon Watch "respect[s] your request and have decided to take [the] report off of [the Amazon Watch] website"); PX 466R (Mar. 17, 2006 ChevronToxico press release), at 2; PX 467R (Mar. 22, 2006 Amazon Defense Coalition press release), at 1 ("Chevron is resorting to increasingly desperate measures to cover its tracks in the landmark environmental trial in Ecuador in which the oil giant faces a $6 billion clean-up tab."); PX 472R (Apr. 26, 2006 Amazon Watch press release), at 1 ("Two rainforest leaders sparked a dramatic showdown with Chevron CEO David O'Reilly today over the oil major's devastating $6 billion toxic contamination of their ancestral lands...."); PX 480R (Oct. 30, 2006 Amazon Watch press release), at 1–3 (referring to "landmark $6 billion pollution trial" and remediation cost estimates of "at least $6 billion"); PX 18A (Undated *Crude* Clip), at CRS–138–02–CLIP–02; PX 788 (Aug. 15, 2006 Email from S. Donziger to D. Russell re "I asked you once ...") ("No problem, I will contact the Frente to have that removed...."); PX 476R (Aug. 25, 2006 Amazon Watch press release), at 1 ("Clean-up is estimated at $6.1 billion."); PX 494R (Aug. 30, 2007 Amazon

Defense Coalition press release), at 3 ("Global Environmental Services, an Atlanta-based company that assessed the damage, called the area the 'Rainforest Chernobyl' and estimated clean-up would cost at least $6 billion.").

180 PX 728 (Apr. 27, 2005 Email from C. Lehane to S. Donziger and J. Kohn attaching Ecuadorian Issues Outline) (emphasis omitted).

181 PX 736 (Nov. 1, 2005 Email from S. Donziger to C. Lehane and J. Kohn re: "SEC ltr/other").

182 PX 754 (Jan. 30, 2006 Amazon Watch Ltr. from A. Soltani and S. Aird to C. Cox).

183 *Id.*

184 PX 3200 (Russell Direct) ¶ 14 ("I told Donziger on several occasions from late 2004 through early 2005 that my initial cost estimate was wildly inaccurate and that it should not be used.").

185 PX 754 (Jan. 30, 2006 Amazon Watch Ltr. from A. Soltani and S. Aird to C. Cox).

In 2007, Bill Powers, a member of the LAPs' technical team, investigated the claim that the contamination in the Orienté was 30 times larger than the contamination caused by the Exxon Valdez. He concluded that it was vastly exaggerated and so informed Donziger and Soltani of Amazon Watch. PX 861 (May 24, 2007 Email from A. Soltani to S. Donziger re: "exxon valdez 30x"); PX 862 (May 24, 2007 Email from B. Powers to S. Donziger, A. Soltani, S. Tegel, K. Koenig and J. Ciplet re: "FOE is on our team RE: exxon valdez 30x"). Soltani responded that Amazon Watch—which had featured the Exxon Valdez comparison in press releases—needed to "save face" and remove the references to the spill. PX 861 (May 24, 2007 Email from A. Soltani to S. Donziger re "exxon valdez 30x"). But Donziger insisted that they stick to the claim. He warned that there would be "HUGE implications for the legal case" if they disavowed the comparison to Exxon Valdez, and told Amazon Watch that it "[w]ould terribly prejudice the people it is trying to help if it makes this change." PX 860 (May 24, 2007 Email from S. Donziger to S. Tegel re: "private"). Despite Soltani's reservations, ChevronToxico continued to tout the claim. *See, e.g.,* PX 492R (July 4, 2007 Amazon Watch press release), at 2; PX 2309R (Aug. 28, 2009 Amazon Defense Coalition Press Release), at 2; PX 503 (May 21, 2008 Amazon Defense Coalition press release), at 2 ("30 times more pure crude than in the Exxon Valdez disaster"); PX 510 (Sept. 16, 2008 Amazon Defense Coalition press release), at 2 ("The Ecuadorians have accused Texaco ... of committing the worst oil-related disaster on the planet on their ancestral lands—one at least 30 times worse than the Exxon Valdez spill."); PX 513R (Oct. 15, 2008 ChevronToxico press release), at 2 ("All told, the amount of oil dumped in Ecuador by Texaco is at least thirty times greater than the amount spilled during the Exxon Valdez disaster, according to the plaintiffs in the civil suit.").

186 PX 754 (Jan. 30, 2006 Amazon Watch Ltr. from A. Soltani and S. Aird to C. Cox).

187 PX 1130R (Apr. 28, 2009 S. Donziger Testimony before Tom Lantos Human Rights Comm'n, Hr'g on Ecuador, Nigeria, West Papua: Indigenous Communities, Environmental Degradation, and International Human Rights Standards), at 60.

Douglas Beltman, another scientist then working for the LAPs, also challenged the accuracy of the Exxon Valdez claim. He asked Donziger: "do you know where the 30 times number comes from?" PX 1110 (Mar. 1, 2009 Email from D. Beltman to S. Donziger re "Pls answer questions"), at 1. Donziger replied: "*My own calculations. If that doesn't suffice then kiss my butt.*" *Id.* (emphasis added).

Shortly thereafter, Donziger recited the Exxon Valdez comparison in his testimony and continued to use the statistic in press releases and blog posts throughout 2009 and 2010. PX 522R (Apr. 27, 2009 Amazon Defense Coalition press release), at 2; PX 527R (Oct. 22, 2009 Amazon Defense Coalition press release), at 2 ("Experts for the plaintiffs have concluded the disaster is at least 30 times larger than the Exxon Valdez spill...."); PX 529R (Dec. 30, 2009 Amazon Defense Coalition press release), at 2 ("Experts consider the disaster at least 30 times worse than the damage caused by the Exxon Valdez."); PX 533R (*The Chevron Pit* Blog Entry), at 3 ("Experts have concluded that the Chevron [sic] discharged at least 345 million gallons of pure crude oil directly into the rainforest ecosystem ... and approximately 11 million gallons of pure crude was spilled during the Exxon Valdez disaster.").

188 PX 756 (Jan. 31, 2006 Email from S. Donziger to A. Soltani and J. Ciplet re: "Plan for SEC follow up").

189 *Id.*

190 PX 759 (Feb. 1, 2006 Email to A. Soltani, S. Aird, J. Ciplet, L. Salazar Lopez, and S. Tegel re: "imp follow up with SEC").

191 *Id.*

192 PX 764 (Feb. 14, 2006 Ltr. from D. Russell to S. Donziger re "Cease and Desist"), at 1.

193 PX 768 (Feb. 23, 2006 Email from S. Donziger to A. Soltani, L. Salazar–Lopez, S. Tegel, J. Ciplet re: "important—SEC ltr").

194 PX 781 (July 12, 2006 Email from S. Donziger to A. Page and D. Fisher re: "SEC investigation/Chevron").

195 *Id.*

196 Amazon Watch wrote to SEC Chairman Cox again in March 2008 to request "that the SEC impose sanctions on Chevron ... for violations of its disclosure obligations" with respect to its liability in the Lago Agrio litigation. In that letter, Amazon Watch stated that the case was "[c]oming to a [c]lose" and touted "the appointment of an independent special master to assess culpability and ascertain the monetary value of the damages caused." *See* PX 497R (Mar. 18, 2008 Ltr. from A. Soltani to C. Cox), at 2. The letter stated also that Chevron's liability "appears to have increased substantially" such that the "materiality threshold as understood by SEC guidance is reached." *Id.* at 5. Donziger largely drafted this letter for Amazon Watch as well. *See* PX 996 (Mar. 17, 2008 Email from S. Donziger, M. Anderson, S. Tegel, P. Paz y Mino, and A. Soltani re: "Edited SEC letter/final"), at 1 ("The final SEC letter is attached....").

197 DX 1750 (Donziger Direct) ¶ 118.

198 They were prepared by Donziger's associate, Aaron Marr Page, and his wife, Daria Fisher, and were to be submitted under the name of Fausto Peñafiel. DX 731 (Apr. 14, 2006 Email from A. Maest), at 4 ("Fausto can be the author of this if you'd like to submit it?"); DX 731 (Apr. 16, 2006 Email from S. Donziger to A. Page and D. Fisher re: "excellent work on remediation/questions"); PX 8014 (Edits by S. Donziger, "The Cost of Remediating the Former Texaco Concession: An Order of Magnitude Estimate," signed by Fausto Miguel Peñafiel Villareal). Mr. Peñafiel, one of the LAPs' party-nominated experts, introduced Donziger to Fernando Reyes, whose involvement in the case will be explained below. *See* Reyes Dep. Tr. at 17:2–17. Page and Fisher are lawyers, not scientists. They worked on the estimates under Donziger's direction. PX 8014 (Edits by S. Donziger, "The Cost of Remediating the Former Texaco Concession: An Order of Magnitude Estimate," signed by Fausto Miguel Peñafiel Villareal), at 3 ("Daria, a suggesti[o]n: [I] would put this at end in a footnote or leave out altogether; texaco will see this and slam you ... Remember that this is not science, this is an active litigation and this needs to be written to protect fausto and this part leaves him exposed. Always think how they will come back at us."). Their sole objective—in Page's words—was "to exceed the $6 billion figure, while still passing the laugh test." DX 731 (Apr. 15, 2006 Email from D. Fisher to S. Donziger and A. Page, re: "excellent work on remediation/questions"), at 3.

199 PX 3240 (Apr. 20, 2006 Email from A. Page to S. Donziger re: "DOJ ltr").

200 DX 731 (Apr. 16, 2006 Email from S. Donziger to A. Page and D. Fisher re: "excellent work on remediation/questions"), at 1 ("[W]ill releasing this now help with the SEC ... ?").
* * *

201 PX 4300X (Callejas Direct) ¶¶ 25, 26.

202 *Id.* ¶¶ 28–29.

203 PX 317 (Oct. 29, 2003 Lago Agrio Court Order).

204 PX 3300 (McMillen Direct) ¶ 2.

205 PX 4300X (Callejas Direct) ¶ 31; PX 3300 (McMillen Direct) ¶ 14.

206 PX 4300X (Callejas Direct) ¶ 31.

207 PX 3300 (McMillen Direct) ¶ 11.

208 PX 4300X (Callejas Direct) ¶ 33.

209 *Id.*

210 *Id.*

211 *Id.*

212 Tr. (Zambrano) 1720:3–5.

213 PX 4300X (Callejas Direct) ¶ 34.

214 *Id.* ¶ 33.

215 *Id.* ¶ 31.

216 Russell himself could not serve as an expert because he did not speak Spanish. PX 3200 (Russell Direct) ¶ 7.

217 *Id.* ¶ 24.

218 PX 3200 (Russell Direct) ¶ 26; Calmbacher Dep. Tr. at 13:23–14:1,18:10–14.

219 PX 3200 (Russell Direct) ¶ 26. These sites were Sacha–6, Sacha–21, Sacha–94, and Shushufindi–48.

220 Calmbacher Dep. Tr. at 49:17–20

221 *Id.* at 61:9–16.

222 *Id.* at 61:19–23.

223 DX 1750 (Donziger Direct) ¶ 110; PX 2417 (Oct. 24, 2004 Email from C. Calmbacher to S. Donziger and D. Russell).

224 PX 2417 (Oct. 24, 2004 Email from C. Calmbacher to S. Donziger and D. Russell).

225 *Id.*

226 Calmbacher Dep. Tr. at 62:5–10; PX 2417 (Oct. 24, 2004 Email from C. Calmbacher to S. Donziger and D. Russell).

227 Calmbacher Dep. Tr. at 62:5–10.

228 *Id.* at 62:5–18.

229 *Id.* at 62:18–63:8. Evidence presented at trial suggests that it was more than Russell's imploring that convinced Calmbacher to initial the documents. Donziger was threatening not to pay Calmbacher for the work he performed if he did not sign. Russell sent an email to Donziger on March 1, 2005 that he had "communicated [Donziger's] threat to Calmbacher," and that Russell had "also advised him that it was in his interest to comply by signing the documents and sending them to [Donziger]." PX 721 (Mar. 1, 2005 Email from D. Russell to S. Donziger).

230 PX 249 (Judicial Inspection Report for Sacha Well 93); PX 250 (Judicial Inspection Report of the Shushufindi 48 Well).

231 *Id.*

232 PX 249 (Judicial Inspection Report for Sacha Well 93), at 32.

233 Calmbacher Dep. Tr. at 113:1–25, 114:22–116:18, 117:2–20.

234 *Id.* at 115:15–19.

235 *Id.* at 115:20–24.

236 DX 1750 (Donziger Direct) ¶ 110.

237 Calmbacher Dep. Tr. at 85:19–25.

238 DX 1750 (Donziger Direct) ¶ 113; Tr. (Russell) 394:6–19.

239 Tr. (Russell) 394:22–395:2.

240 Tr. (Russell) 407:17–19 ("We found BTEX and GRO, and that was indicative of recent contamination rather than contamination which would have been ten or perhaps 20 years old from Texaco.").

241 PX 705 (Nov. 4, 2004 Email from D. Russell to E. Camino, S. Donziger, M. Pareja, and A. Wray); *see also* Tr. (Russell) 407:21–408:9.

242 Tr. (Russell) 408:7–9. Donziger testified that "the conclusion of the conversation [in Manhattan] was that if we were looking for a sample analysis that would more precisely evidence the scope of Texaco's contamination, testing for total TPH was the more appropriate test to use.... Accordingly, we adopted a focus on sampling for TPH rather than BTEX or GRO, although we kept a balanced portfolio of chemical analyses." DX 1750 (Donziger Direct) ¶ 114.

The Court does not credit this testimony. It is contrary to Russell's testimony on this technical point, a point on which his testimony was not challenged. Donziger, for reasons discussed below, is not a credible witness. Wray and Bonifaz both were deposed, but the deposition testimony of these two witnesses that was submitted at trial is silent about this meeting.

243 Tr. (Russell) 408:22–409:2.

244 *Id.* 408:10–14.

245 PX 4300X (Callejas Direct) ¶ 39.

246 PX 708 (Nov. 11, 2004 Email from S. Donziger to C. Bonifaz, J. Kohn, J. Bonifaz, A Wray, and M. Pallares).

247 DI 658–18 (Reyes Decl.) ¶ 3. The Reyes declaration is an exhibit to Reyes' deposition, where he attested to its accuracy. The declaration was designated by the plaintiff and received in evidence. Defendants had the opportunity to cross-examine him concerning the declaration at the deposition. It therefore is properly before the Court.

248 *Id.* ¶ 10.

249 *Id.*

250 *Id.* The fact of the meeting is corroborated by Reyes' notes from the meeting, PX 739 (Reyes annotations regarding Nov. 17, 2005 meeting), and Donziger's own notebook, PX 174 (Donziger Notebook), at 1; *see also* Reyes Dep. Tr. at 18:15–22.

251 DI 658–18 (Reyes Decl.) ¶ 11.

252 *Id.*

253 Reyes Dep. Tr. at 21:10–16.

254 *Id.* at 19:2–9.

255 *Id.* at 55:6–10, 20–22.

256 PX 174 (Donziger Notebook), at 1(emphasis added).

257 Donziger Dec. 29, 2010 Dep. Tr. at 2105:19–2106:17.

258 *Id.* at 2108:18–2019:9; Donziger Jan. 29, 2011 Dep. Tr. at 3846:6–17.

259 Donziger Jan. 29, 2011 Dep. Tr. at 3847:19–25.

260 Donziger Dec. 29, 2010 Dep. Tr. at 2109:24–2110:4, 2110:11–14, 2110:20–2111:13.

261 *Id.;* Reyes Dep. Tr. at 28:7–16. Reyes's journal entry from that day states "Letter stating Thursday 17 CIGMYP Board resolved to set up a scientific-technical monitorship (of) remediation process of Texaco case. Invite them to a work meeting. Acknowledging his appointment as settling expert, we express support of developments within bounds of professional ethics and technical results." DI 658–18 (Reyes Decl.) ¶ 12.

262 DI 658–18 (Reyes Decl.) ¶ 12.

263 *Id.* ¶ 15.

264 *Supra* notes 260–61.

265 PX 177 (Donziger Notebook) (emphasis added).

266 PX 175 (Donziger Notebook).

267 Donziger Dec. 29, 2010 Dep. Tr. at 2120:2–11, 2120:25–2111:12.

268 DI 658–18 (Reyes Decl.) ¶ 13.

269 *Id.; see also* PX 741 (Reyes annotation regarding the Nov. 29, 2005 meeting).

270 DI 658–18 (Reyes Decl.) ¶ 14; PX 746 (Jan. 20, 2006 Ltr. from G. Pinto to Judge Yánez).

271 *See* PX 746 (Jan. 20, 2006 Ltr. from G. Pinto to Judge Yánez).

272 DI 658–18 (Reyes Decl.) ¶ 17.

273 Donziger Jan. 29, 2011 Dep. Tr. at 3849:25–3850:8.

274 DI 658–18 (Reyes Decl.) ¶ 17.

275 PX 1530 (Jan. 17, 2006 Ltr. from G. Pinto and F. Reyes to Lago Agrio court) (referring to "[t]he Report [which] was prepared by the Settling Experts Mr. Galo Albán, Eng., Dr. Luis Albuja, Mr. Gerardo Barros, Eng., Mr. Jorge Jurado, Eng., Mr. Johnny Zambrano, Eng., and is dated Feb. 1, 2006.").

276 DX 1306 (Donziger Notebook), at 71 of 87.

277 DI 658–18 (Reyes Decl.) ¶ 20; Reyes Dep. Tr. at 51:2–11.

278 DI 658–18 (Reyes Decl.) ¶ 20; PX 1530 (Feb. 1, 2006 Draft of Reyes and Pinto Report).

279 DI 658–18 (Reyes Decl.) ¶ 20; Reyes Dep. Tr. at 53:19–54–7; PX 191 (Donziger Notebook).

280 PX 174 (Donziger Notebook), at 1.

281 PX 177 (Donziger Notebook).

282 *E.g.,* PX 176 (Donziger Notebook), at 2 ("This goes back to Alberto's errors: ... asking for too many inspections rather than controlling the process"); PX 195 (Donziger Notebook), at 2 ("The problem is that Wray made some dumb-fuck agreement with Callejas at the first inspection where they agreed the perito for the [global expert] would come from somebody who had actuado en [acted in] the trial.").

283 *E.g.,* Tr. (Ponce) 2317:15–2318:8 (recommending LAPs seek to terminate inspections because they were costly and the evidence was very favorable without the remaining inspections) (The Court credits Ponce's testimony as to cost. As the accuracy of his opinion concerning the results of the inspections conducted thus far is not material here, the Court makes no finding on that point either way); DX 1601 (Ponce Direct) ¶ 16 (same); PX 184 (Donziger Notebook), at 3 of 5.

284 PX 4300X (Callejas Direct) ¶ 40; PX 328 (July 21, 2006 Motion, quoting plaintiffs' Jan. 27, 2006 motion), at 3–4.

285 PX 4300X (Callejas Direct) ¶ 41.

286 *Id.*

287 PX 182 (Donziger Notebook), at 2 of 3.

288 PX 181 (Donziger Notebook), at 1 (emphasis added).

289 PX 182 (Donziger Notebook), at 2 of 3 (emphasis added).

290 PX 169R (Donziger Notebook), at 28.

291 PX 328 (July 21, 2006 Motion). The motion, filed by Fajardo, explained *inter alia* that further judicial inspections were unnecessary because, it claimed, the evidence of contamination was clear and abundant.

292 PX 184 (Donziger Notebook), at 3.

293 PX 785 (July 26, 2006 Email from S. Donziger to J. Kohn).

294 PX 184 (Donziger Notebook), at 2 (emphasis added).

295 PX 185 (Donziger Notebook), at 2. Donziger testified that he "never threatened Judge Yánez or any other judge that we would file a complaint against that judge if he did not rule in our favor." DX 1750 (Donziger Direct) ¶ 122.

This testimony is inconsistent with Donziger's contemporaneous writings in his notebook and his July 26, 2006 email to Kohn. Moreover, while Donziger testified that *he* never threatened the judge, he did not say that no one else on his team did or that he did not authorize or approve such threats. The Court finds that Donziger knowingly was complicit both in the preparation of a misconduct complaint against Judge Yánez and in threatening the judge with the filing of the complaint unless the judge did what the LAPs' wished him to do. It was part of Donziger's strategy to instill fear in that judge by convincing him that "we [the LAPs] ha[d] ... control over [his] career[ ], [his] job[ ], [his] reputation[ ]—that is to say, [his] ability to earn a livelihood." PX 184 (Donziger Notebook), at 2.

296 PX 785 (July 26, 2006 Email from S. Donziger to J. Kohn).

297 A defense expert on Ecuadorian law testified, and the Court holds, that threatening a judge to get him to appoint Cabrera or another court officer would be a crime under Ecuadorian law. DI 1400–4 (Albán Dep.), Ex. D at 48:1–12.

298 PX 184 (Donziger Notebook), at 2.

299 PX 185 (Donziger Notebook).

300 PX 181 (Donziger Notebook).

301 PX 185 (Donziger Notebook), at 2.

302 PX 191 (Donziger Notebook), at 4.

303 *E.g.,* PX 2426 (Sept. 19, 2006 Email from S. Donziger to C. MacNeil Mitchell, R. Herrera, and E. Bloom) ("Here is the info on the possible experts from Ecuador.").

304 *Id.; see* Donziger Dec. 29, 2010 Dep. Tr. at 2130:18–23.

305 DI 658–18 (Reyes Decl.) ¶ 22.

306 PX 191 (Donziger Notebook).

307 *Id.* (emphasis added).

308 *Id.* (emphasis added).

309 DI 658–18 (Reyes Decl.) ¶ 25. Reyes responded that in his book he had "advocated for joint responsibility between the Ecuadoran government and Texaco environmental impacts, which could be used against" him, but Donziger "dismissed these concerns and

said none of them would prevent [Reyes] from serving as an expert." *Id.* ¶ 26.

310 PX 316 (Lago Agrio Complaint), at 31.

311 PX 194 (Donziger Notebook), at 1; PX 195 (Donziger Notebook) ("The problem is that Wray made some dumb-fuck agreement with Callejas at the first inspection where they agreed the [expert] for the [global inspection] would come from somebody who had actuado en the trial.").

312 PX 195 (Donziger Notebook).

313 *Id.; see also* DI 658–18 (Reyes Decl.) ¶ 31 ("Donziger asked me to introduce him to Cabrera, and I arranged a meeting which took place on Feb. 9 or 10, 2007, at Hotel Quito....").

314 DI 658–18 (Reyes Decl.) ¶¶ 33–34.

315 PX 197 (Donziger Notebook), at 2.

316 *Id.*

317 *E.g.,* PX 200 (Donziger Notebook) ("On Friday night, Pablo and Luis met with the judge near the airport in his barrio in a restaurant. I was supposed to be there, but I couldn't find it[.] I was really pissed off at the news they reported—that the judge still did not want to rule, he needed protection, that a magistrate from the Supreme Ct was coming on Thursday to check him out given the denuncias, etc. The different pieces of the strategy to get us home have to work in concert, and the one element out of sync at the moment is the fact we don't have the order to begin the [global inspection]. This is the one thing left; if we can get thru this, we should be home free.").

318 PX 197 (Donziger Notebook). And they were certain well before that that Judge Yánez would grant their request to appoint a single global expert. In an email on January 9, 2007 to the LAPs' legal team, Fajardo described a meeting he had had with the judge, to whom he referred as "the Big Boss." "I had a short meeting today with the Big Boss (you know who I'm talking about); we discussed the start of the Global Assessment. The idea is to perform a symbolic act at a well or station in Lago Agrio for the start of the Global Assessment. The Expert will be sworn in at that act, and the judge will set the deadline for the Expert to deliver his report to the Court." PX 821 (Jan. 9, 2007 Email from P. Fajardo to S. Donziger and others).

319 PX 335 (Mar. 19, 2007 Lago Agrio Court Order), at 2.

320 DI 658–18 (Reyes Decl.) ¶ 34. Ann Maest testified that she met Cabrera for the first time in March 2006. Maest Dep. Tr. at 68:12–17; *see also* PX 636 (Screenshot from *Crude* Clip of Mar. 3, 2007 Meeting including Cabrera, Yanza, and Fajardo). She clearly was mistaken as to the year.

321 PX 201 (Donziger Notebook) ("March 7, 2007 ... Sat had all-day Tech meeting in the office ... Richard and Fernando there, as was Ann, Dick, and Champ.").

322 Maest Dep. Tr. at 42:17–34; *see also* PX 633 (Mar. 5, 2010 Email from S. Donziger to E. Englert, M. Hoke, and J. McDermott) ("E-tech is a scientific consulting entity we worked with before we hired Stratus. When Stratus came in the summer of 2007, we stopped working with E-tech.").

323 Maest Dep. Tr. at 50:5–7.

324 PX 33A[S] (Mar. 3, 2007 *Crude* Clip), at CRS–187–01–01 (emphasis added).

325 As will appear, Mr. Donziger had obtained the financing for the film maker and had influence over the content of the film. *Infra Facts* § VII.B. It thus is not too surprising that he spoke as candidly as he often did when the camera was rolling.

326 PX 35A (Mar. 3, 2007 *Crude* Clip), at CRS–187–01–02.

327 *Id.*

328 PX 39A (Mar. 3, 2007 *Crude* Clip), at CRS–191–00–CLIP–03.

329 *Id.*

330 *Id.*

331 *Id.*

332 PX 42A (Mar. 3, 2007 *Crude* Clip), at CRS–193–00–CLIP–01.

333 DI 658–18 (Reyes Decl.) ¶ 35.

334 PX 43A (Mar. 4, 2007 *Crude* Clip), at CRS–195–05–CLIP–01; PX 201 (Donziger Notebook), at 1 of 2 ("On Sunday lunch, went to Mosaico (the four gringos, including me), and spent four hours there talking things through.").

335 PX 46A (Mar. 4, 2007 *Crude* Clip), at CRS197–00–CLIP 3.

336 *Id.* (emphasis added).

337 *Id.*

338 *Id.*

339 PX 43A (Mar. 4, 2007 *Crude* Clip), at CRS–195–95–CLIP–01.

340 *Id.* (emphasis added). The Court makes no finding as to whether the groundwater contamination was widespread or existed "just right under the pits." As noted, the existence or absence of contamination in the Orienté was not at issue in this trial.

341 PX 843 (Mar. 21, 2007 Email from P. Fajardo to S. Donziger and L. Yanza) (attaching draft of work plan).

342 Tr. (Donziger) 2558:16–20.
Donziger at trial denied any knowledge of the fact that the March 21, 2007 work plan said "everyone silent" following the entry for submission of the report to the court. *Id.* 2558:21–2559:1. That denial is patently incredible, however, as the work plan was submitted to Donziger, who led the entire effort.

343 PX 845 (Mar. 26, 2007 Email from P. Fajardo to S. Donziger and others).

344 *Id.*

345 Donziger Jan. 29, 2011 Dep. Tr. at 3817:13–23.

346 Tr. (Donziger) 2549:10–2550:12.

347 PX 850 (Apr. 17, 2007 Email from L. Yanza to S. Donziger).

348 PX 871 (June 12, 2007 Email string between L. Yanza and S. Donziger).

349 PX 913 (Sept. 12, 2007 Email from L. Yanza to S. Donziger and P. Fajardo).

350 Tr. (Donziger) 2550:13–19. As will be seen, the LAP team also used the term "huao" in correspondence to refer to Cabrera.

351 The images indicate that the recording was done from the hallway outside the judge's chambers. PX 61 (June 4, 2007 *Crude* Clip).

352 PX 61A (June 4, 2007 *Crude* Clip), at CRS354–02–CLIP–05.

353 *Id.*

354 *Id.*

355 *Id.*

356 *Id.*

357 *Id.*

358 PX 63A (June 4, 2007 *Crude* Clip), at CRS346–00–CLIP–02.

359 *Id.*

360 *Id.* (emphasis added).

361 PX 67A (June 6, 2007 *Crude* clip), at CRS–350–04–CLIP–01 (emphasis added).

362 *Id.* (emphasis added).

363 PX 872 (June 13, 2007 Email from S. Donziger to P. Fajardo and L. Yanza) (emphasis added).

364 PX 342 (Cabrera Certificate of Swearing In).
Donziger obviously was unaware when he wrote his own June 13 email (PX 872) that Cabrera had been or would be sworn in on that day. It is unclear whether the threat he had suggested to Fajardo and Yanza was made before the swearing in took place.

365 PX 342 (Cabrera Certificate of Swearing In), at 3.

366 PX 277R (Cabrera Work Plan).

367 Donziger Jan. 31, 2011 Dep. Tr. at 4132:11–18 ("Q. Now, in the spring of 2007 it was the plaintiffs' team that drafted Mr. Cabrera's work plan, correct? A. We drafted a work plan that we gave to him. Q. That he then adopted, correct, sir? A. I believe he used most of it, if not all of it.").

368 PX 277R (Cabrera Work Plan), at 11.

369 Donziger Jan. 31, 2011 Dep. Tr. at 4132:20–22.

370 PX 67A (June 6, 2007 *Crude* Clip), at CRS–350–04–CLIP–01 (emphasis added).

371 PX 875 (June 26, 2007 Email chain between S. Donziger, M. Bonfiglio, and J. Berlinger).

372 *Id*.

373 *Id.*

374 PX 78 (July 3, 2007 *Crude* Clip), at CRS405; PX 79A (July 3, 2007 *Crude* clip).

375 PX 3300 (McMillen Direct) ¶ 27.

376 *Id.*

377 PX 4300X (Callejas Direct) ¶ 48.

378 PX 3300 (McMillen Direct) ¶¶ 27–28.

379 PX 4300X (Callejas Direct) ¶ 49.

380 *Id.* ¶ 52.

381 *Id.*

382 PX 348 (Oct. 3, 2007 Lago Agrio Court Order).

383 Donziger Dec. 29, 2010 Dep. Tr. at 2203:4–6; 2203:11–17; Tr. (Donziger) 2457:22–2548:4.

384 Tr. (Donziger) 2548:9–17; Donziger Jan. 29, 2011 Dep. Tr. at 3726:23–3727:4.

385 PX 4300X (Callejas Direct) ¶¶ 50–57. This process was consistent with Articles 9 and 14 of Ecuador's Rules Governing the Activities and Fee Schedule of Experts in the Civil, Criminal and Similar Areas of the Judiciary. *See* DI 1413–9, at 21.

386 For example, on June 25, 2007, Cabrera filed a request with the court for $59,349 "[t]o complete the work I am to perform within the deadline Your honor has set...." PX 277 (June 25, 2007 Ltr. from R. Cabrera to Lago Agrio court). The following day, the Lago Agrio court approved the payment. PX 344 (June 28, 2007 Court Approved Payment of $59,349 from LAPs to Cabrera), at 2 of 5. Two days later, the LAPs paid Cabrera $59,349. *Id.* at 1.

On October 15, 2007, Cabrera wrote to the court asking it to order the LAPs to pay him $97,000. PX 350 (Oct. 15, 2007 Ltr. from R. Cabrera to Lago Agrio court). The court ordered the LAPs to pay Cabrera $97,000 a week later. PX 354 (Oct. 22, 2007 Lago Agrio Court Order). The LAPs paid Cabrera the $97,000 in at least three installments. PX 356 (Nov. 22, 2007 Court Approved Payment of $30,000 from LAPs to Cabrera); PX 361 (Jan. 24, 2009 Court Approved Payment of $25,000 from LAPs to Cabrera); PX 367 (May 10, 2008 Court Approved Payment of $33,000 from LAPs to Cabrera).

387 PX 871 (June 12, 2007 Email string between L. Yanza and S. Donziger); PX 913 (Sept. 12, 2007 Email from L. Yanza to S. Donziger and P. Fajardo).

388 PX 871 (June 12, 2007 Email string between L. Yanza and S. Donziger).

389 *Id.*

390 *Id.*

391 *Id.* He considered opening the account in the name of either "Lupe" or "Donald," referring to Lupeta de Heraldaia and Donald Moncayo, both of whom work for the LAPs through Selva Viva. Woods Sept. 14, 2011 Dep. Tr. at 439:10–440:23; Tr. (Moncayo) 2058:23–24.

392 PX 578 (Banco Pichincha Account Statement for ADF) (account number XXXXXXXXXX); PX 912 (Sept. 12 2007 Email from L. Yanza to P. Fajardo re: "Secret account") (identifying secret account as account number XXXXXXXXXX).

393 PX 578 (Banco Pichincha Account Statement for ADF), at 6–7; PX 618 (Wire Transfers), at 4–5; PX 897 (Aug. 14, 2007 Email from S. Donziger to K. Wilson and J. Kohn re "Critical money transfer") ("Pls transfer 50,000 to the following account in Ecuador.").

394 PX 578 (Banco Pichincha Account Statement for ADF), at 6; PX 590 (Aug. 17, 2007 Transfer Receipt) (showing transfer of $33,000 to Cabrera); PX 591 (Aug. 17, 2007 Ltr. from J. Fajardo to Banco Pichincha Manager); PX 593 (Banco Pichincha Record of Cash Transactions for the ADF).

395 PX 894 (Aug. 9, 2007 Email from L. Yanza to S. Donziger re: "bank information urgent").

396 PX 2427 (Oct. 26, 2007 Email from K. Wilson to S. Donziger) (reflecting payment of $50,000 to Frente de la Amazonia Aug. 15, 2007).

397 PX 578 (ADF Account Statement), at 6; PX 590 (Aug. 17, 2007 Transfer Receipt); PX 591 (Aug. 17, 2007 Ltr. from J. Fajardo to Banco Pichincha Manager); PX 593 (Banco Pichincha Record of Cash Transactions for the ADF).

398 PX 912 (Sept. 12, 2007 Email from L. Yanza to S. Donziger).

399 PX 917 (Sept. 17, 2007 Email from L. Yanza to S. Donziger).

400 PX 578 (ADF Account Statement), at 6.

401 PX 967 (Feb. 8, 2008 Email from L. Yanza to S. Donziger).

402 PX 968 (Feb. 8, 2008 Email from S. Donziger to J. Kohn and K. Wilson).

403 PX 578 (ADF Account Statement), at 7; PX 618 (Banco Pichincha Account Statement for ADF).

404 PX 2411 (Donziger Defs.' Second Supplemental Responses to Chevron's Interrogatories), at 34.

405 Tr. (Donziger) 2550:20–25.

406 Tr. (Donziger) 2551:16–20.

407 DI 1413–9 (Art. 15 of Rules Governing the Activities and Fee Schedule of Experts in Civil, Criminal and Similar Areas of the Judiciary), at 21.

408 DI 1413–12 (Albán Dep. Tr.), at 31:25–32:2, 54:7–23.

409 DI 1413–4 (ECUADOR CRIM. CODE Art. 359), at 48–49.

410 The fact that at least some of the money the LAPs paid Cabrera changed hands before Cabrera took the oath of office in June 2007 is not significant. They knew that he was to act in an official capacity before any of the payments were made. The money was intended to influence his official actions once he was sworn in. In those circumstances, the payments were wrongful. *See, e.g.,* 18 U.S.C. § 201 (the prohibition against bribing a public official extends to a "person who has been selected to be a public official," defined as "any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed"); 18 U.S.C. § 201 (the prohibition against government officials receiving compensation for representational services extends to agreements to receive or acceptance of compensation before the term of employment begins); *Crandon v. United States,* 494 U.S. 152, 163, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (discussing the inclusion in Sections 201 and 203 of pre-employment compensation or bribes); N.Y. Penal Law §§ 10.00(15), 200.10, 200.11, 200.12, 200.15 (proscribing the receipt of bribes by public servants, defined to include those who have "been elected or designated to become a public servant"); *see also United States v. Stein,* 541 F.3d 130, 153 (2d Cir.2008) ("Although defendants' Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment."); *United States v. Solow,* 138 F.Supp. 812, 813–16 (S.D.N.Y.1956) (Weinfeld, J.) (destruction prior to service of subpoena of evidence material to known investigation constitutes obstruction of justice).

411 PX 877 (July 1, 2007 Email from P. Fajardo to L. Yanza and S. Donziger re: "WORRIED").

412 *Id.* (emphasis added).

413 *Id.*

414 *Id.;* PX 881 (July 11, 2007 Email from J. Prieto to P. Fajardo and S. Donziger re: "insurance for the wao").

415 PX 279 (July 12, 2007 Ltr. from R. Cabrera to Lago Agrio court), at 2. This exhibit was not offered or received for the truth of Cabrera's statements.

416 *Id.*

417 PX 883 (July 17, 2007 Email from S. Donziger to L. Yanza and P. Fajardo).

418 *Id.* (emphasis added)

419 *See, e.g.,* PX 2481 (July 19, 2007 Email from S. Donziger to L. Yanza and P. Fajardo re: "Very important") ("If we use the American consultants here, it is [sic] necessary for Huales to pay directly or can Kohn pay them? It might be a problem. Another option is for the locals to adopt the work they do and are paid here, and the locals there.").

420 *See, e.g.,* PX 632 (July 18, 2007 Retention Agreement between J. Kohn and UBR); PX 2430 (July 24, 2007 Statement Reflecting $5,000 payment from J. Kohn to UBR).

421 PX 310 (Cabrera Report), at 4347 of 6124; Donziger Jan. 8, 2011 Dep. Tr. at 2537:12–17 ("Q. Now, the work that Uhl Baron did for yourself and Mr. Kohn ultimately became Annex O–R of the Cabrera Report, correct? A. I believe so, either verbatim or something very similar.").

422 PX 310A (Cabrera Report), at 6085 of 6124.

423 PX 279 (July 12, 2007 Ltr. from R. Cabrera to Lago Agrio Court), at 2.

424 PX 883 (July 17, 2007 Email from S. Donziger to L. Yanza and P. Fajardo).

425 No. 04 Civ. 8378(LBS).
Chevron Corporation briefly changed its name to Chevron Texaco before rechanging it to Chevron. *See* Chevron Corp. Annual Report 2000 (Form 10–K) (Mar. 28, 2001), *available at* http://www.sec.

gov/Archives/edgar/data/93410/000009341001000015/0000093410–01–000015.txt; ChevronTexaco Corp. Annual Report 2001 (Form 10–K) (Mar. 27, 2002), *available at* http://www.sec.gov/Archives/edgar/data/93410/000095014902000568/f80065e10–k405.htm; Chevron Corp., Annual Report 2005 (Form 10–K) (Mar. 1, 2006), *available at* http://www.sec.gov/Archives/edgar/data/93410/000095014906000076/f16935e10vk.htm. the Court takes judicial notice of the fact that Chevron, following the acquisition of the shares of Texaco, was renamed Chevron–Texaco Corporation and then later changed its name back to Chevron Corporation. *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007) (explaining that courts may take judicial notice of "documents filed with the SEC ... 'to determine what the documents stated' ").

426 PX 915 (Sept. 16, 2007 Email from S. Donziger to M. Quarles re: Quarles Affidavit), at 6 of 9.

427 *Id.*

428 *Id.* at 5–6 of 9 (emphasis in original).

429 PX 918, at 3–4 (emphasis in original); *Republic of Ecuador v. ChevronTexaco Corp.,* No. 04 Civ. 8378(LBS) (S.D.N.Y. filed Sept. 17, 2007) [DI 225], at 3–4 of 6.

430 Quarles Sept. 1, 2010 Dep. Tr. at 115:20–116:04, 118:20–25, 121:21–122:05.

431 PX 848 (Apr. 10, 2007 Email from S. Donziger to J. Lipton and A. Maest) ("Josh—Ann Maest suggested I write to reconnect about the Ecuador case against Chevron.... The case is winding down fast, and we need to prepare a damages assessment.... I am interested in a 'global' discussion of how Stratus might be able to take on some or all of this."). Donziger wrote in his notebook on April 12, 2007 "Need to see Stratus in Denver to get help, but worried about the money.... Maest was down. Unclear if we can pull it all together in the time frame allotted." PX 204 (Donziger Notebook); *see also* PX 5200 (Lipton Direct) ¶ 13 ("On April 10, 2007 Donziger contacted me via email at Dr. Maest's suggestion and described his need for technical assistance on a damages assessment.").

432 PX 5200 (Lipton Direct) ¶ 15 ("I met with Donziger on April 26, 2007 at Stratus's office in Boulder, Colorado."); PX 851 (Apr. 23, 2007 Email from S. Donziger to J. Lipton and A. Maest re: Meeting Thursday); PX 2466 (Apr. 22, 2007 Memorandum from S. Donziger to J. Lipton re: Overall Ecuador Work Plan); PX 59A (Apr. 26, 2007 *Crude* Clip), at CRS–269–01–04 (April 2007 meeting with Stratus).

433 PX 5200 (Lipton Direct) ¶ 15.

434 PX 59A (Apr. 26, 2007 *Crude* Clip), at CRS–269–01–04 (April 2007 meeting with Stratus).

435 *Id.*

436 PX 633 (Mar. 5, 2010 Email from S. Donziger to E. Englert and M. Hoke), at 2–10.

437 *Id.* at 8.

438 PX 5200 (Lipton Direct) ¶ 19.

439 *See, e.g.,* PX 942 (Dec. 10, 2007 A. Maest handwritten notes re: "Call with Steven and Doug re Damages Assessment"); PX 945 (Dec. 20, 2007 A. Maest handwritten notes re "Ecuador GW Sampling"); PX 951 (Dec. 27, 2008 A. Maest handwritten notes re "Call with Steven and Doug–Ecuador"); PX 954 (Jan. 9, 2008 A. Maest handwritten notes re "Needed for Trip"); PX 956 (Jan. 15, 2008 A. Maest handwritten notes re "Meeting in Quito"); *see also* PX 957 (Jan. 16, 2008 Memorandum "Potential tasks for Stratus Consulting").

440 *E.g.,* PX 985 (Mar. 5, 2008 Email from D. Beltman to S. Donziger re: "Annex tracking table") (attaching table tracking author, language, and status of review of each annex); PX 1521 (chart tracking translation of annexes); PX 8026 (Feb. 20, 2008 Email from D. Beltman to A. Maest, J. Peers, and S. Donziger re: "annex on TexPet cleanup"); PX 8027 Mar. 10, 2008 Email from D. Beltman to S. Donziger and A. Maest re: "Another annex: ecological risks"); PX 8028 (Mar. 5, 2008 Email from D. Beltman to S.

Donziger re: "Draft annex on historical data") ("For your review. English and Spanish versions."); PX 8029 (Mar. 4, 2008 Email from D. Beltman to S. Donziger re: "extrapolation annex without maps"); PX 8030 (Mar. 13, 2008 Email from D. Beltman to S. Donziger and A. Maest re: "Lost ecosystem value") ("Steven: Attached is the Spanish version of our annex on the value of the rainforest lost at wells and stations.").

441 *See id.;* PX 985 (Mar. 5, 2008 Email from D. Beltman to S. Donziger re: Annex tracking table) (attaching table tracking author, language, and status of review of each annex, including column for "SD review").

442 *E.g.,* PX 936 (Nov. 17, 2007 Email from S. Donziger to D. Beltman re: "Unjust Enrichment") ("pls read our submission carefully and make sure you don't say or even suggest anything that backs away from the figures. Remember, we said in the submission that the unjust enrichment would be on the order of billions of dollars (for everything, not just dumping).").

443 Donziger Dec. 29, 2010 Dep. Tr. at 2253:5–11.

444 PX 962 (Jan. 24, 2008 Email from D. Beltman to S. Donziger and A. Maest) (attaching draft outline, named "Outline.v1.doc," for the report); *see also* PX 2433 (Feb. 8, 2008 Email from D. Beltman to S. Donziger, A. Maest, and others) (attaching updated draft outline "based on what we talked about last Friday").

445 PX 1648 (Feb. 22, 2008 Email from D. Beltman to Stratus employees re: "CONFIDENTIAL—Ecuador Project Update") ("Greetings from Ecuador").

446 *Id.*

447 Donziger Dec. 29, 2010 Dep. Tr. at 2253:5–11.

448 PX 978 (Feb. 27, 2008 Email from D. Beltman to S. Donziger re: "Start on report text; human tox annex").

449 *E.g.,* PX 985 (Mar. 5, 2008 Email from D. Beltman to S. Donziger re: "Annex tracking table").

450 *E.g.,* PX 1649 (Mar. 1, 2008 Email from D. Beltman to M. Carney re: "eco risk annex") ("Hey Mike: Great job on the ecorisk annex. The link below has some edits and comments. We are well on our way, but it's going to take a bit more work."); PX 981 (Mar. 4, 2008 Email from A. Maest to J. Peers re: "Yet another updated perito db").

451 *E.g.,* PX 2468 (Mar. 4, 2008 Email from J. Sáenz to D. Beltman); PX 1014 (Mar. 27, 2008 Email from J. Peers to L. Villacreces, P. Fajardo, and J. Prieto re: "corrected figures—Exhibit Ecological Impact").

452 PX 1050 (July 28, 2008 Email from D. Beltman to B. Lazar re: "english translations"); PX 2436 (Mar. 10 2008 Email From D. Beltman to A. Maest and J. Peers re: "Report help") ("Unfortunately, I've been too busy on annex stuff to work much on [the report], and it has to go to the court in 2 weeks and get translated.... My goal is to have the entire report drafted by COB Tuesday. Based on how things are going, our current translators will take more than a week to turn it around, which puts us at next week Tuesday, if we're lucky."); PX 980 (Feb. 29, 2008 Email from D. Beltman toinfo@translatingspanish.com and A. Maest re: "Ecuador project") (attaching two annexes for translation); PX 994 (Mar. 12, 2008 Email frominfo@translatingspanish.com to D. Beltman and A. Maest); PX 2437 (Mar. 12, 2008 Email from D. Beltman toinfo@translatingspanish.com re: "Big Report").

453 *See* PX 1003 (Mar. 19, 2008 Email from B. Lazar to D. Beltman re: "eco loss"); PX 1005 (Mar. 20, 2008 Email from L. Gamboa to D. Beltman re: "Infomacion"); PX 1007 (Mar. 20, 2008 mail from L. Gamboa to D. Beltman re: "A modest change"); PX 1008 (Mar. 21, 2008 Email from A. Maest to J. Peers and D. Beltman re: "Most recent versions of report and three annexes"); PX 1011 (Mar 22, 2008 Email from B. Powers to D. Beltman, S. Donziger, and A. Maest re: "Status?"); PX 1653 (Mar. 22, 2008 Email from D. Beltman to J. Peers, M. Carney, and A. Maest re: "TPH figures in pits, out of pits"); PX 1013 (Mar. 25, 2008 Email from D. Beltman to J. Sáenz and S. Donziger re: "new pieces").

454 PX 1018 (Mar. 30, 2008 Email from S. Donziger to D. Beltman re "what do u think of this?"). The next day, Donziger emailed the chart to criscadena@hotmail.com. PX 1020 (Mar. 31, 2008 Email from S. Donziger to ciscadena@hotmail.com re: "chart").

455 PX 1018 (Mar. 30, 2008 Email from S. Donziger to D. Beltman re: "what do u think of this?").

456 PX 1017 (Apr. 1, 2008 Email from gringograndote@gmail.com to S. Donziger re: "Informe Final"); PX 4100 (Lynch Direct) ¶¶ 8, 15.

457 Tr. (Shinder) 1294:25–1295:9.

458 Tr. (Donziger) 2554:16–22; PX 1017 (Apr. 1, 2008 Email from gringograndote@gmail.com to S. Donziger re: "Informe Final").

459 PX 4300X (Callejas Direct) ¶ 56.

460 PX 310A (Cabrera Report).

461 *Id.* at 7.

462 *Id.* at 1.

463 Donziger Jan. 8, 2011 Dep. Tr. at 2433:8–14 (Cabrera "adopted pretty much verbatim what had been provided to him" by Stratus).

464 PX 1019 (Mar. 31, 2008 Email from S. Donziger tocriscadena @hotmail.com) ("Table of Calculated Damages/Main Report"); Donziger Jan. 8, 2011 Dep. Tr. at 2507:24–2508:7 ("Q. That was the damage table that was going to ... appear in the Cabrera report, correct? A. I believe so. Q. And that is something that you are working on drafting as of March 30th of 2008, correct? Q. I believe so, yes."); *see also* PX 976 (Feb. 26, 2008 Email from D. Beltman to M. Carney, T. Hodgson, J. Peers, A. Maest, P. Sowell, E. English, D. Mills, C. Rodgers and copying L. Cross re: "Ecuador annex schedule") (discussing work plan to complete Report and attaching chart listing who was responsible for each annex and to whom each should be attributed).

465 PX 976 (Feb. 26, 2008 Email from D. Beltman to M. Carney, T. Jodgson, J. Peers, A. Maest, P. Sowell, E. English, D. Mills, C. Rodgers and copying L. Cross re: "Ecuador annex schedule") (attaching chart listing who was responsible for each annex and to whom each should be attributed).

466 *Compare* PX 1023 (Apr. 1, 2008 Email from S. Donziger to J. Kohn re: "DRAFT ONLY—DO NOT SHOW TO ANYBODY"), with PX 498R, 499R (Apr. 2, 2008 Press Release).

467 PX 498R (Apr. 2, 2008 Press Release) (emphasis added).

468 PX 501 (Apr. 14, 2008 Press Release).

469 PX 2237A (*Crude* Clip), at CRS 481 (emphasis added).

470 PX 502 (Apr. 16, 2008 Press Release).

471 PX 1030 (Apr. 2, 2008 Email from D. Beltman to S. Donziger and A. Maest re: "List of items for moving forward").

472 *See, e.g.,* PX 1040 (June 10, 2008 A. Maest Handwritten notes re: "Ecuador Meeting"); PX 1664 (Aug. 10, 2008 Email from D. Beltman to J. Peers, A. Maest, D. Mills, D. Chapman, and J. Lipton re: "Status of Cabrera comment work").

473 PX 1028 (Apr. 2, 2008 Email from P. Fajardo to LAP team re: "GOSSIP AND SUGGESTIONS").

474 PX 311 (Chevron Sept. 15, 2008 Motion); PX 4300X (Callejas Direct) ¶ 57.

475 PX 311 (Chevron Sept. 15, 2008 Motion).

476 PX 312 (LAPs' Comments on Cabrera Report), at 17.

477 *Id.* at 2.

478 PX 299 (Oct. 8, 2008 Ltr. from R. Cabrera to Lago Agrio court), at 7–8.

479 PX 4300X (Callejas Direct) ¶ 59.

480 PX 1075 (Oct. 27, 2008 Email chain between D. Beltman, A. Maest, and J. Peers re: "Ecuador, Doug-you should read this") ("We received a request from Tania for an update on where we are in responding to a set of the questions to the [Expert] assigned to us"); PX 1668 (Oct. 29, 2008 Email from D. Beltman to J. Peers and A. Maest re: "Plan for rough estimate of groundwater damages"); PX 1078 (Oct. 31, 2008 Email from A. Maest to D. Beltman and J. Peers re: "Reinjection and gas capture questions"); PX 1080 (Nov. 6, 2008 Email from D. Beltman to S. Donziger re: "Clapp").

481 PX 303 (Feb. 5, 2009 Ltr. from R. Cabrera to Lago Agrio court), at 1–2 (emphasis added).

482 There is another sidelight to the tale of the Cabrera Report.

In the course of preparing the Cabrera Report and ensuing documents, Stratus, Donziger, and the LAP team dealt not only with new material prepared by Stratus, but with material that the LAPs already had in hand from other experts they had employed. They divided some of the available material among the Cabrera Report itself, the response that Stratus prepared for Cabrera to make to the comments on the Cabrera Report submitted on behalf of the LAPs, and perhaps other documents. With so many cooks in the kitchen, there was bound to be confusion, and at least one now obvious mistake was made.

Donziger and Stratus hired Richard Clapp to prepare two reports. PX 1080 (Nov. 6, 2008 Email from D. Beltman to S. Donziger re: "Clapp") ("[Clapp] has done two reports that I know of. A long while back, he wrote up a summary of the toxic effects of the chemicals in crude oil and drilling fluids, and it was incorporated into the expert report as an annex pretty much as is."). One of Clapp's reports was submitted "pretty much as is" as an annex to the Cabrera Report, although it was attributed to someone else. *Id.* Beltman explained to Donziger that Clapp had written also another piece, which Stratus had sent to the LAP team in Ecuador, "but it did not appear in the [LAPs'] comments on the Cabrera report, which means it will probably appear in the expert's response to the comments." *Id.* Beltman and Donziger were adamant, however, that Clapp's authorship of both reports remain secret. *Id.* ("I don't think we should hand out either one as Clapp's thereby distributing proof."). Clapp informed Beltman and Donziger at one point that he was planning to use his initial report in a piece Donziger asked him to write. PX 1082 (Nov. 18, 2008 Email from R. Clapp to D. Beltman re: "Ecuador trip report and health summary"). Beltman immediately wrote to Donziger: "We have to talk to Clapp about that [report] and how we have to limit its distribution. It CANNOT go into the Congressional Record as being authored by him. You want to talk to him, or me?" *Id.* The fact that Clapp had written the annex was not revealed until years later, in discovery actions filed in the United States.

483 PX 2478A (June 13, 2007 *Crude* Clip).

484 The Court does not credit this claim of confusion. Donziger was the architect of all that occurred with respect to the Cabrera Report and is intimately familiar with all the details.

485 DX 1750 (Donziger Direct) ¶ 91.

486 On October 3, 2007, for example the court issued an order which stated that Cabrera "is hereby reminded that he is an auxiliary to the Court for purposes of providing to the process and to the Court scientific elements for determining the truth.... The Expert is responsible for the opinions, for the conclusions made by the professionals making up his team and assisting with the preparation of the report." PX 348 (Oct. 3, 2007 Lago Agrio Court Order), at 2. And on October 22, 2007, the court issued an order stating that "Richard Cabrera[ ] is informed that he must personally prepare and work on the expert report, taking into account the scientific, technical, and legal standards of both a universal nature and those in effect here." PX 352 (Oct. 22, 2007 Lago Agrio court Order), at 6–7.

487 PX 281 (July 23, 2007 Ltr. from R. Cabrera to Lago Agrio court).

488 PX 283 (Oct. 11, 2007 Ltr. from R. Cabrera to Lago Agrio court); *see also* PX 286 (Oct. 30, 2007 Ltr. from R. Cabrera to Lago Agrio court) ("I have fully and faithfully complied with the instructions you gave in each order and at the meetings that were held

during the sample collection process.").

489 PX 287 (Oct. 31, 2007 Ltr. from R. Cabrera to Lago Agrio court).

490 PX 354 (Oct. 29, 2007 Motion).

491 One of defendants' Ecuadorian law experts testified as follows: "Q. So if I understood you, if Cabrera received information from a U.S. firm called Stratus and the plaintiffs submitted it and he adopted it, his obligation was to say in his report 'This information came from Stratus'? [colloquy omitted] A.... I'm being asked for an opinion that were not the subject of my [written] opinion. But nonetheless, I reaffirm if the Court-appointed expert were to incorporate information that is not his and did not expressly acknowledge that, the—the expert would be lying. And if that is proved, he would be subject to a criminal—criminal proceedings for providing false testimony." DI 1413–12 (Albán Dep. Tr.), at 66:14–67:3. Further: "Q. For example, when the expert passes off someone else's work as his own without attributing it to the person who submitted it? [objection omitted]. A. I answered previously that the expert's silence on the true source or origin of that information would constitute false testimony." *Id.* at 107:9–16.

The same expert testified that the passing off of Cabrera's ghostwritten work plan was inappropriate, DI 1400–4 (Albán Dep. Tr.), at 112:8–17, and that Cabrera's attendance at the March 3, 2007 meeting and the discussion about ghostwriting his report and keeping that information from Chevron was "irregular, arbitrary and illegal." *Id.* at 126:1–16.

492 PX 170 (Donziger Notebook).

493 PX 172 (Donziger Notebook) (emphasis added).

494 PX 252 (Order by Dr. Cecilia Armas Erazo de Tobar in Preliminary Criminal Investigation).

495 PX 256 (Submission by Dr. M. Vega Carrera in Preliminary Criminal Investigation No. 25–2004); PX 259 (Filing by W. Pesantez in Cause No. 25–2004); PX 26 1 (Prosecutor General's Ratification of Dismissal of Criminal Action).

496 PX 3000 (Reis Veiga Direct) ¶ 77; PX 258 (Filing by J. German in Preliminary Criminal Investigation No. 146–2003).

497 PX 16A (Dec. 6, 2006 *Crude* Clip), at CRS 138–01.

498 *Id.; see also* PX 192 (Donziger Notebook) ("Met interim [Attorney General] with Luis [Yanza], APV [Ponce], Raul. 'The door is always open' he said to Luis—a far cry from the days of the protests, fighting our way into the halls of power. Think of what has happened in ten years—how we have gone from fighting on the outside of power, to being on the inside.").

499 PX 484R (Mar. 20, 2007 ROE Press Release), at 1 of 3.

500 PX 844 (Mar. 21, 2007 Email from M. Eugenia Yepez Relegado to S. Donziger re: "report") (emphasis in original); *see* Tr. (Ponce) 2303:20–2304:2.

501 *Id.* (capitals in original, other emphasis added).

502 PX 54A (Mar. 29, 2007 *Crude* Clip), at CRS–221–02–CLIP–01.

503 PX 487R (Apr. 25, 2007 ROE Press Release).

504 PX 489R (Apr. 26, 2007 ROE Press Release).

505 PX 58A (Apr. 26, 2007 *Crude* Clip), at CRS–268–000–CLIP–01.

506 *Id.*

507 PX 853 (Apr. 28, 2007 Transcript of Correa Radio Address).

508 PX 75A (June 8, 2007 *Crude* Clip), at CRS376–03–CLIP–01.

509 PX 358 (Nov. 29, 2007 Official Register of the Government of Ecuador: Mandate No. 1 of the Constituent Assembly), at 3; PX 259 (Mar. 13, 2007 Filing by W. Pesantez in Cause No. 25–2004), at 10; PX 261 (Prosecutor General's Ratification of Dismissal of Criminal Action), at 12; PX 300 (Reis Veiga Direct) ¶ 96.

510 PX 992 (Mar. 11, 2008 Email from P. Fajardo to S. Donziger).

511 *Id.*

512 PX 1033 (Apr. 23, 2008 Email string between S. Donziger, P. Fajardo, A. Ponce, J. Sáenz, J. Prieto, and L. Yanza re: "URGENTE").

513 PX 1058 (Aug. 11, 2008 Email from S. Donziger to LAP team re: "Problem") (emphasis in original).

514 PX 1069 (Sept. 19, 2008 Email from S. Donziger to P. Fajardo and others re: "important suggestions about the media") (emphasis in original).

515 PX 8058 (Jul. 18, 2010 Email from S. Donziger to J. Sáenz, J. Prieto, and P. Fajardo).

516 PX 1149 (July 4, 2009 Transcript of President Correa's Weekly Radio Program).

517 PX 2494 (Sept. 12, 2009 Reuters Article).

518 PX 272 (Prosecutor's Office Opinion in connection with Instruccion Fiscal No. 09–2008–DRR).

519 *Id.* at 95.

520 PX 407 (June 1, 2011 Opinion of National Court of Justice, First Criminal Division).
It is more likely than not that this occurred because the pendency of the criminal charges had become disadvantageous to Donziger and the LAPs in U.S. litigation because it was a factor in the success of Chevron and the former Texaco lawyers in obtaining discovery here that the LAPs wished to prevent. *See, e.g., Chevron Corp. v. Donziger,* 11 Civ. 0691(LAK), 2013 WL 646399, at *9–10 (S.D.N.Y. Feb. 21, 2013) (describing circumstances).

521 *E.g.,* PX 7511 (Aug. 17, 2013 *Agence France–Presse Article*); PX 7516 (Sept. 14, 2013 Tr. of Pres. Correa Statement); PX 7518 (Sept. 16, 2013 El Telegrafo Article); PX 7519 (Sept. 17, 2013 *El Telégrafo* Article); PX 7520 (Sept. 21, 2013 Tr. of Pres. Correa Statement); PX 7526 (Sept. 28, 2013 Tr. of Pres. Correa Statement).

522 PX 853 (Apr. 28, 2007 Tr. of Pres. Correa's Weekly Radio Program).

523 PX 7511 (Aug. 17, 2013 *Agence France–Presse* Article).

524 PX 2503 (Feb. 19, 2011 *Ultimahora* Article).

525 PX 68A (June 6, 2007 *Crude* Clip), at CRS–350–04–CLIP–02.

526 Berlinger testified in a related proceeding that "During the summer of 2005, a charismatic American environmental lawyer named Steven Donziger knocked on my Manhattan office door. He was running a class-action lawsuit on behalf of 30,000 Ecuadorian

inhabitants of the Amazon rainforest and was looking for a filmmaker to tell his clients' story." *Chevron Corp. v. Berlinger,* 629 F.3d 297, 302–03 (2d Cir.2011) (quoting *In re Application of Chevron Corp.,* 709 F.Supp.2d 283, 287 (S.D.N.Y.2010)) (emphasis omitted).

527 The video was shot in Ecuador and in the United States during the period approximately January 2006 through September 2008. PX 1 (*Crude* Annotated Tape Log).

528 Tr. (Donziger) 2567:22–25.

529 Donziger often instructed Bonfiglio and Berlinger to stop filming when he did not like what was being said. *E.g.,* PX 46A (Mar. 4, 2007 *Crude* Clip), at CRS 197–00–CLIP 3. In the months leading up to *Crude's* release in January 2009, Donziger and Fajardo were in close contact with Berlinger and Bonfiglio—to discuss budgeting, to coordinate press strategy, and to ensure that the film makers and the LAP team were putting forth the same message. Donziger wrote to Bonfiglio that "there will be certain questions asked of us that you might want to advise us on how to position—such as funding sources, questions of bias, etc. [W]e need to show independence from each other but we should be on the same page as to how that will play out." PX 1090 (Dec. 23, 2008 Email from S. Donziger to M. Bonfiglio).

530 PX 203 (Donziger Notebook).

531 *Id.*

532 PX 4900 (Dahlberg Direct) ¶ 97.

533 Donziger Dec. 22, 2010 Dep. Tr. at 1569:16–19; PX 2465 (Dec. 13, 2008 Email from S. Donziger to A. Woods re: "tell me what u think of this"). Donziger testified that he sent this list also to Berlinger. Donziger Dec. 22, 2010 Dep. Tr. at 1570:21–1571:5.

534 Donziger Dec. 22, 2010 Dep. Tr. at 1571:6–1572:2. The list included also a note that the film's "scene of me [Donziger] telling Trudie [Styler] to only use Texaco is gratuitous and not necessary." PX 2465 (Dec. 13, 2008 Email from S. Donziger to A. Woods re: "tell me what u think of this").

535 PX 1091 (Dec. 25, 2008 Email from P. Fajardo to M. Bonfiglio).

536 PX 1097 (Jan. 22, 2009 Email from P. Fajardo to M. Bonfiglio).

537 *Id.*

538 *Id.*

539 PX 1097 (Jan. 22, 2009 Email from J. Berlinger to M. Bonfiglio and A. Spiegel).

540 *Chevron v. Stratus Consulting, Inc.,* No. 10 Civ. 00047 (D.Colo.).

541 *Id.,* DI 2 (Chevron Corp. Mem. in Support of § 1782 App lication), at 8 & n. 7.

542 *Id.*

543 PX 1213 (Jan. 23, 2010 Email from S. Donziger to J. Shinder); PX 2356 (Feb. 26, 2010 Email from E. Engelhart to S. Donziger re: "Chevron petition") (attaching draft engagement letter); Donziger Dec. 29, 2010 Dep. Tr. at 2353:17–2354:21, 2381:15–18.

544 Tr. (Shinder) 1262:2–9; PX 7608 (Jan. 19, 2010 Email from S. Donziger to J. McDermott), at 14; PX 1241 (Mar. 5, 2010 Email from S. Donziger to J. Shinder), at 2 of 4 ("selection of Cabrera was made independently by the court," "Cabrera conducted dozens of independent site inspections and lab analyses").

545 Tr. (Shinder) 1262:14–23.

546 *Id.* 1272:21–22.

547 *Id.* 1268:17–1269:21.

548 *Id.* 1275:5–7; PX 1224 (Feb. 9, 2010 Email from S. Donziger to J. Shinder re: "interested in your thoughts").

549 PX 1224 (Feb. 9, 2010 Email from S. Donziger to J. Shinder re: "interested in your thoughts").

550 *Id.*

551 Amazon Defense Coalition seems to have been used interchangeably with Amazon Defense Front in references to the Frente de la Defensa de la Amazonia. *E.g.,* PX 2389R (Hugo Camacho Naranjo's Objections and Responses to Chevron Corps' First Set of Requests for Prod. of Documents) ¶ 31; PX 700 Defin. 5; PX 1504 (included papers).

552 Tr. (Shinder) 1276:2–11.

553 Tr. (Shinder) 1276:4–10; *see also* PX 1244 (Mar. 8, 2010 Email from S. Donziger to J. Shinder and L. Minnetto) ("With respect to the Stratus documents ... we have determined that a package of material (approx. 3,000 pages) was submitted by local counsel to the court in early 2008 in response to a court order asking both parties to turn over any materials they thought might assist Cabrera in carrying out his mandate. While we do not know (yet) precisely what documents may have been submitted, all documents would only have been submitted directly to Cabrera to assist him in preparation of his report....").

554 Tr. (Shinder) 1276:12–15.

555 PX 1255 (Mar. 15, 2010 Email from A. Woods to L. Minnetto, J. Shinder, and S. Donziger) (attaching retention agreement).

556 Tr. (Shinder) 1285:12–22.

557 *Id.* 1288:6–1292:7 (emphasis added).

558 *Id.* 1292:11–17.

559 *Id.* 1295:25–1296:2.
The testimony of Shinder, Donziger, Stratus attorney Martin Beier, and Beltman conflicted as to whether Donziger was present during this meeting. *See* DX 1750 (Donziger Direct) ¶ 104 (not present); Donziger Jan. 29, 2011 Dep. Tr. at 3639:4–8 (same); Beier Dep. Tr. at 83:1–4 (meeting included Beltman, Beier, Shinder, Page); *id.* at 90:7–11 (meeting included "Jeff Shinder, Doug Beltman, Aaron Marr Page, Joe Silver. At the very beginning, possibly before the meeting formally convened, Steven Donziger was there. But he left and was not present during the interview"); Beltman Oct. 6, 2010 Dep. Tr. at 383:20–21 (Donziger present).
The Court finds that he was not.

560 Tr. (Shinder) 1298:1–4.

561 *Id.* 1298:5–8.

562 *Id.* 1298:21–1299:4; PX 1262 (Mar. 19, 2010 Email from J. Shinder to S. Donziger re: "Constantine Cannon Withdrawal").
The Brownstein firm withdrew as well. After Shinder's withdrawal, John McDermott of the Brownstein firm asked to speak with him. Donziger gave Shinder permission to speak to McDermott and told Shinder he could be fully forthcoming about reasons for his withdrawal. PX 1264 (Mar. 19, 2010 Email chain Between J. Shinder and S. Donziger); Tr. (Shinder)

1301:15–25. Shinder spoke with McDermott two or three days later, and informed him of what Shinder had learned during his interview with Beltman. *Id.* at 1302:10–1303:1. On March 21, 2010, the Brownstein law firm withdrew as well. PX 1269 (Mar. 21, 2010 Email from J. McDermott to S. Donziger re: "*Chevron v. Stratus* "). McDermott wrote to Donziger: "Based upon what we have learned regarding Stratus and Cabrera, including the troubling information we gathered in our call with you and Andrew [Woods] and conversations with Jeff Shinder, and our as yet unresolved questions regarding Ecuadorian laws of privilege or confidentiality of materials submitted to the court, we are in an untenable position." *Id.*

563 PX 1270 (Mar. 22, 2010 S. Donziger memo to file re: "Denver action/ethical issues").
He wrote that "[w]hile Shinder noted that it was not unusual for court experts to adopt factual findings of the parties, he thought Beltman described a much broader role where Stratus was preparing materials in conjunction with local Ecuadorian counsel to be used and/or adopted by Cabrera in his report." The memo went on to state that Shinder had "made these conclusions without being aware of various court orders in Ecuador asking for the parties to turn over materials to Cabrera to assist him in the preparation of his report, or being aware generally that the parties in the Ecuador litigation ... generally work very closely with the parties." *Id.* It claimed also that Donziger was "unclear whether the facts a[s] described by Beltman would be considered acceptable or improper by an Ecuadorian court .... [and] whether the role of Stratus was consistent with Ecuadorian rules and procedures, per representations by local counsel." *Id.* In fact, however, there were no such uncertainties in Donziger's mind. He had chosen Cabrera for the global expert position because Cabrera would cooperate with the LAPs. He and Fajardo procured his appointment by coercing Judge Yánez. They had caused Stratus to write all or most of his report and then falsely passed that report off—both to the court and to the world press—as the independent work of a neutral, court-selected expert. The Court finds that he had no illusions about the impropriety of what he and his colleagues had done.

564 PX 1291 (Donziger Memo to "Fellow Counsel").

565 *Id.*

566 DX 1750 (Donziger Direct) ¶ 91.

567 Fajardo understood that the collusion between the LAP team and Stratus on the one hand and Cabrera on the other, not to mention the manner in which Cabrera was appointed and paid, was improper. As we have seen, he implored Bonfiglio and Berlinger to remove the images of Beristain and Maldonado from *Crude* precisely because the presence of those images could lead to discovery of what really had happened. And he was under no illusion that there was any benign explanation for that. He told Bonfiglio that if the images of Beristain and Maldonado were left in the film, "the entire case will simply fall apart on us.... Those two guys [Beristain and Adolfo Maldonado, another supposed neutral] must not appear in the documentary at all!" PX 1091 (Dec. 25, 2008 Email from P. Fajardo to M. Bonfiglio). He explained that the images were "so serious that we could lose everything...." PX 1097 (Jan. 22, 2009 Email from P. Fajardo to M. Bonfiglio).
As we will see momentarily, Prieto and other lawyers in the LAPs' Ecuador office were even more aware of the improprieties that had been committed.

568 There is only one respect in which Cabrera was even arguably comparable to a party-nominated expert in either country. Although he was court-appointed, the LAPs were responsible for providing the Court with funds to pay him through an open process described above. The secret payments, however, were improper.

569 *Chevron v. Stratus Consulting, Inc.,* No. 10 Civ. 00047 (D.Colo.), DI 22.

570 PX 1279 (Mar. 30, 2010 Email from J. Prieto to S. Donziger, P. Fajardo, L. Yanza, and J. Sáenz).

571 *Id.* (emphasis added).

572 Parker Dep. Tr. at 136:1–5.

573 Donziger much later tried to put a very different spin on Prieto's "go-to-jail" email. We conclude below that his attempt was untruthful. *Infra Facts* § XI.A.3.b.iii.

574 *In re Chevron Corp.,* 10 MC 1(LAK) (S.D.N.Y.), DI 1 (filed Apr. 9, 2010).

575 *Chevron v. Stratus Consulting, Inc.,* No. 10 Civ. 00047 (D.Colo.), DI 68.

576 *Id.* DI 99 (filed May 5, 2010).

577 PX 1319 (May 3, 2010 Email from I. Maazel to others) (emphasis added).

578 PX 1316 (May 3, 2010 Email from E. Westenberger to others).

579 PX 1326 (Fajardo Decl.) ¶ 16.

580 *Id.* ¶ 19.

581 *Id.* ¶ 18.

582 PX 1319 (May 3, 2010 Email from I. Maazel to S. Donziger, E. Westenberger, A. Wilson, E. Yennock, J. Abady, E. Daleo, and J. Rockwell re: "Draft Affidavit").

583 PX 883 (July 17, 2007 Email from S. Donziger to L. Yanza and P. Fajardo).

584 *See Chevron Corp. v. Stratus Consulting, Inc.,* No. 10 Civ. 0047, DI 154, 2010 WL 2135217 (filed May 25, 2010).

585 PX 1363 (May 27, 2010 Email chain Between S. Donziger and Patton Boggs Attorneys re: "Mini-revelation").

586 *Id.*

587 PX 384 (Fajardo Petition).

588 PX 1382 (June 20, 2010 Email from S. Donziger to U.S. lawyers re: "important update on Ecuador submission"), at 2–3.

589 PX 384 (Fajardo Petition).

590 PX 1371 (June 14, 2010 Email from J. Abady to U.S. lawyers re: "Current Thinking on Ecuadorian Submission").

591 PX 384 (Fajardo Petition), at 6–7.

592 PX 2514 (filing in Second Circuit); PX 2515 (filing in 10–MC–00001); PX 2516 (filing in 10–MC–00002).

593 *See In re Application of Chevron Corp.,* 709 F.Supp.2d 283 (S.D.N.Y.2010), *aff'd sub nom. Chevron Corp. v. Berlinger,* 629 F.3d 297 (2d Cir.2011).

594 *Id.*

595 *In re Chevron Corp.,* 749 F.Supp.2d 141, 170 (S.D.N.Y.2010), *aff'd sub nom. Lago Agrio Plaintiffs v. Chevron Corp.,* 409 Fed.Appx. 393 (2d Cir.2010).

596 *See* PX 1326–1340, 2479 (Fajardo Decls.).

597 PX 1291 (Donziger Draft Letter to "Fellow Counsel").

598 *In re Chevron Corp.,* 10 MC 00001(LAK), DI 24 (filed May 13, 2010), at 8.

599 PX 2454 (Aug. 3, 2010 Email between S. Donziger and J. Berlinger re: "GRACIAS").

600 PX 1090 (Dec. 25, 2008 Email from P. Fajardo to M. Bonfiglio).

601 *In re Chevron Corp.,* 10 MC 00001(LAK) (S.D.N.Y. Apr. 30, 2010), Hr'g Tr. 39:16–20; 40:20–23.

602 *See* PX 1 (*Crude* Annotated Tape Log).

603 PX 5600 (Kohn Direct) ¶ 29; PX 633 (Aug. 20, 2007 Stratus Contract), at 1–9.

604 PX 5600 (Kohn Direct) ¶ 29 (quoting PX 633 (Aug. 20, 2007 Stratus Contract)).

605 *Id.* ¶ 27.

606 *Id.* ¶ 73.

607 *Id.* ¶ 74.

608 *Id.* ¶ 31 (Kohn "did not review drafts of Stratus' work being submitted in Ecuador. [He did] not recall reviewing any draft documents beginning with 'I, Richard Cabrera.' [He] was not involved in any discussions about Stratus's work being attributed to Mr. Cabrera or otherwise being used in a non-transparent manner.").

609 *Id.*

610 *Id.* ¶ 50.

611 PX 1023 (Apr. 1, 2008 Email from S. Donziger to J. Kohn); PX 1032 (Apr. 4, 2008 Email from S. Donziger to J. Kohn).

612 PX 5600 (Kohn Direct) ¶ 33.

613 *Id.* ¶ 37.

614 *Id.* ¶ 38; PX 897, 917, 965, 968, 984 (Emails to Kohn Referring to Second Selva Viva Account).

615 PX 5600 (Kohn Direct) ¶ 38.

616 PX 897 (Aug. 14, 2007 Email from S. Donziger to J. Kohn, K. Wilson, K. Kenny re: "Critical money transfer").
Kohn testified that he understood that the "second account was simply an administrative or ministerial matter, no different from any business or firm having more than one bank account." PX 5600 (Kohn Direct) ¶ 39.

617 The record is silent as to what other covert purposes, if any, it served.

618 PX 5600 (Kohn Direct) ¶ 30.

619 *Id.* ¶ 38.

620 *See supra Facts* § V.C.1.

621 PX 5600 (Kohn Direct) ¶¶ 20, 50.

622 Infra Discussion § IX.B.2.

623 PX 5600 (Kohn Direct) ¶ 20.

624 *Id.*

625 *Id.*

626 *Id.*

627 *Id.* ¶ 54.

628 *Id.*

629 *Id.* ¶ 55.

630 PX 1185 (Nov. 13, 2009 Email from J. Sáenz to L. Yanza, P. Fajardo, and J. Kohn).

631 PX 1146 (July 2, 2009 Memo from S. Donziger to Kohn team re: "Activity Going Forward") (emphasis added).

632 PX 5600 (Kohn Direct) ¶¶ 50–52. Kohn testified that he participated in two mediation sessions with Donziger and attorneys for Chevron in late 2007 and early 2009. At both of those sessions, Chevron's attorneys "asserted that the Ecuadoran plaintiffs' team had improper contacts with Mr. Cabrera." *Id.* ¶ 52.

633 *Id.* ¶ 22.

634 *Id.;* PX 1155 (draft retention agreement with K. Trujillo).

635 PX 1155 (draft retention agreement with K. Trujillo).

636 PX 5600 (Kohn Direct) ¶ 22.

637 *Id.;* PX 1156 (Sept. 4, 2009 Email from S. Donziger to J. Kohn re: "idea to retain a lawyer").

638 PX 1156 (Sept. 4, 2009 Email from S. Donziger to J. Kohn re: "idea to retain a lawyer") (emphasis added).

639 PX 5600 (Kohn Direct) ¶ 22.

640 PX 1181 (Nov. 9, 2009 Email Chain Between J. Kohn and S. Donziger).
Donziger and Kohn had a fee sharing arrangement, and Kohn was under no obligation to pay Donziger's expenses. *Id.*

641 *Id.*
Donziger wrote: "As a general matter, your firm's primary obligation is to finance the case; my firm's primary obligation is to run the case on a day to day basis, maintain relations with the clients, handle press and political aspects in both Ecuador and the U.S., and make sure we are set up for an enforcement action and financing going forward. In other words, I am doing a substantial portion of the actual work. If you break it down by time and value, I think I am doing the overwhelming amount of work on this case. I am not going to keep doing a substantial portion of the work AND take over your responsibility for financing while maintaining our same equity arrangement." *Id.*

642 *Id.*

643 *Id.*

644 *Id.*

645 *Id.*

646 PX 1184 (Nov. 10, 2009 Ltr. from J. Kohn to L. Yanza and P. Fajardo).

647 *Id.*

648 PX 5600 (Kohn Direct) ¶ 60 (citing PX 1187 (Nov. 19, 2009 Ltr. from J. Kohn to L. Yanza and P. Fajardo)).

649 Tr. (Kohn) 1463:18–1464:18.

650 PX 1187 (Nov. 19, 2009 Ltr. from J. Kohn to L. Yanza and P. Fajardo).

651 *Id.*

652 *Id.*

653 PX 5600 (Kohn Direct) ¶ 63.

654 *Id.* ¶ 64.

655 *Id.*

656 *Id.*

657 *Id.*

658 PX 1290 (Apr. 13, 2010 Ltr. from J. Kohn to P. Fajardo, J. Sáenz, and L. Yanza).

659 *Id.*

660 *Id.* at 2.

661 *Id.*

662 *Id.*

663 PX 5600 (Kohn Direct) ¶ 66.

664 *Id.*

665 PX 1312 (May 3, 2010 Email from P. Fajardo to J. Kohn).

666 *Id.*

667 *Id.*

668 *Chevron Corp. v. Stratus Consulting, Inc.,* 10 Civ. 0047, DI 99 (D.Colo. filed May 5, 2010).

669 PX 5600 (Kohn Direct) ¶ 68.

670 *Id.* ¶ 25.

671 *Id.* ¶ 81.

672 Tr. (Kohn) 1448:19–21.

673 Kohn testified that he has "preserved through tolling agreements [his] firm's right to pursue litigation to recover amounts paid [to Donziger and Stratus] in connection with the Ecuadoran litigation." PX 5600 (Kohn Direct) ¶ 25.

674 Tr. (Kohn) 1449:10–19.

675 Tr. (H. Piaguaje) 2678:10–13.

676 *Id.* 2698:11–16.

677 *Id.* 2699:20–24.

678 PX 543 (Jun. 30, 2009 Investment Agreement between R. DeLeon, S. Donziger, and J. Kohn) § 7.2.

679 Shinder testified as follows with respect to a late 2009 conversation with Donziger: "Q. Did you come to speak to Mr. Donziger in the fall of 2009? A. Yes, I did. Q. Generally, do you recall what legal services Mr. Donziger was looking for? A. I do. He was looking for enforcement counsel, lawyers in the United States who were going to take a judgment that he anticipated getting from the court in Ecuador and getting it enforced in the United States against Chevron, and that was the role we were auditioning for. Q. Did you say enforcing in the United States? A. Yes. Q. Did Mr. Donziger say that to you? A. Yes." Tr. (Shinder) 1253:6–18.

680 PX 3100 (Bogart Direct) ¶ 5; PX 541 (Nov. 1, 2009 Ltr. from N. Economou to S. Donziger and L. Yanza).

681 PX 541 (Nov. 1, 2009 Ltr. from N. Economou to S. Donziger and L. Yanza).

682 PX 3100 (Bogart Direct) ¶ 5.

683 *Id.*

684 *Id.*

685 Tyrrell Dep. Tr. at 81:13–23.

686 PX 1389 (Response to Request for Information), at 7 of 88.

687 *Id.*

688 PX 3100 (Bogart Direct) ¶ 6; PX 1391R (July 12, 2010 Ltr. from J. Tyrrell to S. Donziger) ("PB's work on behalf of the plaintiffs ... first commenced in February 2010").

689 PX 3100 (Bogart Direct) ¶ 7.

690 PX 1391R (July 12, 2010 Ltr. from J. Tyrrell to S. Donziger).

691 *Id.*

692 PX 3100 (Bogart Direct) ¶ 4.

693 PX 2382 (Invictus Memo).

694 PX 2382 (Sept. 5, 2010 Memo from C. Bogart to Burford Investment Comm.), at 3.

695 PX 3100 (Bogart Direct) ¶ 8.

696 *Id.* ¶ 25; PX 2456 (Nov. 2, 2010 Email from C. Bogart to S. Donziger, N. Economou, and W. Carmody) ("I confirm that we have funded Patton Boggs' London account.").

697 PX 552 (Burford Funding Agreement).

698 PX 2382 (Invictus Memo), at 15.

699 *Id.* at 22.

700 *Id.*

701 *Id.*

702 *Id.* at 21 (emphasis in original).

703 *Id.* at 26.

704 PX 392 (Fajardo Nov. 2010 Power of Attorney), at 1–2.
The new POA was "a broadening or extension of the power of attorney that was previously granted to [Fajardo], for which reason the [LAPs] ratif[y] and approve[ ] each and every one of the actions performed by the attorney Pablo Fajardo Mendoza ... in ... legal actions in ... court of law, national or foreign, financial or administrative actions and that have been performed

directly or through other persons legally authorized by him for the defense of his/her interests." *Id.*

705 Donziger Jan. 31, 2011 Dep. Tr. at 4075:10–16.

706 PX 1402 (July 27, 2010 Email from R. DeLeon to S. Donziger re: "Amendment to Agreement").

707 *Id.* ("Does Pablo have authority to sign for [the LAPs]? If so, how can this be clarified?").

708 Donziger and Fajardo had signed also retention agreements with various U.S. law firms on the LAPs' behalf. Donziger Jan. 18, 2011 Dep. Tr. at 3207:1–22.

709 PX 558 (Donziger Jan. 2011 Retention Agreement).

710 *Id.* at 2.

711 PX 1490 (Sept. 29, 2011 Ltr. from Burford to P. Fajardo, El Frente de Defensa de la Amazonia, S. Donziger, Purrington Moody Weil LLP, and L. Yanza).

712 *Id.*

713 Tyrrell of Patton Boggs informed Bogart shortly after Donziger's depositions in January 2011 that Donziger had not "told the truth" to Patton Boggs about the LAPs "voluminous" contacts with Cabrera when he retained the firm. PX 1473 (Bogart Notes of Jan. 27, 2011 Call with J. Tyrrell). (The notes are received as evidence of Tyrrell's state of mind but not for the truth of the matters stated.)

714 PX 3100 (Bogart Direct) ¶ 18.

715 *Id.* ¶ 38; PX 1490 (Sept. 29, 2011 Ltr. from Burford to P. Fajardo, El Frente de Defensa de la Amazonia, S. Donziger, Purrington Moody Weil LLP, and L. Yanza).

716 PX 1490 (Sept. 29, 2011 Ltr. from Burford to P. Fajardo, El Frente de Defensa de la Amazonia, S. Donziger, Purrington Moody Weil LLP, and L. Yanza).

717 PX 3100 (Bogart Direct) ¶ 18.

718 *Id.* ¶ 36 (quoting PX 1490 (Sept. 29, 2011 Ltr. from Burford to P. Fajardo, El Frente de Defensa de la Amazonia, S. Donziger, Purrington Moody Weil LLP, and L. Yanza)).

719 PX 1371 (June 14, 2010 Email from J. Abady to E. Yennock, E. Westenberger, E. Daleo, J. Tyrrell, I. Moll, S. Donziger, B. Narwold, I. Maazel, A. Wilson, A. Celli, N. Economou, J. Brickell re: "Current Thinking on Ecuadorian Submission") (brackets in original).

720 *Id.*

721 PX 384R (Fajardo Petition).

722 PX 1370 (Jun. 14, 2010 Email from S. Donziger to J. Tyrrell, E. Westenberger, and E. Daleo).

723 PX 384R (Fajardo Petition).

724 *Id.* at 2.

725 PX 387 (Aug. 2, 2010 Lago Agrio Court Order).

726 PX 1410 (Aug. 18, 2010 Email from A. Small to S. Donziger, E. Westenberger and J. Abady re: "Brainstorming on Expert Issues").

727 *Id.*

728 Dunkelberger Dep. Tr. at 10:9–15.

729 *Id.* at 51:6–14.

730 *Id.* at 60:19–61:11.

731 *Id.* at 250:2–24.

732 *Id.* at 81:24–82:7.

733 *Id.* at 91:16–22.

734 Donziger Jan. 30, 2011 Dep. Tr. at 4065:16–22.

735 Donziger Jan. 31, 2011 Dep. Tr. at 4067:11–21.

736 Tr. (Donziger) 2577:4–11.

737 Allen Dep. Tr. at 90:4–10.

738 Shefftz Dep. Tr. at 68:14–24.

739 *Id.* at 63:18–64:9.

740 PX 1410 (Aug. 18, 2010 Email from A. Small to S. Donziger, E. Westenberger, and J. Abady re: "Brainstorming on Expert Issues").

741 PX 400 (Lago Agrio Judgment).

742 *Id.* at 49–51.

743 *Id.* at 94.

744 *Id.* at 50–52.

745 *Id.* at 51.

746 *Id.* at 186.

747 *Id.* at 187.

748 PX 2502 (Chevron Motion for Clarification and Expansion of the Lago Agrio Judgment).

749 *Id.* at 2–3.

750 *Id.* at 23.

751 PX 429 (Mar. 4, 2011 Judgment Clarification Order).

752 *Id.* at 3.

753 *Id.* at 8–9.

754 *Id.* at 9.

755 Tr. (Zambrano) 1608:12–16.

756 PX 400 (Lago Agrio Judgment), at 107.

757 Tr. (Zambrano) 1611:15–18.

758 He perhaps meant to refer, incorrectly in response to this question, to hexavalant chromium, which is a different known carcinogen. *See id.* 1610:21–23.

759 Id. 1613:1–16 (quoting PX 400 (Lago Agrio Judgment), at 134).

760 *Id.*

761 PX 400 (Lago Agrio Judgment), at 134.
The Judgment does not identify by name the author of the study *Cáncer en la Amazonáia Ecuadoriana.* Defendants nowhere suggest that Barros was the author this study.

762 Tr. (Zambrano) 1614:7–10; PX 400 (Lago Agrio Judgment), at 88.

763 PX 399 (Lago Agrio Judgment (Spanish)), at 20–21.

764 Tr. (Zambrano) 1614:11–12.

765 *Id.* 1712:12–13.

766 *Id.* 1713:8–11.

767 *See, e.g.,* PX 400 (Lago Agrio Judgment), at 100, 101, 102, 104.

768 *Id.* at 181.

769 Tr. (Zambrano) 1615:1–10.

770 Zambrano testified that he set to work on the Judgment right after he began his second tenure on the case with the benefit of the notes he had made during his brief prior tenure. He claimed that he read the entire court record in order to render his decision and that he finished doing so "[w]ay before January 2011 ... [and] [b]y that time ... [he] w[as] already polishing the draft of the judgment." *Id.* 1736:21–1737:2

771 PX 6330 (Zambrano Mar. 28, 2013 Decl.) ¶ 14 (emphasis added).

772 PX 6391 (Zambrano Sept. 2013 Decl. to Ecuadorian Prosecutors), at 1 ("I am the only author of the decision issued on February 14, 2011, that I have not had any help from any person....").

773 Zambrano testified: "I would begin dictating by taking a document from here, another one from over there. So you have an idea as to what the office was set up ... the cuerpos of the trial were laid out. On some of them I had the corresponding annotations. On some occasions I would sit on the piece of furniture that was next to her desk. I would dictate. Other times I would stand up because I would reach for a document or refer to a cuerpo or some other writing. I wold refer to notes that I had made and in my mind I was developing the idea I wanted to state so she would type it accurately." Tr. (Zambrano) 1661:16–1662:10.

774 Calva was not a court employee. Her father was a lawyer in Lago Agrio who often appeared before then-Judge Zambrano. Tr. (Zambrano) 1659:23–1660:13. Zambrano hired her at his personal expense in mid-November 2010, *id.* 1664:12–15, to help him with the Judgment in the Chevron case because, he said, "it was a very voluminous trial. [Calva] was an excellent typist; she was very good at typing. She also know very much about the computing system. She had just graduated ... and her mother asked me if she could help me in some kind of situation, and precisely I needed help. That's why I made the proposal to her that I could give her $15 per day, and the mother accepted willingly." *Id.* 1818:8–15.

775 PX 4800 (Guerra Direct) ¶ 46.

776 DI 1642 (Oct. 30, 2013 LAPs Mot. to Amend Witness List).

777 Tr. (Zambrano) 1608:14–16.

778 *Id.* 1616:23–1617:4; *see also id.* 1619:4–6, 1620:1–4.
Zambrano later testified that he never performed internet searches himself. *Id.* 1684:7–10

779 Defendants contend that Zambrano did not have to read the French sources cited in the Judgment because he "copied [them] from [an] Ecuadorian Supreme Court case which went through and discussed Colombian, Argentinean, and French law." Tr. (summation) 2902:7–11. But Zambrano's testimony at trial suggested that he never actually had read that case. He was unable to recall its name, the names of the parties, or what it was about—even after being shown a copy of the decision by defense counsel. Tr. (Zambrano) 1885:1–20, 1887:10–23. And even if the supreme court case could have explained the French language authorities that are cited in the Judgment, it does not explain the American, English, or Australian ones. PX 1141 (June 18, 2009 Email from P. Fajardo to J. Prieto, J. Sáenz, and S. Donziger attaching *Torres de Concha v. Petroecuador*). It nowhere cites or discusses cases or law from those countries. *Id.*

780 Tr. (Zambrano) 1879:23–25.

781 PX 399 (Lago Agrio Judgment (Spanish)), at 109.

782 DI 1681 (Nov. 5, 2013 Lago Agrio Court Order).

783 Tr. 2333:16–2335:10.

784 PX 6374 (Oct. 1, 2010 Lago Agrio Court Order).

785 PX 2546 (Oct. 11, 2010 Lago Agrio Court Order).

786 Tr. (Zambrano) 1911:2–5.

787 PX 397 (Dec. 17, 2010 Lago Agrio Court Order).

788 Zambrano testified that he read every page of the Lago Agrio record to render the decision and that this was required by Ecuadorian law. Tr. (Zambrano) 1719:24–1720:16. Even assuming that reading every page would have been required as a formal matter of Ecuadorian law, the Court does not find it credible that Zambrano, or many other judges, would have read portions of the record that were not relevant to the decision of the case in the course of preparing a decision. It implies no criticism of any such omission, which is a different matter from Zambrano's apparent lack of candor in claiming that he actually had done that. Accordingly, the Court finds Chevron's argument that Zambrano could not even have read every page of the record during the total time over which he was assigned to the case (*see* PX 4200 (Rayner Direct) *passim*), though quite probably correct, immaterial on the authorship issue.

789 One of Donziger's former associates wrote to Sáenz that the Lago Agrio record in January 2010—more than a year before the case was decided—contained "more than 200,000 pages of trial evidence, 62,000 scientific analyses produced by independent laboratories contracted by both parties, testimony from dozens of witnesses, and 101 judicial field inspections...." PX 1211 (Jan. 7, 2010 Email From L. Garr to J. Sáenz).

790 Zambrano's contention that he was aided by notes and materials he had collected during his first tenure on the case, *i.e.,* in the roughly four month period starting in September 2009, is undermined by the fact he claimed to have destroyed those notes and materials. While that was understandable in light of Zambrano's removal from the bench, as he could not have any further use for them, there remains a lack of anything to corroborate that part of his story.

791 Tr. (Zambrano) 1679:5–7, 1680:3–6; PX 6371 (Tarco Decl.).

792 DI 1601 (Oct. 24, 2013 LAPs Mot. for Leave to Amend the Witness List).

793 PX 6371 (Tarco Decl.) ¶ 1.

794 *Id.* This statement was admissible against defendants as an adoptive admission by virtue of their submission of his declaration in support of their motion for leave to call him as a witness. *See* Fed.R.Evid. 801(d)(2)(B); see also 2 Kenneth S. Broun, McCormick on Evidence § 261 (7th ed.) ("When a party offers in evidence a deposition or an affidavit to prove the matters stated therein, the party knows or should know the contents of the writing so offered and presumably desires that all of the contents be considered on its behalf since only the portion desired could be offered. Accordingly, it is reasonable to conclude that the writing so introduced may be used against the party as an adoptive admission in another suit."); *see, e.g., Attorney Gen. of U.S. v. Irish N. Aid Comm.,* 530 F.Supp. 241, 252 (S.D.N.Y.1981) *aff'd,* 668 F.2d 159 (2d Cir.1982) (finding letters written to defendant that defendant had specifically adopted or incorporated by reference in its reply to the summary judgment motion admissible under F.R.E. 801(d)(2)(B)); *Diaz v. Silver,* 978 F.Supp. 96, 120 (E.D.N.Y.1997) *aff'd,* 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997) and *aff'd sub nom. Acosta v. Diaz,* 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997) and *aff'd sub nom. Lau v. Diaz,* 522 U.S. 801, 118 S.Ct. 36, 139 L.Ed.2d 5 (1997) (referee's report admissible under 801(d)(2)(B) where state legislature submitted it to the Department of Justice in seeking preclearance under the Voting Rights Act).

795 PX 6371 (Tarco Decl.) ¶ 2.

796 Tr. 2781:20–2789:1.

797 PX 6371 (Tarco Decl.) ¶ 5.

798 *Id.* A "forensic copy" is "the exact image that is created of all of the data and information from the hard drives in a computer at a certain moment." *Id.*

799 *Id.* ¶ 6.

800 *Id.* ¶ 5.

801 *See* PX 4108 (Lago Agrio Court Delivery Record of Furniture and/or Office Equipment); PX 4110 (same); PX 4109 (Lago Agrio Court Department of Fixed Assets Control of Fixed Assets for N. Zambrano); PX 4110 (Lago Agrio Court Record of Delivery of Furniture and/or Office of Equipment).

802 *See* PX 4122 (HP Shipment Detail).

803 Tr. (Lynch) 2808:9–11, 2813:4–13.

804 Lynch determined that the "old" computer was manufactured by HP in October 2006 (PX 4119 (Serial Number & Subassembly Tracking)), and given to Zambrano two years later. PX 4110 (Lago Agrio Court Record of Delivery of Furniture and/or Office of Equipment); Tr. (Lynch) 2812:22–2813:3. The new computer—on which Zambrano testified the Judgment was typed in full—was manufactured by HP in September 2010. PX 4121 (Serial Number and Subassembly Tracking). The Judicial Council of the Lago Agrio court purchased the new computer on November 26, 2011. PX 7772 (Ltr. No. AF–001–2013 from A. Jimenez).

Moreover, the new computer had not even been shipped by HP by October 10, 2010—the date on which the Tarco declaration stated that the PROVIDENCIAS file was created. Tr. (Lynch) 2819:25–2820:5. It was not received by the Ecuadorian Judicial Council until November 26, 2010, PX 7772 (Ltr. No. AF–001–2013 from A. Jimenez), almost two months after Zambrano was reassigned to the Chevron case.

805 Tr. (Zambrano) 1679:5–7; *see also id.* 1658:14–1659:6.

806 *Id.* 1894:25–1902:4; PX 4124 (July 30, 2008 Zambrano Judicial Appointment).

807 PX 411 (Feb. 29, 2012 Order). The Plenary Judicial Council found that Zambrano and Judge Ordófiez, previously mentioned, overturned a detention order and released from custody a defendant who had been apprehended in a truck containing 557 kilograms of cocaine. *Id.*

808 PX 6321 (May 22, 2012 Order), at 8.

809 Tr. (Zambrano) 1801:23–25.

810 PX 6330 (Zambrano Decl.) ¶¶ 1, 14.

811 Tr. (Zambrano) 1792:4–21, 1802:9–1803:7.

812 Zambrano testified that he had never visited the website of the Refinery of the Pacific, despite that he had been working there for six months. Tr. (Zambrano) 1794:15–19. He was unaware that he had an email address with the company. *Id.* 1795:15–17. And he claimed not to know whether Petroecuador was a majority shareholder of RFP, even though he admitted that Ecuadorian law requires that Petroecuador must own more than a majority share. *Id.* 1793:13–21, 1793:3–8.

813 *See, e.g., Chevron Corp. v. Republic of Ecuador,* 987F.Supp.2d 82, 12 Civ. 1247(JEB), 2013 WL 5797334 (D.D.C. Oct. 29, 2013); *Chevron Corp. v. Republic of Ecuador,* 949 F.Supp.2d 57 (D.D.C.2013); *Chevron Corp. v. Donziger,* 886 F.Supp.2d 235, 248 (S.D.N.Y.2012).

814 Tr. (Zambrano) 1800:6–10; PX 2500 (Tr. of Feb. 14, 2011 Press Conference).

815 PX 2500 (Tr. of Feb. 14, 2011 Press Conference), at 3.

816 *Id.* at 4.

817 PX 2503 (*Correa says the judgment against Chevron in Ecuador must be respected, Ultimahora,* Feb. 19, 2011).

818 Tr. (Zambrano) 1800:3–1801:4.

819 *Id.* 1959:18–21.

820 PX 6405 (Chevron *alegato*), § 3.8, at 150–163 of 604.

821 Tr. (Zambrano) 1961:4–6.

822 Given this finding, it is unnecessary to determine whether the job actually was given to him to buy his testimony or, in the vernacular, to "keep him sweet." The Court does not, however, credit Zambrano's claim that he got the job over the Internet. Tr. (Zambrano) 1935:13–25. He made quite clear at trial that he had limited if any computer skills. If he is to be believed, he had an 18–year old typist do legal research for him on the computer. Tr. (Zambrano) 1684:3–11. He did not even know the email address assigned to him at Refinery of the Pacific. Tr. (Zambrano) 1796:12–14.

823 Infra App'x I Pages 1–5.

824 That of course is a hotly contested issue and the Court does not credit Zambrano's claim of authorship. But Zambrano's testimony as to what materials properly could have been considered in deciding the case nonetheless has value, particularly as the thrust of his testimony was that everything was done with utter propriety.

825 Tr. (Zambrano) 1608:21–22.

826 *Id.* 1691:3–14.

827 *Id.* 1692:25–1693:3.

828 *Id.* 1694:15–22.

829 *Infra* App'x I.

830 *Id.*

831 PX 435 (Fusion Memo).

832 PX 438 (Draft *Alegato*).

833 PX 433–34 (Index Summaries).

834 PX 928 (Clapp Report).

835 PX 437 (Fajardo Trust Email).

836 PX 3700 (Leonard Direct) ¶ 80.

837 *Id.* ¶¶ 39–79.

838 *Id.* ¶ 39.

839 *Id.*

840 The fact that neither is in the Lago Agrio record is established by the testimony of Dr. Juola, PX 3800 ¶¶ 3, 27 (Selva Viva Database), and Mr. Hernandez (PX 3900) ¶¶ 3, 17–19, 35–36, 39) (Moodie Memo). The Court credits that testimony.

841 PX 1101 (Moodie Memo).

842 *Id.*

843 *Id.* at 2.

844 PX 400 (Lago Agrio Judgment), at 89–90 ("Finally, we refer to two theories that have been developed by Anglo–Saxon case law which refer to causation in harm to human health: the theory of the substantial factor and that of the most probable cause, which are legal theories of causation developed in the USA, Australia and England....").

845 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203 (1997).

846 PX 1101 (Moodie Memo), at 2.

847 PX 400 (Lago Agrio Judgment), at 89.

848 PX 1101 (Moodie Memo), at 2 (emphasis in original).

849 PX 400 (Lago Agrio Judgment), at 89–90.

850 PX 5100 (Green Direct) ¶ 1.

851 *Id.* ¶¶ 16–18.

852 *Id.* ¶ 20A–C.

853 PX 1101 (Moodie Memo), at 3 (emphasis added).

854 PX 400 (Lago Agrio Judgment), at 90 (emphasis added).

855 *Id.* at 89–90; PX 1101 (Moodie Memo), at 3.

856 (2000) 49 NSWLR 262, PP 91, 98.

857 PX 5000 (Spigelman Direct) ¶ 1.

858 *Id.* ¶ 18. Counsel for the Donziger defendants pointed at trial to what appears to be an Australian journal article, which cites the *Seltsam* case for this proposition and does not mention *Wigmore on Evidence* or any other American source. Tr. (Spigelman) 902:11–903:13; DX 1203 (K. Mengersen, S.A. Moynihan, and R.L. Tweedie, *Causality and Association: The Statistical and Legal Approaches,* Statistical Science, 2007), at 240. But the fact that Australian authors in an Australian publication cite exclusively to an Australian case in no way establishes that that case—or Australian law in general—is commonly cited in jurisdictions *outside* Australia, such as Ecuador.

859 *See* PX 5100 (Green Direct) ¶¶ 21B–E; PX 5000 (Spigelman Direct) ¶ 17.

860 PX 3900 (Hernandez Direct) ¶ 35 ("The Moodie Memo was not located in the Reviewed Record.... No complete excerpt from the Moodie Memo was located in the Reviewed Record....").

861 PX 439–441 (Selva Viva Database).

862 PX 4100 (Lynch Direct) ¶ 81.

863 *Id.; see also* PX 2175 (Portion of Judgment Showing Errors Common to Selva Viva Database).

864 PX 4100 (Lynch Direct) ¶ 82.

865 *Id.;* PX 349–441 (Selva Viva Database).

866 PX 4100 (Lynch Direct) ¶ 83.

867 PX 399, 400 (Lago Agrio Judgment), at 108.

868 PX 4100 (Lynch Direct) ¶ 84.

869 *Id.; see* PX 2175 (Summary of Overlap and Common Errors in Judgment, Selva Viva Database, and Stratus Compilation).

870 PX 4100 (Lynch Direct) ¶ 87; *see also, e.g.,* 40 C.F.R. § 439.1(j) ("Non-detect (ND) means a concentration value below the minimum level that can be reliably measured by the analytical method"); Dennis R. Helsel, Nondetects and Data Analysis 9 ("[m]easurements whose values are known only to be above or below a threshold ... [are c]alled 'less thans' or 'nondetects' "); *id.* at 6 (illustrating tabular presentation of nondetects using less than ("<") symbol).

871 PX 400 (Lago Agrio Judgment), at 109 (all emphasis added).

872 PX 4100 (Lynch Direct) ¶ 87.

873 This is illustrated by Figure 26 in PX 4100 (Lynch Direct) ¶ 89; *see also id.* ¶¶ 87–88.

874 A milligram is one-thousandth of a gram. A concentration of one milligram is one one-thousandth of a gram per 1,000 grams of sample.

875 PX 400 (Lago Agrio Judgment), at 109 (emphasis added).
Of course, the original Judgment (PX 399) was in Spanish; this is the stipulated English translation. But the phrase "3142 mg/kg" is identical in both.

876 PX 4100 (Lynch Direct) ¶ 90 & Fig. 27.

877 *Id.* & Fig. 28
It perhaps bears mention, though the point is extraneous for the present purpose of identifying copying in the Judgment from non-Record sources, that the use of milligrams per kilogram exaggerated the concentration of the subject substances in these samples by a factor of 1,000, assuming that the Filed Lab Results were accurate to begin with.

878 *Id.* ¶ 85.

879 *Id.* ¶ 85 & Fig. 21.

880 Tr. (Donziger) 2600:6–9.

881 DX 1601 (Ponce Direct) ¶ 11.

882 Tr. (Ponce) 2272:22–2273:1, 2273:4–8.

883 Tr. (Zambrano) 1691:10–14.

884 *Id.* 1691:20–23.

885 *Id.* 1692:24–1693:3.

886 Tr. (Zambrano) 1694:15–21. When asked at trial whether he discarded documents that did not match those that were already in the cuerpos, Zambrano answered in the negative. *Id.* 1694:7–12. However, at his deposition two days earlier, Zambrano had testified that when documents were different from those in the cuerpos, he discarded them. Zambrano Dep. Tr. at 282:11–20. He testified at trial that his deposition testimony on this point was true. Tr. (Zambrano) 1694:23–25.

Again, the point is not that Zambrano wrote the Judgment. The Court finds that he did not. Rather, it is that this testimony confirms that he felt constrained to say that he relied only on material in the record.

887 The testimony, which in this respect was uncontroverted, was given in a deposition and submitted under FED. R. CIV. P. 44.1 to facilitate the Court's decision on certain matters of Ecuadorian law.

888 DI 1751–5 (Rosero Dep. Tr.), at 124:12–125:19.

This is not unique to Ecuador. The same is true in Mexico. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 470 F.Supp.2d 917, 926 (S.D.Ind.2006) ("Under Mexican judicial procedures, it is improper to submit any proposed order to a Mexican state court.") The parties have made no submissions on the point as to the law of other countries.

889 PX 1137 (June 5, 2009 Email from P. Fajardo to S. Donziger re: "BRYAN" [sic]).

890 *Id.* (emphasis added); see also Donziger July 19, 2011 Dep. Tr. at 4763:24–4764:23, 4765:20–4766–17.

891 PX 1141 (June 18, 2009 Email from P. Fajardo to S. Donziger, J. Prieto, and J. Sáenz re: "THIS IS THE MOST COMPLETE ONE") (ellipsis in original).

892 Tr. (Zambrano) 1960:12–14 ("[The alegato] is a statement of position by one of the parties regarding a specific point that is in dispute in that litigation.").

893 PX 1370 (June 14, 2010 Email from S. Donziger to J. Tyrrell, E. Westenberger, and E. Daleo re: "important update/Ecuador") ("The Ecuador team is getting nervous that there is an increasing risk that our 'cleansing' process is going to be outrun by the judge and we will end up with a decision based entirely on Cabrera. Absent our intervention ASAP, they believe the judge could issue autos para sentencia in about 3–4 weeks, which would in effect bar our remedy to the Cabrera problem. Abady's firm is re-editing the submission in light of the recent complications with the Stratus materials ...").

894 PX 1371 (June 14, 2010 Email from J. Abady to S. Donziger and others).

895 Donziger July 19, 2011 Dep. Tr. at 4814:22–4815:2.

896 *Infra Facts* § XII.A.1.

897 E.g., Donziger Jan. 29, 2011 Dep. Tr. at 3711:9–12 (LAP Ecuadorian lawyers "up to a certain point" "spoke regularly to the judge ex parte"); Infra Discussion § II.B.2, supra Facts § IV.F.1.

898 *Supra Facts* § VII.C.1.

899 *Chevron Corp. v. Berlinger,* 629 F.3d 297, 305–06 (2d Cir.2011) (noting July 15, 2010 order to produce).

900 *In re Chevron Corp.,* 749 F.Supp.2d 141, 170 (S.D.N.Y.2010), *aff'd sub nom. Lago Agrio Plaintiffs, Donziger v. Chevron Corp.,* 409 Fed.Appx. 393 (2d Cir.2010) (summary order).

901 PX 4800 (Guerra Direct) ¶ 7.

902 "Findings of fact, whether based on oral or documentary evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). "[W]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Metzen v. United States,* 19 F.3d 795, 797–98 (2d Cir.1994) (citation omitted).

903 1 Leonard B. Sand et al., Modern Federal Jury Instructions Instr. 7–5 (Matthew Bender & Co.2013).
We bear in mind also another relevant portion of this standard instruction:
"The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.
For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt."
A fortiori the same is true in civil cases, in which the standard of proof is less than beyond a reasonable doubt.

904 PX 4800 (Guerra Direct) ¶ 8; Tr. (Zambrano) 1629:19–1630:4.

905 PX 4800 (Guerra Direct) ¶ 4.

906 *Id.*

907 *Id.* ¶ 7.
Guerra said that "[a]ccording to the Judiciary Council, the reason for my dismissal was that I made statements that the Chevron case should be declared null, at a time when I no longer presided over the Chevron case. In reality, I believe I was dismissed because I confronted Judges Novillo and Yánez, who succeeded me as judges in this case, regarding several dubious and illegal rulings they had issued in the proceedings, and regarding their practice of asking the experts for 25 percent of their fees in consideration for having appointed them as such." *Id.*

908 *See* Tr. (Zambrano) 1811:6–1812:2.

909 PX 4800 (Guerra Direct) ¶ 11.

910 *Id.* ¶ 11.

911 *Id.* ¶ 13.

912 *Id.*

913 *Id.*

914 *Id.*

915 *Id.* ¶¶ 13–15.
Guerra testified that he generally shipped the documents to Zambrano directly. At times, however, he shipped them to other individuals in Lago Agrio, who would then deliver them to Zambrano. *Id.* ¶ 16.

916 *Id.* ¶ 17.

917 *Id.*

918 *Infra Facts* § XI.A.1.a.iii.

919 PX 375, PX 1468, PX 1773–PX 1875; PX 4100 (Lynch Direct) ¶ 3e; PX 2177 (Summary Chart of non-Chevron draft rulings on Guerra's computer).

920 PX 4100 (Lynch Direct) ¶¶ 54–68. Chevron expert Spencer Lynch, the Director of Digital Forensics at Stroz Friedberg, LLC (*id.* ¶ 1) compared the drafts orders found on Guerra's computer to court rulings published on the Ecuadorian court website, http://www.funcionjudicial sucubios.gob.ec/index.php/consulta-de-causas, in cases assigned to Zambrano. *Id.* His analysis revealed that text "appear[ed] verbatim, or nearly verbatim in 105 rulings issued by the Ecuadorian court [and] ... [a]t least 101 of the 105 rulings were issued by then judge Zambrano or in cases assigned to then-judge Zambrano." *Id* ¶ 68b-c.

921 PX 1682 (TAME Shipment Records For Alberto Guerra Between Nov. 19, 2009 and Feb. 28, 2012).

922 *Id.*

923 *Id.*

924 Tr. (Zambrano) 1629:25–1630:4.

925 *Id.* 1811:6–1812:2.

926 *Id.* 1630:22–24.

927 As Chevron pointed out, Zambrano "stated that Guerra assisted him with drafting court orders because, at the time, Guerra 'was facing a great financial need.' Tr. (Zambrano) 1630:22–1631:3; *see also id.* 1814:4–11 (Guerra 'was facing a very delicate financial situation'). But, despite having permitted Guerra to assist him by drafting orders because of Guerra's financial desperation, Zambrano denied having paid Guerra for ghostwriting his orders—implausibly implying that Guerra's financial need had resulted in his working for nothing. Tr. (Zambrano) 1630:22–1631:6." DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 101.

928 PX 1733 (Guerra Daily Planner); PX 1734 (Guerra Daily Planner).
He testified that he had lost the prior day planners. Tr. (Guerra) 1025:1–17.

929 PX 1735 (Guerra Daily Planner), at 1, 180; PX 1685 (Guerra Daily Planner Entry for Feb. 24, 2012).

930 PX 4800 (Guerra Direct) ¶ 22.

931 *Id.*

932 *Id.* ¶ 22; Tr. (Guerra) 916:3–3.

933 PX 4800 (Guerra Direct) ¶ 22; Tr. (Guerra) 916:3:917–4.
Guerra did not tell Racines that he was ghostwriting orders for Zambrano. Tr. (Guerra) 917:5–7.

934 Tr. (Guerra) 917:8–20.

935 PX 4800 (Guerra Direct) ¶ 23.

936 *Id.*

937 *Id.;* Tr. (Guerra) 919:6–14.

938 PX 4800 (Guerra Direct) ¶ 23; Tr. (Guerra) 920:2–7.

939 PX 4800 (Guerra Direct) ¶ 23; Tr. (Guerra) 921:6–20.

940 PX 4800 (Guerra Direct) ¶ 25; Tr. (Guerra) 921:5–25.

941 PX 4800 (Guerra Direct) ¶ 27.

942 *Id.;* Tr. (Guerra) 925:6–14.

943 PX 4800 (Guerra Direct) ¶ 31; Tr. (Guerra) 930:7.

944 Tr. (Guerra) 930:14–16.
He occasionally drafted orders, or portions of orders, to favor Chevron because, he explained, "it could seem too obvious if every single portion of every single court order that [Guerra] drafted[.] [I]t could seem as though all of the orders were being issued for the benefit of the plaintiffs. That would have looked suspicious and the idea was to not have it look suspicious." *Id.* 930:20–24.

945 PX 4800 (Guerra) ¶ 31.

946 Tr. (Guerra) 931:8–11.

947 *Supra* note 920.

948 PX 1172, 1173, 1186, 1190–1193, 1197, 1209, 1220, 1243 (Guerra Draft Chevron Orders); PX 4100 (Lynch Direct) ¶ 34.

949 PX 4100 (Lynch Direct) ¶ 48.

950 *Id.* ¶ 45 & Table 10.
Although the last-saved date for the ninth order postdated Zambrano's issuance of it, it is much more likely it actually was created by Guerra before Zambrano issued its counterpart. Chevron's forensic expert testified that the metadata of the order—which is 72 pages long—reflects that the order was edited for a total of only two minutes before it was last saved. Because it is impossible to draft a 72–page document in two minutes, and because the order is nearly identical to the order that was issued by Zambrano, it is much more likely, and the Court finds, that the ninth draft order was written by Guerra, issued by Zambrano, and for some reason later last-saved on Guerra's computer. *Id.*
The Court notes also that the fact that these draft Chevron orders all had a file system create date of July 23, 2010 does not suggest that all were created then or that they were not prepared by Guerra when he said he prepared them. Forensic analysis of his computer showed that he installed Windows XP on July 23, 2010 and then transferred these draft orders, as part of a larger transfer of data on the same date, from an external hard drive. The obvious inference is that Guerra backed up his computer to the external hard drive before installing Windows XP and then restored his files from the external hard drive to the computer. PX 4100 (Lynch Direct) ¶¶ 34–37; *see* Tr. (Lynch) 557:1–558:10.

951 PX 4800 (Guerra Direct) ¶ 31; Tr. (Guerra) 931:21–22.

952 PX 4800 (Guerra Direct) ¶ 32; Tr. (Guerra) 932:10–11 ("[Fajardo] would hand me a blank white envelope and inside the envelope were [$]20 and $50 bills.").

953 PX 4800 (Guerra Direct) ¶ 33.

954 The Court has concluded, for reasons set out in Appendix III, that the records are admissible and it finds them persuasive.

955 PX 1713 (Guerra Banco Pichincha Deposit Slips); PX 1689, 1706–1708 (Guerra Banco Pichincha Account Statements).

956 PX 1719 (Dec. 23, 2009 Deposit Slip); PX 1718 (Feb. 5, 2010 Deposit Slip); Tr. (Donziger) 2596:1–4 ("Q. Ximena Centeno [wa]s an employee of Selva Viva [in December 2009], correct, sir? A. My understanding was that she worked for Selva Viva at that time, yes.").

957 PX 1718 (Feb. 2010 Guerra Banco Pichincha Deposit Slip); PX 1713 (same), at 8; PX 1719 (Dec. 2009 Guerra Banco Pichincha Deposit Slip); PX 1713 (same), at 1.

958 PX 1741 (X. Centeno national identity card). The admissibility of this exhibit is dealt with in Appendix V.I.

959 DI 1671 (Owen Decl.) *passim.* The declaration was filed in opposition to defendants' motion (DI 1660) to strike, among other things, bank records offered through Guerra. Defendants neither objected to consideration of the declaration nor, for that matter, replied to Chevron's opposition to their motion. In any case, the Court is not bound by the rules of evidence in deciding preliminary questions of admissibility. Fed. R. Evid. 104(a).

960 Donziger and Fajardo often used code names in internal emails. As Donziger admitted in a deposition, he did so "to prevent any reader of those documents from knowing exactly who it was [he] w[as] talking about...." Donziger Jan. 29, 2011 Dep. Tr. at 3817:13–18. One admitted example is Fajardo's 2007 cook-waiter-restaurant email, discussed above, in which Donziger admitted that "cook" meant Judge Yánez, "waiter" meant Cabrera, and "restaurant" meant Chevron.

961 PX 1753 (Sept. 15, 2009 Email from P. Fajardo to S. Donziger, J. Prieto, J. Sáenz, L. Yanza, andrenatog85@hotmail.com re: "PUPPETEER") (ellipses in original).

962 He had issued some orders in it earlier. *E.g.,* PX 348 (Oct. 3, 2009 Lago Agrio Court Order).

963 PX 1176 (Oct. 21, 2009 Email from P. Fajardo to S. Donziger, J. Sáenz, J. Prieto, L. Yanza, and R. Garcia re: "ONWARD").

964 PX 1751 (Oct. 27, 2009 Email from P. Fajardo to S. Donziger and L. Yanza re: "NEWS").

965 PX 583 (Banco Pichincha Account Summary for Selva Viva), at 51.

966 PX 1713 (Guerra Deposit Slips), at 10.

967 PX 583 (Banco Pichincha Account Summary for Selva Viva), at 51.

968 PX 1713 (Guerra Deposit Slips), at 5, 11.

969 PX 1746 (Nov. 27, 2009 Email from L. Yanza to S. Donziger).

970 PX 583 (Banco Pichincha Account Summary for Selva Viva), at 52.

971 PX 1713 (Guerra Deposit Slips), at 7; PX 1719 (same), at 1.

972 PX 583 (Banco Pichincha Account Summary for Selva Viva), at 53.

973 PX 1713 (Guerra Deposit Slips), at 8; PX 1718 (same), at 1.

974 PX 4800 (Guerra Direct) ¶ 35; PX 2522 (Timeline of Judges in the Lago Agrio Litigation).

975 PX 4800 (Guerra Direct) ¶ 35.

976 Infra Facts § XI.D.2.

977 Donziger June 24, 2013 Dep. Tr. at 285:14–286:22; Donziger June 25, 2013 Dep. Tr. at 389:23–390:2.

978 Tr. (Donziger) 2592:12–15, 2592:24–2593:4.

979 Donziger Jan. 29, 2011 Dep. Tr. at 3817:13–18.

980 *Id.* 2593:5–23.

981 DX 1360 (June 25, 2012 Interview Transcript), at 42–45 (during period in which Guerra wrote orders for Zambrano, Zambrano told him not to "give Chevron room for anything" out of vanity and avoidance of delay because he wanted to issue the judgment), 65 ("[d]on't give Chevron any room" "to reach such a point as to say: 'Well, right now ..., now we're in a situation to talk, see. Cut the bull. Do you want to talk to me?").

982 *Id.* at 69–70.

983 Donziger argued that Guerra must have lied concerning the alleged fall 2009 meeting at the Honey & Honey restaurant because Donziger was not then in Ecuador. While the Court does not credit Guerra's testimony with respect to that meeting, it finds Donziger's argument that he was not in Ecuador when it allegedly took place unpersuasive. Ecuadorian records establish that Donziger was in Ecuador from October 6 until some time on October 9, 2009. PX 1509 (Donziger Immigration Records). Donziger's contention that the alleged meeting must have taken place at a different time rests on assumptions that the Court regards as unfounded. Nevertheless, the point is academic in view of the Court's finding on this point, which to reiterate is that the LAPs, with Donziger's authorization, paid Guerra during this period to ghostwrite Zambrano's orders on the Chevron case and to do so to their advantage.

984 PX 4800 (Guerra Direct) ¶ 36.

985 *Id.;* Tr. (Guerra) 975:15–977:3.

986 PX 4800 (Guerra Direct) ¶ 36; Tr. (Guerra) 987:1–21.

987 PX 4800 (Guerra Direct) ¶ 37; Tr. (Guerra) 1033:24–1034:20. Guerra testified also that he discussed with Donziger an immigration issue concerning his son at the Honey & Honey Restaurant. Tr. (Guerra) 925:17–926:1.

988 PX 1745 (Sept. 5, 2010 Email from A. Guerra to S. Donziger re: "Greetings from Quito").

989 Tr. (Guerra) 1035:13–20.

990 *Id.* ("By this date, Judge Zambrano and I knew that later on Judge Zambrano would rehear the case. In these circumstances and

through this message, specifically regarding the issue that I will support the matter of Pablo Fajardo so it will come out soon and well, this subject was related only with the Chevron case.").

991 PX 4800 (Guerra Direct) ¶ 37.

992 *Id.* ¶ 39; Tr. (Guerra) 987:5–21.

993 PX 4800 (Guerra Direct) ¶ 40; Tr. (Guerra) 990:9–18.

994 PX 4800 (Guerra Direct) ¶ 41; Tr. (Guerra) 990:9–23.

995 PX 4800 (Guerra Direct) ¶ 41; Tr. (Guerra) 991:20–993:22.

996 PX 4800 (Guerra Direct) ¶ 42; Tr. (Guerra) 995:5–22.

997 PX 4800 (Guerra Direct) ¶ 42; Tr. (Guerra) 995:23–997:9.

998 PX 4800 (Guerra Direct) ¶ 42; Tr. (Guerra) 996:12–16.

999 PX 4800 (Guerra Direct) ¶ 43; Tr. (Guerra) 999:24–1001:12.

1000 PX 4800 (Guerra Direct) ¶ 43; Tr. (Guerra) 1002:2–7.
There were objections to this testimony, which the Court ultimately received for the reasons set forth in Appendix V.II.

1001 PX 4800 (Guerra Direct) ¶ 44; Tr. (Guerra) 1002:8–19.

1002 PX 4800 (Guerra Direct) ¶ 44; Tr. (Guerra) 1000:24–1001:2, 1002:8–1003:11.

1003 PX 4800 (Guerra Direct) ¶ 46; Tr. (Guerra) 1003:17–1004:7.

1004 PX 4800 (Guerra Direct) ¶ 46; Tr. (Guerra) 1003:7–16.

1005 PX 4800 (Guerra Direct) ¶ 46; Tr. (Guerra) 1002:15–19.

1006 PX 4800 (Guerra Direct) ¶ 46; Tr. (Guerra) 1002:15–1003:3.

1007 PX 4800 (Guerra Direct) ¶ 46.

1008 *Id.* ¶ 47; Tr. (Guerra) 1009:6–1010:6.

1009 PX 4800 (Guerra Direct) ¶ 47; Tr. (Guerra) 1009:6–1010:6.

1010 PX 4800 (Guerra Direct) ¶ 47; Tr. (Guerra) 1010:21–1011:7.

1011 PX 4800 (Guerra Direct) ¶ 48; Tr. (Guerra) 1010:18–20.

1012 PX 4800 (Guerra Direct) ¶ 49; Tr. (Guerra) 1011:8–23.

1013 PX 4800 (Guerra Direct) ¶ 49; Tr. (Guerra) 1011:24–1012:12.

1014 PX 4800 (Guerra Direct) ¶ 49.

1015 *Id.;* Tr. (Guerra) 1017:23–1018:7.

1016 PX 4800 (Guerra Direct) ¶ 49; Tr. (Guerra) 1020:3–5.

1017 PX 4800 (Guerra Direct) ¶ 51; Tr. (Guerra) 1018:18–25.

1018 PX 2502 (Chevron Request for Clarification of Judgment).

1019 PX 4800 (Guerra Direct) ¶ 52; Tr. (Guerra) 1020:6–9.

1020 PX 429 (Mar. 4, 2011 Judgment Clarification Order).

1021 PX 4800 (Guerra Direct) ¶ 54; Tr. (Guerra) 1020:19–22.

1022 PX 4800 (Guerra Direct) ¶ 55.
Fajardo offered to pay for Guerra $5,000 for his testimony and to cover his airfare and expenses. Guerra did not disclose to the U.S. lawyer that he had served as Zambrano's ghostwriter or that Zambrano had agreed to $500,000 from the LAP team. *Id.* After the meeting, Fajardo never followed up with Guerra and the subject was dropped.

1023 *Id.* ¶ 58.

1024 *Id.*

1025 *Id.* ¶ 60.

1026 PX 4800 (Guerra Direct) ¶ 61; PX 1671 (Guerra Jan. 27, 2013 Signed Agreement with Chevron) ¶ 2; Tr. (Guerra) 1152:12–22.

1027 PX 1671 (Guerra Jan. 27, 2013 Signed Agreement with Chevron) ¶ 3.

1028 *Id.* ¶ 7.

1029 PX 4800 (Guerra Direct) ¶ 59.

1030 PX 4800 (Guerra Direct) ¶ 61; PX 1736 # ; Tr. (Guerra) 1118:13–16.

1031 PX 4800 (Guerra Direct) ¶ 61; PX 1738 # .

1032 PX 1733, 1734 (Guerra Daily Planners); Tr. (Guerra) 1125:7–9.

1033 PX 1682 (TAME Shipping Records).

1034 PX 1727, 1728 (Guerra telephone records).

1035 PX 4800 (Guerra Direct) ¶ 61; *see* Tr. (Guerra) 1160:22–1161:3.

1036 PX 4800 (Guerra Direct) ¶ 61.

1037 *Id.;* PX 1671, 1672 (Guerra Agreements with Chevron); Tr. (Guerra) 1043:6–15.

1038 Tr. (Guerra) 1070:1–1075:4.

1039 *Id.* 1075:6–19.

1040 DX 1363 (Guerra Nov. 17, 2013 Decl.); Tr. (Guerra) 1084:13–1085:1.

1041 PX 4800 (Guerra Direct) ¶ 64.

1042 PX 1671 (Guerra Jan. 27, 2013 Signed Agreement with Chevron).

1043 *Id.;* Tr. (Guerra) 1052:24–1064:9.

1044 PX 4800 (Guerra Direct) ¶ 64.

1045 Tr. (Guerra) 1049:9–1052:7.

1046 PX 4800 (Guerra Direct) ¶ 55.

1047 *Id.* ¶ 8.

1048 *Id.* ¶ 9.

1049 *Id.*

1050 *Id.* ¶ 7.

1051 Tr. 1197:3–16; DX 1360 (June 25, 2012 Interview Tr.), at 10, 29, 48, 83, 87.

1052 PX 4800 (Guerra Direct) ¶ 58.

1053 Rivero Apr. 24, 2013 Dep. Tr. at 90:12–91:4.

1054 *Id.* at 91:13–92:5; see DX 1360 (Transcript of July 13, 2012 Conversation between A. Guerra, Yohir Akerman, and A. Rivero); DX 1361 (Transcript of July 13, 2012 Conversation between A. Guerra and A. Rivero); DX 1362 (Transcript of July 31, 2012 Conversation between A. Guerra, Investigator 5, and A. Rivero).

1055 PX 4800 (Guerra Direct) ¶ 47.

1056 *Id.* ¶¶ 47–48.

1057 *Id.* ¶ 47.

1058 *Id.* ¶ 49.

1059 *Id.*

1060 DX 1361 (Tr., July 13, 2012 Conversation between A. Guerra and A. Rivero), at 48.

1061 DX 1363 (Guerra Nov. 2012 Decl.) ¶ 26.

1062 Tr. (Guerra) 1012:9–12.

1063 PX 4800 (Guerra Direct) ¶ 50.

1064 *Id.;* Tr. (Guerra) 1016:3–9.

1065 DX 1361 (Tr., July 13, 2012 Conversation between A. Guerra and A. Rivero), at 61.

1066 *Id.*

1067 PX 1703 (memory aid); Tr. (Guerra) 1012:13–23.

1068 *Id.* (Guerra) 1013:5–12.

1069 Tr. (Zambrano) 1810:1–4.

1070 *Id.* 1810:11–18.

1071 *Id.* 1811:3–5.

1072 It is worth noting that Chevron unsuccessfully sought a favorable statement from Zambrano in this action. Zambrano testified that Guerra, in approximately August 2012, informed him that he had been speaking to Chevron representatives, and "that Chevron was willing to give [Zambrano] a minimum of $1 million or whatever he wanted" in exchange for his cooperation. *Id.* 1914:24–1915:2. Guerra met him at the Quito airport and gave Zambrano documents, including the business card of a Chevron attorney who wished to speak with him. *Id.* 1915:7–13; DX 92 (Zambrano Decl.; Rivero Business Card), at 138 of 250.

Guerra called Zambrano several times after their airport meeting to reiterate the proposal. Tr. (Zambrano) 1929:22–1930:9. In January 2013, Zambrano received a phone call from Rivero himself requesting that Zambrano meet with him in person. *Id.* 1930:10–25; DX 84 (Transcript of Recorded Call Between Zambrano and Rivero). Zambrano told Rivero that he would not speak with him until he confirmed that Rivero worked for Chevron and found out exactly what Guerra had told him. Zambrano secretly recorded the conversation. Tr. (Zambrano) 1931:5–15; DX 84 (Transcript of Recorded Call Between Zambrano and Rivero).

Zambrano did not follow up with Rivero. In March 2013, he signed a declaration that defendants filed in this action. PX 6330 (Zambrano Mar. 28, 2013 Decl.).

1073 DX 1750 (Donziger Direct) ¶¶ 71–73.

1074 *Id.* ¶ 75.

1075 *Id.* ¶ 77.

1076 Tr. (Donziger) 2588:20–25.

1077 *Id.* 2589:1–13.

1078 PX 2469 (Mar. 1, 2008 Email from A. Guerra to S. Donziger re: "Request for Investigation" [*sic*]); PX 1749 (Mar. 2, 2008 Email from S. Donziger to P. Fajardo re: "What should I do?"); Tr. (Donziger) 2589:14–20.

1079 He did not deny that he had other meetings with Guerra, with or without Fajardo.

1080 DX 1750 (Donziger Direct) ¶ 78.

1081 *Id.*

1082 Tr. (Donziger) 2597:8–24.

1083 *Id.* 2598:2–16.

1084 DX 1750 (Donziger Direct) ¶ 78.

1085 Tr. (Donziger) 2598:24–2599:7.

1086 *Id.* 2600:24–2601:4.

1087 *Id.*

1088 *Id.* 2650:17–2651:2.

1089 PX 558 (Donziger Jan. 2011 Retention Agreement), at 3.

1090 *Supra Facts* § II.

1091 PX 57A[9] (Apr. 24, 2007 *Crude* Clip), at CRS–258–00–CLIP–01.

1092 PX 203 (Donziger Notebook) (emphasis added).

1093 The Court considers the evidence of Donziger's prior deceit on the issue of his credibility and not to prove character for the purpose of showing that he acted in accordance with that character on other specific occasions.

1094 Tr. (Hinton) 2189:5–2190:3.

1095 PX 1279 (Mar. 30, 2010 Email from J. Prieto to S. Donziger, J. Sáenz, L. Yanza, and P. Fajardo re: "Protection Action").

1096 Donziger Jan. 19, 2011 Dep. Tr. at 3381:14–20 (emphasis added).

1097 Sanctions Hr'g (Donziger), at 113:9–18.

1098 Donziger sought to mislead this Court in another way, albeit perhaps not so blatantly.

On May 3, 2013, former counsel for Donziger sought and later obtained leave to withdraw as counsel on the ground of non-payment of fees. DI 1104 (LAPs Mem.); DI 1105 (Donziger Mem.). Following the withdrawal, Donziger repeatedly moved to adjourn deadlines or stay this case, always claiming that he had "limited resources" with which to secure new counsel and defend himself. DI 1212 (Donziger Aff.) ¶ 14; *see also* DI 1211 (Mot. to Stay) ("A stay is absolutely necessary if I am to have a realistic chance to obtain the funds for, and to retain, substitute counsel"); DI 1214 (May 23, 2013 Tr.), at 3:25–4:4; DI 1318 (July 18, 2013 Tr.), at 11:13–18 ("my prior counsel already spent thousands of hours dealing with their previous motions ... which essentially drove my counsel off of this case ... because I couldn't afford to pay their fees anymore because they were all wasted on these previous motions for summary judgment"); DI 1369 (Mot. for Order to Show Cause); DI 1435 (Mot. for Extension of Time); DI 1459 (LAPs Mem.).

Although the Court largely granted Donziger's requested relief, it made clear time and again that it would be willing to consider further extensions or delays if Donziger provided competent evidence or sworn testimony substantiating his claim that he was constrained by a lack of resources. *E.g.,* DI 1214 (May 23, 2013 Tr.), at 13:25–14:6; DI 1185 (Order), at 3 ("The Court ... is willing to consider [Mr. Donziger's] issues in the event a well supported motion is filed."); DI 1302 (Order Denying Mot. for Stay); DI 1407 (Order Denying Stay). Donziger never did so. At trial, however, Donziger admitted that, notwithstanding his claims of lack of resources, he actually had secured additional funding of $2.5 million in March 2013—two months before his counsel withdrew—from a British investor. *See* Tr. (Donziger) 2528:9–2529:11. He admitted also that he personally had received $600,000 in liquid assets and over one million in real estate over the preceding year and a half from probate actions he initiated against family members in Florida. *Id.* 2537:6–2539:2.

1099 PX 2457 (Donziger Deposition Memo).

1100 *Id.* (emphasis added).

1101 Tr. (Donziger) 2464:4–10.

1102 Donziger June 24, 25, 28, 2013 Dep. Tr., *passim.*

1103 While Donziger tried to explain this away, the fact that he did not report the bribe solicitation is undisputed. Moreover, the explanation is not persuasive. Donziger claimed that there were "various reasons" why no report was made, but the only reasons he mentioned were that he claimed that he did not regard Guerra as having had much credibility and that he was "very concerned that doing anything at that point to turn [Guerra] in would give Chevron an excuse to further use it against the court or against the process such that the trial could be derailed." Tr. (Donziger) 2650:17–2651:2. Given the facts that (a) Donziger frequently claimed that he was afraid that Chevron would corrupt the process and buy a favorable outcome; (b) Donziger had made complaints against other judges, *id.* 2601:5–17; and (c) the Ecuadorian government, up to and including the president, was openly and fully supportive of Donziger and the LAPs, those explanations are of limited value. The failure of Donziger and the LAPs to report Guerra's bribe solicitation, moreover, certainly was not comparable to Chevron's failures in light of the hostility of the Ecuadorian government to Chevron. *Supra Facts* § IX.A.4, *infra Discussion* § VII.C.6.

1104 Zambrano's personal financial statement, filed in November 2010 although dated in July 2008, PX 393 (ROE Judiciary Council personnel action dated Nov. 16, 2010 attaching Zambrano's sworn assets statement dated July 31, 2008), showed that he had cash on hand of under $2,500, not even enough to pay his outstanding Diners Club balance. He owed banks nearly $8,000. Apart from two used vehicles, one of which was pledged, the only other material asset shown was $27,500 of real estate owned by his wife. Zambrano made no effort to explain these data, to show that his financial circumstances had improved, or to deny any economic motive to participate in the bribe arrangement. Nor is it likely that there was any improvement in Zambrano's financial situation between July 2008 and the issuance of the Judgment.

1105 *See supra Facts* §§ 5.E.-G.

1106 That Donziger's mind ran in this direction is shown by his reaction much earlier to Soltani's suggestion that Amazon Watch stop comparing the pollution in the Orienté to the Exxon Valdez spill. Rather than retreat, Donziger insisted that they stick to the claim. He warned that there would be "HUGE implications for the legal case" if they disavowed the comparison to Exxon Valdez, and told Amazon Watch that it "could terribly prejudice the people it is trying to help if it makes this change." PX 860 (May 24, 2007 Email from S. Donziger to S. Tegel re: "private").

1107 DX 1482 (LAPs' Final *Alegato*), *passim.*

1108 PX 1407 (Invictus Memo), at 27 (quoting EMA) (internal quotation marks omitted).

1109 *Id.*

1110 *Id.* at 27–28.
The defendants in May 2012 did create a Gibralter company, Amazonia Recovery Limited ("Amazonia") for receipt and distribution of any funds in consequence of the Judgment. *See* PX 657 (Amazonia Memorandum of Association); Donziger June 25, 2013 Dep. Tr. at 626:18–20, 627:12–24, 629:12–17, 631:3–6, 632:4–9, 633:22–634:2, 634:13–635:15; PX 1520 (diagram of Newco (*i.e.,* Amazonia) structure and fund flows). Amazonia, however, was not created until more than a year after the Judgment was rendered.

1111 DX 899 (Dec. 31, 2010 Email from P. Fajardo to E. Westenberger, S. Donziger and J. Sáenz re: "ABOUT THE ALEGATO"); DX 900 (Jan. 8, 2011 Emails from P. Fajardo to J. Sáenz, J. Prieto, S. Donziger, A. Carrasco, E. Westenberger, L. Yanza, and V. Barham; second email to J. Prieto, J. Sáenz, S. Donziger, toxico, A. Carrasco, E Westenberger, and V. Barham re: "CHEVRON'S ALEGATO").

1112 Patton Boggs in general and Westenberger in particular did a great deal of work in preparing the LAPs' *alegato. E.g.,* Tyrrell Dep. Tr. at 315:4–13, 319:6–320:5; *see also* PX 7468 (Nov. 11, 2010 Email from S. Donziger to E. Westenberger and A. Small re: "this is latest draft of alegato"); PX 1470 (Jan. 12, 2011 Email Chain Between Patton Boggs lawyers re: review of final *Alegato*).

1113 DX 899 (Dec. 31, 2010 Email from P. Fajardo to E. Westenberger, S. Donziger and J. Sáenz re: "ABOUT THE ALEGATO").

1114 DX 900 (Jan. 8, 2011 Emails from P. Fajardo to J. Sáenz, J. Prieto, S. Donziger, A. Carrasco, E. Westenberger, L. Yanza, and V. Barham; second email to J. Prieto, J. Sáenz, S. Donziger, toxico, A. Carrasco, E. Westenberger, and V. Barham re: "CHEVRON'S ALEGATO").

1115 One of the addressees of the second Fajardo email of that date (that of 16:23:47) was <toxico@ecuanex.net.ec> which, as the 15:49:22 email of that date reveals, is (or is among) Yanza's email addresses.

1116 Tyrrell Dep. Tr. at 260:12–17; *Chevron Corp. v. Donziger,* No. 11–1264, DI 92–3, at 87–88 (2d Cir. filed July 5, 2011).

1117 DX 900 (Jan. 8, 2011 Emails from P. Fajardo to J. Sáenz, J. Prieto, S. Donziger, A. Carrasco, E. Westenberger, L. Yanza, and V. Barham; second email to J. Prieto, J. Sáenz, S. Donziger, toxico, A. Carrasco, E Westenberger, and V. Barham re: "CHEVRON'S ALEGATO").

1118 The emails, even if taken literally, would not utterly defeat the idea that Zambrano had been bribed. Even if the corrupt bargain had been struck, Fajardo may have been concerned that Zambrano would double cross the LAPs. Given the LAP team's views of Chevron, the risk of being outbid, whether real or the product of fevered speculation, may have been in his mind.

1119 That is especially true with respect to Eric Westenberger and Anne Carrasco of Patton Boggs, who were recipients. As Donziger, Fajardo, and Yanza must have known, they had no reason to suppose that these lawyers, who were subject to compulsory process in the United States, would have allowed themselves to be swept into a conspiracy to bribe a judge. Indeed, earlier in 2010, Donziger, Fajardo, and Yanza had seen the LAPs' Denver lawyers withdraw in the Stratus 1782 proceeding as soon as they learned the truth about the Cabrera Report.

1120 Chevron objected to the emails on, *inter alia,* hearsay grounds.

1121 As the text shows, the critical point for which the emails might be used would be to support assertions by Fajardo, explicit and implicit, that the outcome of the case was in doubt and that the submissions of which he was urging prompt completion could matter. This in turn could imply that the case had not been fixed. But the emails are inadmissible hearsay for any such purpose.
Fed.R.Evid. 802 renders "hearsay" inadmissible. Rule 801(c) defines "hearsay" as an out of court "statement" offered "to prove the truth of the matter asserted in the statement." Rule 801(a) defines "statement" as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fajardo's statements in these emails, to the extent they are offered for the purpose of proving that the outcome of the Lago Agrio case was in doubt and thus that the case had not been fixed, were assertions and therefore classic hearsay. Nor would they be admissible under the state of mind exception to the extent they contain statements of belief. Fed.R.Evid. 803(3).

1122 *See supra Discussion* § XI.A.3.a.

1123 PX 806R (Donziger Book Proposal), at 5.

1124 *Id.* at 3.

1125 PX 1181 (Nov. 9, 2009 Email from S. Donziger to J. Kohn re: Trip to Ecuador), at 2.

1126 PX 558 (Donziger Jan. 2011 Retention Agreement), at 2.

1127 See PX 4900R (Dahlberg Direct) ¶ 75.

1128 *See supra Facts* § II.C.1.

1129 PX 1509 (Donziger Ecuador Migration Record).

1130 PX 207, 200, 192, 169R (Donziger Notebook), at 20.

1131 PX 558 (Donziger Jan. 2011 Retention Agreement), at 3.

1132 *Supra Facts* § X.C.2.d.

1133 *Id.*

1134 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 38.
* * *

1135 *Wantanabe Realty Corp. v. City of New York,* 315 F.Supp.2d 375, 393 n. 110 (S.D.N.Y.2003); *accord Venzie Corp. v. U.S. Mineral Prods. Co.,* 521 F.2d 1309, 1313 (3d Cir.1975) ("While the jury was free to disregard the defendants' testimony that no agreement of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy."); *Ortho Diag. Systs., Inc. v. Abbott Labs., Inc.,* 920 F.Supp. 455, 477 (S.D.N.Y.1996) (same).

1136 *United States v. Weinstein,* 452 F.2d 704, 713–14 (2d Cir.1971) (Friendly, C.J.) (quoting *Knowles v. People,* 15 Mich. 408, 412 (1867)).

1137 DX 1360 (June 25, 2012 Tr.), at 49, 51, 81.

1138 DX 1363 (Guerra Nov. 17, 2013 Decl.) ¶ 23; PX 4800 (Guerra Direct) ¶¶ 41–43.

1139 DI 1 (Complaint).

1140 *Id.* at 147.

1141 DI 91 (Chevron Reply Mem.).

1142 *Id.* at 6, n. 1.

1143 *Id.* at 6.
Zambrano testified at trial that he lied to the reporter on this point. Tr. (Zambrano) 1738:9–12.

1144 *Id.* at 6, n. 1.

1145 PX 430 (Appellate Judgment), at 1.

1146 *Id.*

1147 *Id.*

1148 PX 2548 (LAPs' July 8, 2011 Filing with Appellate Court), at 4, 8–10.

1149 PX 403 (Certificate of Lottery Drawing to Form the Sole Division of the Provincial Court of Justice of Sucumbios, No. 106–2011). Chevron contends that Judge Zambrano improperly and secretly influenced the selection of the panel, which, it claims, should have been done publicly by random lottery. It has failed, however, to provide evidence or foreign law materials explaining the procedure for selection of appellate judges under Ecuadorian law.

1150 PX 2548 (LAPs' July 8, 2011 Filing with Appellate Court), at 12.

1151 *Id.* at 5.

1152 *Id.* at 8–9 (emphasis in original).

1153 *Id.* at 5, 10.

1154 PX 2549 (Chevron Response to LAPs' July 8, 2011 Appellate Filing), at 1.

1155 *Id.* at 5.
In fact, the footnote in Chevron's February 15, 2011 reply memorandum in this Court referred also to unspecified "indications in the Judgment itself." DI 91, at 6 n. 1. But it did not explain what "indications" it had in mind. The Court notes, however, that at least one such indication was obvious on the face of the Judgment—the presence of the—sv and—tx suffixes in the Judgment's designations of samples. As previously discussed, those suffixes were not used in the Filed Lab Results in the Record, the ostensible source of the Judgment's references. *Supra Facts* § IX.B.1.C. "SV," moreover, were the initials of Selva Viva, the LAPs' administrative entity.

1156 PX 2549 (Chevron Response to LAPs' July 8, 2011 Appellate Filing), at 5.

1157 *Id.* at 2 (emphasis in original).

1158 *Id.*

1159 PX 430 (Appellate Judgment).
As discussed below, the appellate judgment was not received for the truth of the matters stated therein and has no legal effect here.

1160 *Id.* at 1.

1161 *Id.* at 10.

1162 PX 430 (Appellate Judgment).

1163 *Id.* at 11.

1164 Moreover, for reasons previously stated, the appellate court decision may not be considered for the truth of the matters asserted, as it is hearsay if and to the extent it is offered for that purpose. *Infra* note 1563. The Court concludes below that it does not have issue preclusive effect on this or any other factual point. *Infra Discussion* § IX.A.

1165 For example, the appellate court noted that, in listing some of the sample results, the Judgment omitted decimals—notwithstanding that the sampling results reported the decimals—and instead reported the next whole number. PX 430 (Appellate Judgment), at 11. This was particularly true for at least one sample of benzene. But the court concluded that "[t]his gaffe, no doubt involuntary, does not affect the merits of the judgment being examined, since, regardless, it refers to an alarming quantity of benzene in the environment." *Id.* The appellate panel addressed also the fact that the Judgment reported certain results for PAHs in milligrams rather than micrograms but concluded only that "the assessment of the quantity of contamination based on these samples should be reduced considerably." *Id.* And the panel noted that the Judgment omitted the "less than" symbol in reporting the results for mercury, and "[f]or this reason, emphasi[z]ed ... that the reference to the presence of 'high levels' of mercury ... does not match the facts...." *Id.* at 12. Nonetheless, the court "consider[ed] that this error in the assessment of the laboratory results regarding a contaminating element d[id] not invalidate the remaining findings or reasoning regarding others which are in fact characterized as contaminating elements." *Id.*

1166 "[T]he ... errors would not be capable of slanting [the Judgment's] reasoning, or inducing it to error ... because the judge in his judgment has not assessed each sample and its results separately, as if they described isolated facts, but instead it is the collection of information coming from various sources that undoubtedly has created in the trial judge the conviction of the existence of damage." *Id.*

1167 PX 2551 (LAPs' Appellate Clarification Request); PX 2552 (Chevron Response to LAPs' Appellate Clarification Request); PX 431 (Appellate Clarification Order).

1168 PX 2551 (LAPs' Appellate Clarification Request), at 4; PX 2552 (Chevron Response to LAPs' Appellate Clarification Request), at 9 (citing PX 430 (Appellate Judgment), at 10).

1169 PX 2551 (LAPs' Appellate Clarification Request), at 5 (emphasis added).

1170 PX 431 (Appellate Clarification Order).

1171 *Id.* at 4.

1172 *Id.*

1173 *Id.* at 3.

1174 *Id.* at 4.

1175 DX 1022 (Chevron Cassation Appeal).

1176 *Id.*

1177 PX 8095 (Opinion of Ecuadorian National Court of Justice).

1178 *Id.* at 96.

1179 *Id.; see also id.* at 97–98.

1180 *Id.* at 156–57 (citing PX 400 (Lago Agrio Judgment), at 50–51).

1181 *Id.* at 157.

1182 *Id.*

1183 *Id.*

1184 The National Court did not consider Chevron's allegations concerning Guerra or the bribe scheme. Chevron did not raise them in its cassation petition, as Guerra had not yet approached Chevron by the time the petition was filed.

1185 *Id.* at 99 (footnotes omitted).

1186 *Id.* at 222.

1187 PX 2382 (Invictus Memo), at 29.

1188 *Id.* at 35 (emphasis in original).

1189 PX 2461 (Order Issued by the National Civil Trial Court No. 61 of Argentina in *Aguinda Salazar Maria v. Chevron Corp.*).
In the Argentine case, the LAPs successfully convinced a trial court to embargo Chevron's Argentine subsidiary's assets, dividends, and future bank deposits. *Id.* at 2–4. The decision ultimately was reversed by the Argentine Supreme Court, which held that Chevron Argentina—the defendant in the Argentine case—was separate from Chevron Corporation—the defendant in the Lago Agrio case—and that the LAPs had failed to pierce the corporate veil. PX 273 (Order Issued by the Supreme Court of Justice of Argentina in *Aguinda Salazar Maria v. Chevron Corp.*).

1190 PX 2306 (Filing in the Superior Court of Justice of Brazil).
The Brazilian action, *see* Tr. (J. Piaguaje) 2398:7–2399:3, so far as the record discloses still is in its initial stages.

1191 PX 1004 (Amended Statement of Claim, filed in *Yaiguaje v. Chevron Corp.,* Court File No. CV–12–454778, Ontario Superior Court of Justice).
An Ontario court stayed the LAPs' enforcement action against Chevron's Canadian subsidiary, holding that the LAPs had failed to pierce the corporate veil. The court held that the case could not proceed unless and until the LAPs located assets of Chevron Corporation in Canada. PX 660 (Order, *Yaiguaje v. Chevron Corp.,* File No. CV–12–9808–00CL, Ontario, Canada). The stay of proceedings later was vacated by the Ontario Court of Appeal, http://cdn5.lettersblogatory.com/wp-content/uploads/2013/12/C57019. rere_.pdf, which then stayed its decision pending Chevron's motion for leave to the Supreme Court of Canada, http://cdn5.lettersblogatory.com/wp-content/uploads/2014/01/2014ONCA0040.pdf.

1192 As noted, attempts to enforce the Judgment in the United States always have been part of the plan. Indeed, even when the defendants sought to defeat the preliminary injunction in this case by disclaiming any then present intention to seek enforcement in New York, they conspicuously did not disclaim any such intention elsewhere in the United States.
Moreover, the reasons for their failure to seek enforcement to date in the United States are fairly obvious.
As an initial matter, the defendants' repeated efforts to have this case assigned to a different judge make clear their preference for almost any other forum. Any attempt, however, to enforce the Judgment in the United States while this action remains pending would carry a substantial risk that the enforcement proceeding would be litigated here for two reasons.
First, as long as this action remains pending, any suit in a federal court by any of the LAPs (other than the two LAP Representatives who defended this case at trial) to enforce the judgment likely would be a compulsory counterclaim in this case, as the defaulting LAPs are defendants here and have not answered the complaint in this case. Fed.R.Civ.P. 13(a)(1).
Second, there in any event would be a substantial chance that any enforcement action brought in a federal court other than this one would be transferred to this Court under 28 U.S.C. § 1404(a) or 1407, as occurred with Patton Boggs' related lawsuit in the District of New Jersey. *Patton Boggs LLP v. Chevron Corp.,* No. 12 Civ. 9176(LAK), DI 42 (filed Dec. 14, 2012). Moreover, as the LAPs all are aliens, any enforcement action brought in a state court, other than those of the two states of which Chevron is a citizen (California and Delaware), could and quite likely would be removed by Chevron to federal court and then likely

transferred to this Court.

1193 PX 2382 (Invictus Memo), at 31.

1194 *Id.*

1195 PX 432 (Oct. 15, 2012 Order issued in Summary Proceeding No. 21100–2003–0002), at 4 (attaching intellectual property, cash, and other assets in Ecuador, along with a $96,355,369 arbitration award issued against the ROE); PX 418 (Oct. 25, 2012 Order issued in Summary Proceeding No. 21100–2003–0002) (expanding attachment order); PX 7087 at 4 *et seq.* (Oct. 3, 2013 Official Letter of Ecuadorian Intellectual Property Inst. informed Lago Agrio court of notations of attachment of Chevron trademark registrations pursuant to attachment).

1196 PX 169R (Donziger Notebook), at 6.

1197 PX 931 (Oct. 29, 2007 Memo from S. Donziger to C. Lehane); *see also* PX 728 (Apr. 27, 2005 email from C. Lehane to S. Donziger and J. Kohn), at 2 ("As we have discussed, the Ecuadorian Amazon Chevron–Texaco project can be reduced, in the end, to a single strategic imperative: **Bringing ChevronTexaco to the negotiation table by inflicting real economic pain on the company.**") (bold in original).

1198 PX 7450 (Aug. 2009 Memo from S. Donziger to New Partners re "Idea for Campaign").

1199 DX 1500 (Hinton Direct) ¶ 11.
The Court does not credit her assertions that Donziger told her that the sample data overwhelmingly proved contamination or that he would not compromise the case in any way meaningful to Chevron for that reason. Nor does it credit her testimony that "[t]hroughout the time [she] worked on the case, the team prepared the case for trial, not settlement." *Id.*

1200 She testified on cross examination as follows:
"Q. And at any time did Mr. Donziger tell you that his goal was to get more press, increase the pressure in order to get that settlement price higher? A. Are you speaking about a particular time frame?
Q. At any time, Ms. Hinton. A. Repeat it again.
Q. At any time, ma'am, *did Mr. Donziger tell you that his goal was to increase press so that he could increase the pressure in order to get the settlement price higher? A. Yes.*
Q. At any point in time, Ms. Hinton, did Mr. Donziger tell you that he wanted to force Chevron to the table for possible settlement? [Objection and ruling omitted] A. Not in those words." Tr. (Hinton) 2159:3–18 (emphasis added).

1201 *See* PX 1184 (Nov. 10, 2009 Ltr. from J. Kohn to P. Fajardo and L. Yanza re: "Ecuador–Texaco Case"), at 2; PX 1187 (Nov. 19, 2009 Ltr. from J. Kohn to P. Fajardo and L. Yanza re: "Ecuador–Texaco Case"), at 2 (noting reported "decision to not raise settlement before [they] 'win' the trial").

1202 Among these were the Stratus Defendants—Stratus Consulting, Inc., the consulting firm that allegedly ghost-wrote all or most of the Cabrera Report, and two of its personnel, Douglas Beltman and Ann Maest. The Stratus Defendants ultimately settled with Chevron.

1203 DI 128 (Letter from P. Fajardo to Court, Feb. 23, 2011); DI 127 (Order extending time).

1204 DI 205.

1205 *Chevron Corp. v. Donziger,* No. 11 Civ. 0691(LAK), 871 F.Supp.2d 229 (S.D.N.Y.2012) (Donziger); DI 634 (LAP Representatives).

1206 *Id.* ¶¶ 420–26.

1207 *Id.* ¶ 430.

1208 DI 307 (Donziger answer); DI 350 (LAP Representatives' answer).

1209 DI 307 (Donziger answer), at 71.

1210 DI 350 (LAP Representatives' answer), at 106.

1211 *Id.* at 91–105; DI 307 (Donziger answer), at 71.

1212 Indeed, they allege that:

> "*As observed by the Ecuadorian Court in its final judgment,* Chevron also engaged in the following procedural misconduct: raising at the eleventh hour 'unresolved issues' previously abandoned by Chevron in an effort to delay resolution of the case; obstructing the evidence gathering process by launching frivolous attacks upon each and every expert report not submitted by a Chevron-affiliate, which the Court found to be designed to 'impede the normal advance of the evidence gathering process, or even prolong it indefinitely;' and frontally attacking the court in a display of shocking disrespect for the judicial process. Further, In [*sic*] summation of Chevron's behavior throughout the course of the litigation, *the Court observed that* 'the following constitutes a display of procedural bad faith on the defendant's part: failure to ... [produce] ... documents ordered coupled with a failure to submit an excuse on the date indicated; attempting to abuse the merger between Chevron Corp. and Texaco Inc. as a mechanism to evade liability; abuse of the rights granted under procedural law, such as the right to submit the motions that the law allows for [...]; repeated motions on issues already ruled upon, and motions that by operation of law are inadmissible within summary verbal proceedings, and that have all warranted admonishments and fines against defense counsel defendant from the various Judges who have presided over this Court; [and] delays provoked through conduct that in principle is legitimate, but ... [which have] ... unfair consequences for the proceedings ... such as refusing and creating obstacles for payment of the experts who took office, thus preventing them from being able to commence their work....' " *Id.* at 103–04 (emphasis added). *See also* DI 350 (LAP Representatives' answer), at 101–04.

1213 *Chevron Corp. v. Donziger,* 296 F.R.D. 168 (S.D.N.Y.2013).

1214 *Id.* at 221–22 (striking defense unless documents relevant to personal jurisdiction were produced by Oct. 24, 2013, which they were not).

> The Court concluded also that defendants' failure to comply with the order compelling production warrants (a) the inference that the documents requested but not produced would have been unfavorable to defendants, and (b) exclusion at trial of documents ordered but not produced. But it reserved for trial the questions whether to draw that inference and to exclude such documents. *Id.* at 221–24. In any event, the Court drew no such inference from the defendants' failure to comply and excluded no documents on that ground. In some instances, it drew inferences from the failure of the Ecuadorian lawyers to testify. As noted however, it would have made the same findings in the absence of such inferences.

1215 *Chevron Corp. v. Donziger,* No. 11 Civ. 0691(LAK), 2013 WL 4482691 (S.D.N.Y. Aug. 22, 2013) (denying motion in the exercise of discretion without consideration of the merits); DI 1063 (Order, Apr. 24, 2013) (denying motion for partial summary judgment dismissing collateral estoppel affirmative defense); DI 878 (Order, Mar. 4, 2013) (denying motion for partial summary judgment on Count 8); *Chevron Corp. v. Donziger,* 886 F.Supp.2d 235 (S.D.N.Y.2012) (substantially denying motion for partial summary judgment dismissing former adjudication affirmative defenses). (The first of the cited decisions mistakenly spoke of three rather than four motions for partial summary judgment.)

1216 *Chevron Corp. v. Berlinger,* 629 F.3d 297, 305–06 (2d Cir.2011) (noting July 15, 2010 order to produce); *In re Chevron Corp.,* 749 F.Supp.2d 141, 170 (S.D.N.Y.2010), *aff'd sub nom. Lago Agrio Plaintiffs v. Chevron Corp.,* 409 Fed.Appx. 393 (2d Cir.2010) (summary order).

1217 *Chevron Corp. v. Donziger,* 783 F.Supp.2d 713, 718 (S.D.N.Y.2011).

1218 *Chevron Corp. v. Naranjo,* No. 11–2259–op, 2011 WL 4375022 (2d Cir. Sept. 19, 2011) (quoting *McLaughlin v. Union Oil Co. of Calif.,* 869 F.2d 1039, 1047 (7th Cir.1989)).

1219 *Chevron Corp. v. Naranjo,* 667 F.3d 232, 239 n. 11 (2d Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 423, 184 L.Ed.2d 288 (2012).

1220 DI 391 (Feb. 17, 2012 Mot. for Recusal).

1221 DI 392 (Feb. 24, 2012 Memo. Endorsement).

1222 Petition for writ of mandamus, *Naranjo v. Chevron Corp.,* No. 13–772 (2d Cir. filed Mar. 5, 2013), at 31–40.

1223 *Naranjo v. Chevron Corp.,* No. 13–772, DI 182 (2d Cir. filed Sept. 26, 2013).

1224 *See Chevron Corp. v. Donziger,* No. 11 Civ. 691(LAK), 2013 WL 5526287 (S.D.N.Y. Oct. 7, 2013) (no right to jury trial in this case).

1225 *See* DI 1850 (Donziger Defs.' Post-trial Mem. of Law); DI 1857 (Donziger Defs.' Post-trial Reply); DI 1851 (LAPs Reps.' Post-trial Mem. of Law); DI 1858 (LAPs Reps.' Post-trial Reply).

1226 That is true also, albeit not to the same extent, of Chevron. Chevron, however, has explained its case extensively both in summation and in extensive post-trial submissions.

1227 As frequently occurs in bench trials, most of the exhibits on both sides were received subject to subsequent rulings on (1) motions to strike, where such motions were made, and (2) objections, which in the case of Chevron's objections are set forth in an extensive spreadsheet listing each exhibit, Chevron's objections, and defendants' responses. A similar practice was employed with respect to the parties' designations of deposition testimony.

Some of these motions and objections were ruled upon during or after the trial. Others are dealt with in this opinion, including in Appendix III. Beyond that, little purpose would be served by the making of specific rulings as to the admissibility of hundreds or possibly thousands of exhibits and many pages of deposition testimony that do not figure in the outcome. Suffice it to say that the Court has received in evidence any exhibit or testimony upon which it relies in this opinion.

1228 There is a basis of subject matter jurisdiction over these and other non-federal claims completely independent of the RICO claims, namely 28 U.S.C. § 1332. *See generally* DI 283 (Am. Compl.), ¶¶ 8–17, 20, 23.

At the outset of the action, there was one uncertainty as to the existence of complete diversity, viz. the allegation that defendant Selva Viva Selviva CIA, LTDA (actually Selva Viva CIA, LTDA, subsequently referred to as "Selva Viva") is an Ecuadorian limited liability company. *Id.* ¶ 14. Had that been true, it would have been a citizen of every state or nation of which any of its members was a citizen. *E.g., Handelsman v. Bedford Vill. Assocs. L.P.,* 213 F.3d 48, 52 (2d Cir.2000). There is no allegation as to the identity or citizenship of its members. Accordingly, if paragraph 13 of the complaint (paragraph 14 of the amended complaint) had been accurate, plaintiff's failure to have alleged that none of Selva Viva's members was a citizen of Delaware or California, the states in which Chevron is organized and in which it has its principal place of business, respectively, would have been fatal to diversity or alienage jurisdiction. But that pleading flaw has been rendered immaterial by the proof at trial.

The Court finds that Selva Viva is, and from its inception always has been, an Ecuadorian corporation with its principal place of business in Ecuador. Tr. (Donziger) 2635:4–6 (Selva Viva is an entity created under corporate law of Ecuador); Donziger June 24, 2013 Dep. Tr. at 103:6–16 (acknowledging incorporation of Selva Viva and Donziger's designation as president); Tr. (H. Piaguaje) 2677:12–2678:3 (stating that witness is a 40 percent shareholder of Selva Viva); PX 6906 (record of incorporation of Selva Viva, its entry into the Register of Companies, and the designation of Donziger as president); PX 426 (Ecuadorian court record reflecting Fajardo's description of Selva Viva as a corporation); Tr. (Kohn) 1420:11–20 (Selva Viva headquartered in Quito, Ecuador); Tr. (Donziger) 10:6–17 (Selva Viva's office is in office of LAPs' Ecuadorian counsel); Donziger June 26, 2013 Dep. Tr. at 737:7–14 (Selva Viva office is in Ecuador); DX 226T–227T (same). It therefore is a citizen of Ecuador. Thus, plaintiff Chevron is a citizen of California and Delaware, and defendants all are citizens of Ecuador or of states other than California and Delaware. The matter in controversy, exclusive of interest and costs, obviously exceeds the sum of $75,000. Subject matter jurisdiction exists under 28 U.S.C. § 1332(a) and (c). For the sake of good order, the complaint and the amended complaint are deemed amended to conform to the proof that Selva Viva is an Ecuadorian corporation with its principal place of business in Ecuador. *See* Fed.R.Civ.P. 15(b)(2); 28 U.S.C. § 1653. Accordingly, even a pretrial dismissal of the RICO claims would not have permitted dismissal of the non-RICO claims for want of subject matter jurisdiction.

1229 15 Moore's Federal Practice § 101.32 (3d ed. 2013) ("Standing is determined as of the time suit is filed.").

1230 *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 184, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (rejecting challenge to plaintiffs' standing because "unlawful conduct ... was occurring at the time the complaint was filed"); *Grupo Dataflux v. Atlas Global Grp., L.P.,* 541 U.S. 567, 570–71, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004) (footnote omitted) ("It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.' *Mollan v. Torrance,* 9 Wheat. 537, 539, 6 L.Ed. 154 (1824). This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure."). *Accord, e.g., Utah Ass'n of Counties v. Bush,* 455 F.3d 1094, 1099 (10th Cir.2006); *Focus on the Family v. Pinellas Suncoast Trans. Auth.,* 344 F.3d 1263, 1275 (11th Cir.2003).

1231 *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) ("One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' ") (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363, 1384 (1973)).

1232 U.S. Const., art. III, § 2.

1233 *See Clapper v. Amnesty Int'l USA,* —— U.S. ——, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013) (internal quotation marks omitted).

1234 *Chafin v. Chafin,* —— U.S. ——, 133 S.Ct. 1017, 1023, 185 L.Ed.2d 1 (2013) (quoting *Already, LLC v. Nike, Inc.,* —— U.S. ——, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013)).

1235 *Id.* (quoting *Knox v. Serv. Empls.,* —— U.S. ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (emphasis added)).

1236 *Knox,* 132 S.Ct. at 2287 (quoting *Ellis v. Ry. Clerks,* 466 U.S. 435, 442, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)) (emphasis added).

1237 *Id.* at 1024; *see also Cabala v. Crowley,* 736 F.3d 226, 229 (2d Cir.2013) ("Because the parties continued to dispute the form and extent of the relief to which [plaintiff] was entitled, the case never became moot.").

1238 *Chafin,* 133 S.Ct. at 1023.

1239 *Chafin,* 133 S.Ct. at 1026 ("[T]he availability of a partial remedy is sufficient to prevent [a] case from being moot.") (quoting *Calderon v. Moore,* 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*per curiam*)); *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for [plaintiff's injury], ... the availability of [any] possible remedy is sufficient to prevent this case from being moot.").

1240 *Hargrave v. Vermont,* 340 F.3d 27, 34 n. 7 (2d Cir.2003); *see also Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (although the "proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed* " (emphasis added) (internal citation omitted)).

1241 *Rothstein v. UBS AG,* 708 F.3d 82, 91 (2d Cir.2013) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

1242 *Hedges v. Obama,* 724 F.3d 170, 188–89 (2d Cir.2013).

1243 *See* DI 1 (Feb. 1, 2011 Compl.).

1244 The Judgment was entered thirteen days following the filing of the original complaint in this case, thus demonstrating that Chevron's claim that this event was imminent was well founded. *See Hargrave,* 340 F.3d at 34. In any case, Chevron alleged other, already consummated, injuries.

1245 *See, e.g.,* DI 1 (Feb. 1, 2011 Compl.) Prayer for Relief.

1246 Defendants argue that even a global anti-enforcement injunction could not have redressed Chevron's injuries "because foreign courts would first have to decide to give it effect." *See* DI 1861 (Defs.' Mem. of Law in Supp. Mot. to Dismiss for Lack of Jurisdiction), at 6 n. 4. That argument ignores the fact that even the possibility that foreign enforcement might enforce the Judgment is a threat directly caused by the fraudulent procurement of the judgment in the first place. It ignores also the facts that "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured" and that "[c]ourts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed." *Chafin,* 133 S.Ct. at 1025–26. Such potentialities have no bearing on jurisdiction.

1247 *See* DI 1847 (Chevron Corp.'s Post-trial Mem. of Law), at 197–98; DI 1848 (Chevron Corp.'s Proposed Findings of Fact) ¶ 127.

1248 PX 6000 (Anson Direct) ¶¶ 48–49.

1249 PX 432 (Oct. 15, 2012 Order issued in Summary Proceeding No. 21100–2003–0002), at 4 (attaching $96,355,369 arbitration award issued against the ROE).

1250 *See, e.g.,* PX 432 ("Therefore, in strict compliance with Article 2367 of the Civil Code, which states that, 'every personal obligation gives the creditor the right to satisfy it with all real property or personal property of the debtor, whether present or future, only excepting those that cannot be attached ...', since none of the assets for which attachment is being requested is covered under this exception, and since it is necessary to comply with that ordered in the judgment being executed, against the defendant in this proceeding, Chevron Corp., it is ordered that the execution of this judgment be applicable to the entirety of the assets of Chevron Corporation, until such time as the entire obligation has been satisfied.").

1251 Defendants' argument that subsequent appellate proceedings constitute an intervening cause ignores the fact that "the 'fairly traceable' standard is lower than that of proximate cause." *Rothstein v. UBS AG,* 708 F.3d 82, 91 (2d Cir.2013). Defendants' actions need not be "the very last step in the chain of causation" in order to establish causation for the purposes of Article III. *Bennett v. Spear,* 520 U.S. 154, 168–69, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). It ignores also this Court's conclusion, *infra,* that the subsequent appellate rulings are not entitled to any recognition in consequence of the systemic deficiencies of the Ecuadorian legal system.

1252 *Counihan v. Allstate Ins. Co.,* 194 F.3d 357, 361 (2d Cir.1999) ("A constructive trust is properly imposed in this situation in order to make [a plaintiff] whole for its loss of the value of the Property....").

1253 *See, e.g.,* PX 3000 (Veiga Direct), ¶ 132.

1254 PX 2461 (Order, National Civil Trial Court No. 61, Argentina, in *Aguinda Salazar Maria v. Chevron Corporation*).
The Argentine attachment ultimately was vacated by Argentina's highest court. *See* PX 273 (Order, Supreme Court of Justice of Argentina, in *Aguinda Salazar, Maria v. Chevron Corporation*).

1255 PX 2382 (Invictus Memo), at 17 ("Consistent with its aggressive approach, Plaintiffs' Team will look for ways to proceed against Chevron on a prejudgment basis, largely as a means of attaining a favorable settlement at an early stage.").

1256 *See Friends of the Earth,* 528 U.S. at 184, 120 S.Ct. 693 (plaintiffs' evidence of direct effects of defendants' conduct could not "be equated with the speculative 'some day' intentions" upon which plaintiffs relied in *Lujan*) (quoting *Lujan,* 504 U.S. at 564, 112 S.Ct. 2130).

1257 Defendants' reliance on *Clapper* for the proposition that the harm must be certain and that plaintiffs may not rely on "speculation about the unfettered choices made by independent actors not before the court," 133 S.Ct. at 1150 n. 5 (quotation marks and citation omitted), is misplaced. *Clapper* acknowledged that the "substantial risk" and "clearly impending" standards may be coextensive and, even if they are not, did not abandon the former. *See id.* There is no proper comparison to be made between the chain of speculation that the *Clapper* Court condemned as too attenuated and the far more direct relationship between defendants' fraud in this case and any foreign judgment enforcing the Ecuadorian Judgment.
Even more basic, *Clapper* must be read in the context in which it was written—an attempt to use the courts to cabin the actions of the executive branch. The Court made clear that its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 1146–47 (quoting *Raines v. Byrd,* 521 U.S. 811, 819–20, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)) (internal quotation marks omitted).
This purely private dispute implicates none of the separation of powers concerns that inform the standing doctrine, particularly in cases like *Clapper.* It therefore would be entirely wrong to apply literally some of the language used in *Clapper,* assuming that the language was meant to impose standards higher than usual in the first place, to purely private litigation. Such application could alter dramatically, to cite but one example, the law governing preliminary injunctions in trade secret cases by transforming the requirement of impending dissemination into a jurisdictional question, rather than a question on the merits. *See Faiveley Transp. Malmo AB v. Wabtec Corp.,* 559 F.3d 110 (2d Cir.2009) (finding that plaintiff had standing, but vacating preliminary injunction for lack of irreparable harm where plaintiff failed to show imminent disclosure of trade secrets).

1258 *Larson v. Valente,* 456 U.S. 228, 244 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (emphasis added).

1259 *Id.*

1260 *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 103 n. 5, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

1261 DI 1847 (Chevron Post-trial Mem. of Law), at 326.

1262 *Id.* at 347–49.

1263 E.g., 4 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 1364, at 984 (Symons 5th ed. 1941) ("Pomeroy") ("where the legal judgment was obtained or entered through fraud, ... then a court of equity will interfere ... and restrain proceedings on the judgment which cannot be conscientiously enforced"); Note, *Injunctions—Foreign Judgment—Enforcement Abroad Restrained,* 38 Yale L.J. 261 (1928). Fed.R.Civ.P. 60(b) indeed provides that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules *or by an independent action.*" *See id.* Comm. Note 2007 Amdt. (emphasis added).

1264 *See, e.g.,* Henry L. McClintock, McClintock on Equity ("McClintock") § 4, at 11, 459 (1948); *see also id.* § 171, at 459 ("Since [the seventeenth century] ... there has been no serious question as to the power [of equity] to enjoin the enforcement of a judgment obtained by fraud....").

1265 *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 382 n. 26, 69 S.Ct. 606, 93 L.Ed. 741 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."); *Union Mut. Life Ins. Co. v. Friedman,* 139 F.2d 542, 544 (2d Cir.1944) ("Under the present practice there is no longer a law side and an equity side of the court, but only a civil action in which all relief must be obtained that could formerly be secured either at law or in equity."); 4 Charles Alan Wright et al., Federal Practice and Procedure § 1043, at 177 (3d ed. 2002) ("[T]he merger of law and equity and ... abolition of ... forms of action furnish a single uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to award whatever relief is appropriate and just; the substantive and remedial principles that applied prior to the advent of the federal rules are not changed."); *see also, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 318–19, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999) ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.") (quoting 11 A Charles Alan Wright, et al., Federal Practice and Procedure: Federal Rules of Civil Procedure § 2941, at 31 (2d ed. 1995) (internal quotation marks omitted) (alteration in original)).

1266 *E.g.,* 2 Pomeroy § 428; McClintock § 34, at 85; *see also, e.g., Hart v. Sansom,* 110 U.S. 151, 155, 3 S.Ct. 586, 28 L.Ed. 101 (1884) ("[A] court of equity acts in personam, by compelling a deed to be executed or canceled by or on behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title."); *Massie v. Watts,* 10 U.S. (6 Cranch) 148, 158, 3 L.Ed. 181 (1810) (Marshall, C.J.) ("[T]he principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.").

1267 *Steele v. Bulova Watch Co.,* 344 U.S. 280, 289, 73 S.Ct. 252, 97 L.Ed. 319 (1952) (affirming injunction prohibiting use of trademark in Mexico); *accord, e.g., Cole v. Cunningham,* 133 U.S. 107, 111, 10 S.Ct. 269, 33 L.Ed. 538 (1890) (affirming Massachusetts decree restraining Massachusetts citizens from prosecuting attachment actions in New York); *NML Capital, Ltd. v. Republic of Argentina,* 699 F.3d 246, 263 (2d Cir.2012) (federal court sitting in equity having personal jurisdiction over party may "enjoin him from committing acts elsewhere" (quoting *Bano v. Union Carbide Corp.,* 361 F.3d 696, 716 (2d Cir.2004) (internal quotation marks omitted))); *City of Jamestown v. Pennsylvania Gas Co.,* 1 F.2d 871, 878 (2d Cir.1924) ("Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitae, which he could do voluntarily, to give full effect to the decree against him.") (internal quotation marks and citation omitted); *Storm LLC v. Telenor Mobile Commc'ns AS,* No. 06 Civ. 13157(GEL), 2006 WL 3735657, at *14 (S.D.N.Y. Dec. 15, 2006) (Lynch, J.) (enjoining initiation of lawsuits in Ukraine that would disrupt or delay New York arbitration proceedings); *Penn v. Lord Baltimore,* 1 Ves. Sen. 444, 447–48, 27 Eng. Rep. 1132, 1134–35(Ch.) (1750) (Lord Chancellor entertained in England bill seeking specific performance of contract to determine boundary between provinces of Maryland and Pennsylvania).

1268 McClintock § 34, at 85; *accord,* 73 N.Y. Jur.2d,*Judgments* § 226 (2011) ("The equitable remedy against a judgment is not a proceeding in rem but is a proceeding in personam against a party to the judgment seeking to deprive him or her of the benefit of the judgment by enjoining the enforcement of it. The remedy in equity does not assail the court in which the judgment was rendered ... but may be employed to secure relief against the judgment on the ground that the rights acquired cannot be retained in good conscience."); 73 N.Y. Jur.2d,*Judgments* § 234 ("By a decree operating in personam or upon parties personally subject to its

jurisdiction, a court of equity may grant relief from a judgment rendered in a foreign state even though the court that rendered the judgment had jurisdiction.") (footnote omitted).

This principle underlies also the rule that "[w]hen ... both parties to a suit in a foreign country[ ] are resident within the territorial limits of another country [or subject to its *in personam* jurisdiction], the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit." Joseph Story, Commentaries on Equity Jurisprudence § 899 (1st Eng. ed. Grigsby ed. 1884).

1269 *Gray v. Richmond Bicycle Co.,* 167 N.Y. 348, 358–59, 60 N.E. 663 (1901) ("a court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state") (quoting *Davis v. Cornue,* 151 N.Y. 172, 179, 45 N.E. 449 (1896) (internal quotation marks omitted)); *Venizelos v. Venizelos,* 30 A.D.2d 856, 293 N.Y.S.2d 20 (App.Div.1968) (affirming injunction barring, inter alia, enforcement of a Greek court decree); *Browning v. Navarro,* 826 F.2d 335 (5th Cir.1987) (instructing district court to consider whether state court judgment was procured by fraud and may be set aside); *Ellerman Lines, Ltd. v. Read,* [1928] 2 K.B. 144 (C.A.1928) (English plaintiff entitled to injunction barring enforcement of Turkish judgment that was procured by fraud); *Title Ins. & Trust Co. v. Cal. Dev. Co.,* 171 Cal. 173, 152 P. 542, 550–51, 553, 557–58 (1915) (affirming injunction barring enforcement in Mexico of Mexican judgment obtained by fraud); *Ochsenbein v. Papelier,* (1873) L.R. 8 Ch. (Eng.) 695 (English equity court had jurisdiction to enjoin enforcement of French judgment procured by fraud but declined to grant relief in light of adequacy of legal remedy); *Bowles v. Orr,* (1835) 1 Younge & Collyer, 464, 160 Eng. Rep. 189 (1835) (enjoining action to enforce in England a French judgment allegedly obtained by fraud); *Injunction Against Enforcement of Judgment Rendered in Foreign Country or Other State,* 64 A.L.R. 1136 (1930); *see also Tamimi v. Tamimi,* 38 A.D.2d 197, 328 N.Y.S.2d 477 (App.Div.1972) (declaring void a Thai divorce decree on the ground that the decree had been procured by fraud).

1270 *E.g., supra* note 1263; 12 Moore's Federal Practice § 60.81.

1271 Fraud in the context of independent actions or other applications for relief from a judgment generally falls into two or three categories. "Relief is always possible for 'extrinsic' fraud" and for "fraud on the court," which often is confused with or treated as a subset of extrinsic fraud. 12 Moore's Federal Practice § 60.81[1][b]. Relief for so-called "intrinsic fraud" often has been available less frequently. *Id.* § 60.81[1][b][ii]. There is more recent discussion as to whether the supposed distinction between extrinsic and intrinsic fraud is or should be meaningful. *Id.* § 60.81[1][b][iv]; *see Gleason v. Jandrucko,* 860 F.2d 556, 560 (2d Cir.1988) ("Relief from a judgment by way of an independent action need not be premised on a showing of extrinsic as opposed to intrinsic fraud.") (citations and emphasis omitted).

1272 Restatement (Second) of Judgments § 70(1)(a) & cmt b (1982); *see* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2870 ("Fraud on the court" most commonly has been invoked in cases involving " 'the most egregious conduct involving a corruption of the judicial process itself.' The concept clearly includes bribery of a judge ...."); *accord,* Restatement of Judgments § 124 (1942); *United States v. Buck,* 281 F.3d 1336, 1342 (10th Cir.2002) (bribery of judge or juror is fraud on court and ground for relief from judgment) (internal quotations omitted); *Wilkin v. Sunbeam Corp.,* 466 F.2d 714, 717 (10th Cir.1972) (corruption of judicial officers is fraud on the court); *Root Ref. Co. v. Universal Oil Prods. Co.,* 169 F.2d 514, 517, 541 (3d Cir.1948) (vacating judgments obtained by bribery of Third Circuit judge), *cert. denied sub nom. Universal Oil Products Co. v. William Whitman Co.,* 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed. 444 (1949); *In re Ibanez,* 834 N.W.2d 306, 312 (S.D.2013) (same); *Pizzuto v. Ramirez,* No. 1:92–cv–00241–BLW, 2013 WL 1222560, at *8 (D.Ida. Mar. 22, 2013) (bribery of judge or juror is fraud on court and ground for equitable relief against judgment); *Ellett v. Ellett,* 35 Va.App. 97, 101, 542 S.E.2d 816, 818 (2001) ("[e]xtrinsic fraud includes such circumstances as bribery of a judge or juror"); *In re Miller,* 273 Mont. 286, 902 P.2d 1019, 1022 (1995) ("[e]xtrinsic fraud includes such circumstances as bribery of a judge or juror").

For the sake of completeness, the defendants have not asserted that the question whether the bribery of Zambrano and the coercion of Judge Yánez were lawful under Ecuadorian law should be decided under Ecuadorian law. In the absence of a party's demonstration of a conflict of laws, the law of the forum, here New York, applies. 19A N.Y. Jur.2d,*Conflict of Laws* § 2 (2014). Citations are unnecessary to establish the proposition that bribing a judge is unlawful here. Moreover, an Ecuadorian law expert for defendants testified, and this Court holds, that the law in Ecuador is the same. DI 1413–12 (Albán Dep. Tr.), at 31:21–32:2; DI 1400–4 (Ex. D), at 48:1–12.24.

1273 Restatement of Judgments § 124 cmt. a.

1274 *Id.*

1275 DI 1496–2 (Tr., Sept. 26, 2013), at 25:3:15, *Naranjo v. Chevron Corp.,* No. 13–772–cv (2d Cir.).

1276 The National Court of Justice accepted that statement and therefore disregarded the allegations regarding Cabrera. *Supra Facts* § XII.B.

1277 *Infra Discussion* VII.A.

1278 *Infra* App'x III.I.

1279 As discussed, experts are prohibited under Ecuadorian law from accepting "anything of value" from parties, as the fees are established by the judge, and it is illegal to bribe a court-appointed expert. *Supra Facts* § V.C.1; *see also* DI 1413–4 (Ecuador Crim.Code Arts. 355, 359), at 48, 49; DI 1413–7 (Ecuador Code of Civ. P. Arts. 251, 252, 839), at 56; DI 1413–9 (Rules Governing the Activities and Fee Schedule of Experts in the Civil Criminal and Similar Areas of the Judiciary, Arts. 9, 14, 15), at 21; DI 1413–12 (Albán Dep. Tr.), at 31:25–32:2, 54:7–23.

1280 *See Morgan v. United States,* 304 U.S. 1, 19–20, 58 S.Ct. 773, 82 L.Ed. 1129 (1938) (addressed below).

1281 304 U.S. 1, 58 S.Ct. 773.

1282 *Id.* at 20, 58 S.Ct. 773.

1283 470 F.Supp.2d 917 (S.D.Ind.2006).

1284 *United States v. Throckmorton,* 98 U.S. 61, 65, 25 L.Ed. 93 (1878).

1285 The Court recognizes that the parties referred to their respective nominated judicial inspection experts and others they hired as "independent" in certain public statements notwithstanding that those individuals had been selected and paid by those who selected them and sometimes interacted with the lawyers who engaged them. *See, e.g.,* Tr. (Reis Veiga) 107:4–109:8, Tr. (McMillen) 428:1–429:6; DX 1416 (Filing of A. Callejas). Those situations, however, were quite different from that of Cabrera, who was (1) court-appointed to be a single global expert rather than someone openly nominated by and working with one side or the other, (2) sworn to be independent and impartial, (3) to be paid only through an open court process. The representations and pretenses that Cabrera was "independent" therefore are not properly comparable to the manner in which the parties treated experts whom they openly had hired and who would have been regarded by any reasonable observer as partisan or, at least, beholden to the hiring party.

1286 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

1287 The procedure, now unfamiliar, involved the filing in the court of appeals of a petition for leave to file a bill of review in the district court to set aside the decree that had been entered in the district court following the issuance of the court of appeals' mandate in the first case. 322 U.S. at 239, 64 S.Ct. 997.

1288 *Id.* at 245–47, 64 S.Ct. 997.
* * *

1289 *Id.* at 250, 64 S.Ct. 997.

1290 *Id.* at 251, 64 S.Ct. 997.

1291 PX 4300X (Callejas Direct) ¶ 50.

1292 *Id.* ¶¶ 47–60.

1293 *See* PX 3300 (McMillan Direct) ¶¶ 5–6, 33–60.

1294 *See* Restatement (Second) of Judgments § 70 cmt. d (1982); *see also Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 421, 43 S.Ct. 458, 67 L.Ed. 719 (1923) ("[I]t must appear that the fraud charged really prevented the party complaining from making a full and fair defense"); *Marshall v. Holmes,* 141 U.S. 589, 596, 12 S.Ct. 62, 35 L.Ed. 870 (1891); *Lundborg v. Phoenix Leasing, Inc.,* 91 F.3d 265, 271 (1st Cir.1996) (due diligence; clear and convincing evidence); *Diaz v. Methodist Hosp.,* 46 F.3d 492, 497 (5th Cir.1995) (full and fair opportunity to present case); *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 71 (2d Cir.1990) (due diligence and lack of fault on part of party attacking judgment); *Green v. Foley,* 856 F.2d 660, 665 (4th Cir.1988) (fully and fairly presenting case), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989).

The same considerations are pertinent in determining whether a judgment should be recognized or enforced, either offensively or by means of an affirmative defense, under the Uniform Act, which in New York is CPLR Article 53.

1295 The Court finds both the fraud and that Chevron has been diligent in discovering the fraud and attacking the Judgment by clear and convincing evidence. Indeed, the defendants do not suggest any lack of diligence by Chevron.

1296 12 Moore's Federal Practice § 60.43[1][d] (3d ed. 2012) (quoting *Lonsdorf v. Seefeldt,* 47 F.3d 893, 898 (7th Cir.1995)).

1297 Restatement (Second) of Judgments § 70, cmt. b (1982).

1298 The Circuit wrote:

"We cannot doubt that the other judges who sat in the various cases acted honestly and with pure motives in joining in the decisions. No breath of suspicion has been directed against any of them and justly none could be. And for aught that now appears we may assume for present purposes that all of the cases in which Manton's action is alleged to have been corruptly secured were in fact rightly decided. But the unlawfulness of the conspiracy here in question is in no degree dependent upon the indefensibility of the decisions which were rendered in consummating it. *Judicial action, whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative requisite of even-handed justice proclaimed by Chief Justice Marshall more than a century ago; that the judge must be 'perfectly and completely independent with nothing to influence or control him but God and his conscience.*' " *United States v. Manton,* 107 F.2d 834, 846 (2d Cir.1939) (emphasis added).

1299 *E.g., Ty Inc. v. Softbelly's Inc.,* 353 F.3d 528, 536–37 (7th Cir.2003); *Schultz v. Butcher,* 24 F.3d 626, 631 (4th Cir.1994); *Anderson v. Cryovac, Inc.,* 862 F.2d 910, 924 n. 10 (1st Cir.1988); Restatement (Second) of Judgments § 70, cmt c, d (1983) (party seeking relief must show either corruption of court or that fraud goes to a material matter and that party seeking relief had "a substantial case to present"); Restatement (First) of Judgments § 124, cmt. d (1942) ("It is of the essence of a fair trial that a judicial tribunal should have an uncorrupted mind and if it does not the trial is not fair even though it may be shown that the tribunal would have reached the same result had there been no corruption or duress. Thus where a party, although believing that he can prove his case, nevertheless out of excess of caution bribes a tribunal, equitable relief will be given against him even though, on the facts presented, the tribunal would have reached the same decision.").

1300 *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir.1978); *see Ty Inc.,* 353 F.3d at 536–37.

1301 *See* Restatement (Second) of Judgments § 70 cmt. d (1982); *see Greiner v. City of Champlin,* 152 F.3d 787, 789 (8th Cir.1998) (denying relief on ground of fraud consisting of alleged withholding of report that would have been cumulative); *see also Robinson v. Volkswagenwerk AG,* 56 F.3d 1268, 1274 n. 5 (10th Cir.1995) ("[C]oncealment of material information by a party may justify a refusal to give preclusive effect to a judgment.") (emphasis added); *Standard Chlorine of Del., Inc. v. Sinibaldi,* 821 F.Supp. 232, 253 (D.Del.1992).

1302 *Morgan,* 304 U.S. at 20, 58 S.Ct. 773.

1303 This is especially obvious with respect to one of Chevron's most significant defenses, viz. that it was not liable because it never had operated in Ecuador and that there was no basis for holding it liable for any actions of Texaco—not a defendant in the Lago Agrio case—because Chevron did not succeed to Texaco liabilities by virtue of its indirect acquisition of its shares years after the events in question. Much of the portion of the Judgment rejecting Chevron's position was copied directly out of the Fusion Memo, part of the LAPs' unfiled work product. *Supra Facts* § IX.B. But it would have been true in any case because Chevron never was afforded any opportunity to respond directly to anything that was given to Zambrano *ex parte.*

1304 Camacho and Piaguaje, the LAP Representatives, are liable for the actions of Donziger, Fajardo, and the other Ecuadorian and U.S. lawyers for the LAPs, and Stratus and the other LAP experts, consultants, and advisers. Under New York law, a principal is liable for the acts of its agents, committed within the scope of their employment or actual or apparent authority. *E.g., American Soc'y of*

Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982); *Standard Sur. & Cas. Co. v. Plantsville Nat'l Bank,* 158 F.2d 422 (2d Cir.1946), *cert. denied,* 331 U.S. 812, 67 S.Ct. 1203, 91 L.Ed. 1831 (1947); *Gen. Overseas Films, Ltd. v. Robin Int'l, Inc.,* 542 F.Supp. 684, 687 (S.D.N.Y.1982), *aff'd* 718 F.2d 1085 (2d Cir.1983).

These defendants dispute their liability for the acts of their agents only under New York law and only on the theory that their awareness of Chevron's complaint and other claims of misconduct was insufficient to constitute ratification. DI 1858 (LAP Reps.' Post-trial Mem. of Law), at 15–17. There are two fundamental problems with the argument.

First, a principal is liable for the torts of an agent under New York law as long as the agent acted within the scope of the agent's actual or apparent authority. Ratification is immaterial except in the absence of actual or apparent authority. *E.g., Dover, Ltd. v. A.B. Watley, Inc.,* 423 F.Supp.2d 303, 318–19 (S.D.N.Y.2006) (mag. op.); Restatement (Third) of Agency Y §§ 7.03(1)(a), 7.04 (principal liable for torts of agent committed with actual authority or ratified by principal), 7.03(2)(b), 7.08 (principal liable for torts of agent committed with apparent authority). Moreover, an Ecuadorian law expert for Chevron explained, and this Court holds, that the law in Ecuador is the same. DI 1413–11 (Apr. 5, 2013 Velazquez Decl.), Ex. 92, Ann. B. ("According to rules of contractual and tort liability, the client is held liable for the actions of his agent, even when the client does not become aware of the agent's conduct until after it has occurred, if he takes no action to reject it or, failing that, to withdraw the agency authorization and, even more so, if he benefits from such conduct.").

Second, the Court finds that these defendants knowingly ratified the misconduct, substantially for the reasons set forth by Chevron. DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 254–56.

1305 The amended complaint states RICO claims also against Fajardo, Yanza, the ADF, Selva Viva, Stratus Consulting, Inc., Ann Maest, and Doug Beltman. *See* DI 283 (Am. Compl.) ¶ 1. Each of these other defendants either has settled or defaulted. Accordingly, this opinion deals with the RICO liability only of Donziger.

1306 *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 248–49, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

1307 *Id.* at 245–46, 109 S.Ct. 2893.

1308 *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 495, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) ("Section 1962 ... makes it unlawful for 'any person'—*not just mobsters*—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity.") (emphasis added); *see also H.J. Inc.,* 492 U.S. at 247, 109 S.Ct. 2893 (quoting 116 Cong. Rec. 35204 (1970)).

1309 *Sedima,* 473 U.S. at 497–99, 105 S.Ct. 3275 ("The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.").

1310 *M.O.C.H.A. Soc'y Inc. v. City of Buffalo,* 689 F.3d 263, 277–78 (2d Cir.2012).

1311 *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 491, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); *Cullen v. Margiotta,* 811 F.2d 698, 731 (2d Cir.1987), *abrogated on other grounds, Agency Holding Co. v. Malley–Duff & Assocs., Inc.,* 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987).

The Court has found certain facts that are common to the RICO and non-statutory claims by clear and convincing evidence. Nevertheless, the Court wishes to be clear that it makes no findings based on the "beyond a reasonable doubt" standard.

1312 *Compare Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076, 1080–89 (9th Cir.1986) (reading legislative history of RICO statute as foreclosing injunctions for private plaintiffs), *with Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687, 695–98 (7th Cir.2001) (hereinafter "*NOW* ") (ruling that RICO statute's text expressly provides for private injunctive relief), *overruled on other grounds sub nom. Scheidler v. Nat'l Org. for Women, Inc.,* 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).

Circuits to have addressed the question in *dicta* likewise are divided. *Compare Johnson v. Collins Entm't Co.,* 199 F.3d 710, 726 (4th Cir.1999), *In re Fredeman Litig.,* 843 F.2d 821, 828–30 (5th Cir.1988) (suggesting injunctive relief unavailable), *with Bennett v. Berg,* 710 F.2d 1361, 1366 (8th Cir.1983) (McMillan, J., concurring) (suggesting injunctive relief is available); *see also Lincoln House, Inc. v. Dupre,* 903 F.2d 845, 848 (1st Cir.1990); *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.,* 262 F.3d 260, 267 n. 4 (4th Cir.2001) (noting controversy but expressing no opinion).

1313 *See, e.g., Trane Co. v. O'Connor Sec.,* 718 F.2d 26, 28–29 (2d Cir.1983) (expressing doubt in dicta about availability of injunctive relief for private plaintiffs).

1314 267 F.3d 687 (7th Cir.2001).

1315 *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 462, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' ") (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

1316 18 U.S.C. § 1964(a).

1317 *Id.* § 1964(b).

1318 *Id.* § 1964(c).

1319 *See id.* § 1964(a), (b), (c).

1320 *NOW,* 267 F.3d at 696.

1321 *Rotella v. Wood,* 528 U.S. 549, 557, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (Congressional intent was to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the ... prohibited practices"); *see also NOW,* 267 F.3d at 698 (quoting *Rotella* and noting that "this role for civil RICO litigation" is "fully consistent" with the view that "the statute gives private citizens the ability to seek injunctive relief as well as damages").

1322 Pub. L. No. 91–452, § 904(a), 84 Stat. 947 (1970).

1323 *Sedima,* 473 U.S. at 491 n. 10, 105 S.Ct. 3275.

1324 *S. New England Tel. Co. v. Global NAPs,* 624 F.3d 123, 135 (2d Cir.2010) ("Because we presume that 'Congress legislates against the backdrop of existing jurisdictional rules that apply unless Congress specifies otherwise, a clear statement from Congress is required before we conclude that a statute withdraws the original jurisdiction of the district courts ...." (citations and internal quotation marks omitted)).

1325 U.S. Const. art. III, § 2 (emphasis added).

1326 *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 318, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999) (quoting Judiciary Act of 1789, § 11, 1 Stat. 78).

1327 *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (stating that the "comprehensiveness" of a court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"); *see also Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 291, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) (holding that, where the statute provided that "the [d]istrict [c]ourts are given jurisdiction ... 'for cause shown, to restrain violations' " of a statute, district courts have full equitable powers).

1328 202 F.Supp.2d 239, 244 (S.D.N.Y.2002).

1329 796 F.2d 1076.

1330 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010).

1331 *See Chevron v. Donziger,* 871 F.Supp.2d at 239.

1332 *Morrison,* 130 S.Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)).

1333 *Id.*

1334 *Id.* at 2878.

1335 *Morrison,* 130 S.Ct. at 2884.

1336 *Id.* (citation omitted).

1337 *Norex Petroleum Ltd. v. Access Indus., Inc.,* 631 F.3d 29, 32–33 (2d Cir.2010).
Although the Court adheres to *Norex,* it respectfully questions whether RICO's "silence" as to extraterritorial application, the basis for the *Norex* holding, correctly resolves the question whether Congress intended that RICO apply outside the territorial limits of the United States. As the Supreme Court observed in *Morrison,* its reliance on the presumption against extraterritorial application was not intended to impose a "clear statement" requirement, "if by that is meant a requirement that a statute say 'this law applies abroad,' " before it could be so applied. *See* 130 S.Ct. at 2883. "Assuredly, context can be consulted as well" in pursuit of statutory meaning and Congressional intent. *Id.*
Given RICO's heritage as a weapon of choice in prosecuting the Sicilian Mafia, *see, e.g., United States v. Casamento,* 887 F.2d 1141 (2d Cir.1989), and the more recent application of racketeering statutes to transnational drug and terrorism networks, *e.g., United States v. Leija–Sanchez,* 602 F.3d 797 (7th Cir.2010) (reversing dismissal of indictment charging murder of Mexican citizen under 18 U.S.C. § 1959 in Mexico where defendant paid for and arranged murder in United States); *United States v. Guzman Loera,* No. 3:12–cr–006849–FM1, Indictment [DI 1] ¶¶ 10–11 (W.D.Tex. filed Apr. 11, 2012), it seems likely that Congress intended it to have extraterritorial application. *See* Gideon Mark, *RICO's Extraterritoriality,* 50 Am. Bus. L.J. 543, 573–85 (2013) (hereinafter "*RICO's Extraterritoriality* ").

1338 *See United States v. Chao Fan Xu,* 706 F.3d 965, 975–79 (9th Cir.2013) (discussing the different approaches and holding that the proper focus is on the pattern of activity); *see also Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.,* 871 F.Supp.2d 933, 938–40 (N.D.Cal.2012) (focusing on the enterprise); *Cedeño v. Intech Grp., Inc.,* 733 F.Supp.2d 471, 473 (S.D.N.Y.2010), *aff'd,* 457 Fed.Appx. 35 (2d Cir.2012).

1339 *Chao Fan Xu,* 706 F.3d at 975–79; *Chevron Corp. v. Donziger,* 871 F.Supp.2d at 245; *Hourani v. Mirtchev,* 943 F.Supp.2d 159, 165–66 (D.D.C.2013); *Borich v. BP, P.L.C.,* 904 F.Supp.2d 855, 862 (N.D.Ill.2012); *CGC Holding Co. v. Hutchens,* 824 F.Supp.2d 1193, 1209 (D.Colo.2011).

1340 *Chao Fan Xu,* 706 F.3d at 977–78; *Chevron Corp. v. Donziger,* 871 F.Supp.2d at 245–46; *see also RICO's Extraterritoriality,* 50 Am. Bus. L.J. at 595–603.

1341 *Chao Fan Xu,* 706 F.3d at 977–78; *accord Chevron Corp. v. Donziger,* 871 F.Supp.2d at 245–46.
Recognizing that a reviewing court might disagree and focus instead on the character of the enterprise, this Court finds that the character of the enterprise here at issue was predominantly domestic by any reasonable standard. The enterprise, as will appear, was essentially the LAP team, including Donziger and the LAPs' other lawyers (both U.S. and Ecuadorian), and its host of consultants, PR people, financiers, and advisors including Stratus, Beltman, Maest, Hinton, Lehane, Russell, Calmbacher, H5, and many others. With the exception of the handful of Ecuadorian lawyers, Yanza, and the two entities that he and Donziger controlled, virtually every member of the enterprise—and there were a great many—were American. The nerve center of the entire operation, *see Chao Fan Xu,* 706 F.3d at 976–77, was in New York City, where Donziger was based and, despite roughly monthly visits to Ecuador, spent most of his time. In any case, it was in the United States. This is where almost all of the important decisions were made, the location from which the Ecuadorian lawyers were supervised (except when Donziger actually was in Ecuador), and the place from which the pressure campaign with all of its many different aspects was organized, supervised, and run.

1342 18 U.S.C. § 1961(1).

1343 631 F.3d 29 (2d Cir.2010); *see also Cedeño v. Castillo,* 457 Fed.Appx. 35 (2d Cir.2012).

1344 *Chevron Corp. v. Donziger,* 871 F.Supp.2d 229, 240–42 (S.D.N.Y.2012).

1345 *Id.* at 240–41 (footnotes included in curly brackets).

1346 *Id.* at 244 (quoting *CGC Holding Co. v. Hutchens,* 824 F.Supp.2d 1193, 1209–10 (D.Colo.2011) (distinguishing *Norex* on the basis of pattern of racketeering activity in that case that occurred largely in the United States and was directed at U.S. victim)); *Aluminum Bahrain B.S.C. v. Alcoa Inc.,* Civ. Action No. 8–299, 2012 WL 2093997, at *2–4 (W.D.Pa. June 11, 2012) (distinguishing *Norex* on similar grounds).

1347 706 F.3d 965.

1348 706 F.3d at 972–74; *United States v. Xu Chaofan,* No. 2:02–cr–00674–PMP–LRL, Second Superseding Indictment [DI 151] ¶¶ 1–13 (D.Nev. filed Jan. 31, 2006).

1349 *Xu Chaofan,* No. 2:02–cr–00674–PMP–LRL [DI 151] ¶ 11.

1350 *Chao Fan Xu,* 706 F.3d at 975–78.

1351 *Id.* at 978.
This formulation conflates "pattern of racketeering activity," which is defined by statute as a pattern of acts indictable or chargeable under U.S. or state law, *see* 18 U.S.C. § 1961(1), and thus domestic in nature, with all of the defendants' alleged misconduct, whether domestic or foreign. Referring to the latter as "Defendants' pattern racketeering activity taken as a whole," while perfectly normal in ordinary conversation, can be confusing in this context.

1352 *Id.*

1353 *Id.* at 978–79.

1354 *Id.* at 979.

1355 *Jacobellis v. Ohio,* 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (concurring opinion).

1356 *Norex,* 631 F.3d at 33.

1357 *Sedima,* 473 U.S. at 496, 105 S.Ct. 3275.
In a suit for damages for such a violation, the plaintiff would be obliged to prove "injury to [its] business or property ... caused by the violation of Section 1962." *Chevron v. Donziger,* 871 F.Supp.2d 229, 239 (S.D.N.Y.2012) (quoting *Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178, 184 (2d Cir.2008)). Chevron at this point, however, seeks only equitable relief. The Court deals below with the proof required to entitle it to such relief, assuming proof of a violation of the statute.

1358 *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

1359 *Boyle v. United States,* 556 U.S. 938, 948, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

1360 *Turkette,* 452 U.S. at 583, 101 S.Ct. 2524.

1361 *Id.* ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.") (citation omitted).

1362 *Reves v. Ernst & Young,* 507 U.S. 170, 179, 183–84, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) ("An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.").

1363 *Id.* at 179, 113 S.Ct. 1163 (emphasis added).

1364 *Baisch v. Gallina,* 346 F.3d 366, 376 (2d Cir.2003) (quoting *United States v. Diaz,* 176 F.3d 52, 93 (2d Cir.1999)).

1365 18 U.S.C. § 1951(b)(2). The New York Penal Law, upon which Chevron relies also for predicate act purposes, is to the same effect. N.Y. Penal L. §§ 155.05(2)(e), 105.17, 110.00 (McKinney 2013).

The Hobbs Act makes it unlawful to attempt "in any way or degree," to "obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce, by ... extortion." 18 U.S.C. § 1951(a) "[I]t is well established that the burden of proving ... a nexus [with interstate or foreign commerce] is *'de minimis.'* " *United States v. Arena,* 180 F.3d 380, 389 (2d Cir.1999) (quoting *United States v. Farrish,* 122 F.3d 146, 148 (2d Cir.1997)). "[A]ny interference with or effect upon interstate [or foreign] commerce, whether slight, subtle or even potential ... is sufficient to uphold a prosecution under the Hobbs Act," *Jund v. Town of Hempstead,* 941 F.2d 1271, 1285 (2d Cir.1991), and proof of the defendants' intent to affect commerce is unnecessary where the interference is a natural consequence of the offense, *see United States v. Daley,* 564 F.2d 645, 649 (2d Cir.1977). The nexus with interstate and foreign commerce in this case is plain: the potential of a payment by Chevron to the LAPs. The commerce requirement is satisfied here, and the defendants do not claim otherwise.

1366 *Deck v. Engineered Laminates,* 349 F.3d 1253, 1258 (10th Cir.2003); *see also Vemco, Inc. v. Camardella,* 23 F.3d 129, 134 (6th Cir.1994) ("A threat of litigation if a party fails to fulfill even a fraudulent contract ... does not constitute extortion.").

1367 *Deck,* 349 F.3d at 1258.

1368 *Viacom Int'l, Inc. v. Icahn,* 747 F.Supp. 205, 210 (S.D.N.Y.1990).

1369 *United States v. Jackson,* 180 F.3d 55, 70, *on reh'g,* 196 F.3d 383 (2d Cir.1999).

1370 *Id.,* 180 F.3d at 69–70.

1371 PX 1146 (July 2, 2009 Memorandum from "SRD" to "Kohn Team" re: "Activity Going Forward"), at 2 (emphasis added).

1372 PX 77A (June 13, 2007 *Crude* Clip). Donziger's comments in full:

"We have to keep pushing on all fronts at all times. That simple. All fronts at all times; push, push, push. It's just a matter of force. It's pure force. Who can put the most pressure and who can resist. It's just like ... You know, all this bullshit about the law and facts, ... yeah, that factors into it, 'cause that affects the level of force. But in the end of the day it is about brute force; who can apply the pressure and who can withstand the pressure. And can you get them to the breaking point."

1373 PX 33A[S] (Mar. 3, 2007 *Crude* Clip), CRS–187–01–01.

1374 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 71 (emphasis added).

1375 180 F.3d 55 (2d Cir.1999).

1376 *Id.* at 70.

1377 *Id.* at 70–71.

1378 *United States v. Tobin,* 155 F.3d 636, 640 (3d Cir.1998) (Alito, J.).

1379 *Jackson,* 180 F.3d at 70–71.

1380 *Deck v. Engineered Laminates,* 349 F.3d 1253, 1258 (10th Cir.2003) (collecting cases and holding that "meritless litigation is not extortion" under Hobbs Act); *United States v. Pendergraft,* 297 F.3d 1198, 1205 (11th Cir.2002).

1381 *See* PX 1146 (July 2, 2009 Memo), at 2; PX 33A[S] (Mar. 3, 2007 *Crude* Clip), CRS187–01–01.

1382 That doctrine sharply restricted, on the basis of First Amendment considerations, antitrust liability based on litigation, lobby and petitioning of public agencies for allegedly anticompetitive purposes. *See generally* ABA Section of Antitrust Law, Antitrust Law Developments (Sixth)))))))) 292–94 (2007). Nevertheless, antitrust liability may be imposed for (1) "filing of baseless lawsuits or administrative actions not in order to prevail ... but to impede a competitor's ability to compete," (2) litigation "brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival," and (3) "intentional misrepresentations made to a judicial or administrative body" for anticompetitive purposes. *Id.* at 293–94. Accordingly, "activities of this sort have been held beyond the protection of *Noerr.*" *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n,* 663 F.2d 253, 263 (D.C.Cir.1981) (collecting cases); *see also Clipper Exxpress v. Rocky Mtn. Motor Tariff Bur., Inc.,* 690 F.2d 1240, 1261 (9th Cir.1982) ("In the adjudicatory sphere, ... information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity" from liability).

1383 *Cal. Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 513, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) (there are "many ... forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations" because "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process"); *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 420, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Stevens, J., concurring) (while "the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.' " (quoting Schauer, *Categories and the First Amendment: A Play in Three Acts,* 34 Vand. L.Rev.. 265, 270 (1981)) (brackets in original)).

1384 *Fed. Prescription Serv.,* 663 F.2d at 263.

1385 18 U.S.C. § 1951(b)(2).

1386 *See, e.g., United States v. Coppola,* 671 F.3d 220, 241 (2d Cir.2012) ("[T]he Hobbs Act 'leaves open the cause of the fear' inducing a party to consent to part with property and does not require that such fear be 'created by implicit or explicit threats.' ") (quoting *United States v. Gotti,* 459 F.3d 296, 333 (2d Cir.2006)).

1387 PX 1146 (July 2, 2009 Memorandum from "SRD" to "Kohn Team" re: "Activity Going Forward"), at 2.

1388 *See supra Facts* § III.B.1–2.

1389 *See, e.g.,* PX 6817 (Mar. 11, 2009 Email from S. Donziger to K. Hinton) ("do not change headlines ever without telling me"); PX 6814 (Dec. 3, 2009 Email from S. Donziger to K. Hinton) ("[w]hen I send a final copy of a press release for posting, the issue of the headline is settled. never change it at that point. tks."); PX 1214 (Jan. 27, 2010 Email from S. Donziger to S. Tegel, A. Soltani, K. Koenig, M. Anderson re: "another thought"), at 1 ("Suggestions are welcome for any press release we do; final editing authority is something we would never grant to any outsider—especially somebody not in a position to understand the art and feel of this campaign and its daily developments.").

1390 PX 931 (Oct. 29, 2007 Email from S. Donziger to C. Lehane re: "let's talk") ("Totally confidential, but Chevron is hurting and they have asked to go to mediation at end of November. We need to get more press and increase the pressure b/w now and then, to get the price up.").

1391 *See supra Facts* § III.C–D.

1392 PX 764 (Feb. 14, 2006 Ltr. from D. Russell to S. Donziger re "Cease and Desist"), at 1.

1393 *Id.*

1394 *Id.* at 2.

1395 As noted above, the ADF uses the name the Amazon Defense Coalition. Although its press releases are issued under the latter name, we continue to use ADF to prevent confusion.

1396 *See, e.g.,* PX 477R (Sept. 13, 2006 Amazon Watch press release), at 1, 2, 3 ("[a]n independent expert has estimated a clean-up would cost $6.1 billion"); PX 480R (Oct. 30, 2006 Amazon Watch press release) at 2 (alleged contamination "would cost at least $6 billion to remediate"); PX 481R (Nov. 8, 2006 Amazon Watch press release) at 2 (Chevron's "Ecuador liability" was "estimated at $6 billion"); PX 482R (Nov. 15, 2006 Amazon Defense Coalition press release) at 1–2 ("Clean-up is estimated at $6 billion.").

1397 *See, e.g.,* PX 494R (Aug. 30, 2007 Amazon Defense Coalition press release) at 3 ("Global Environmental Services, an Atlanta-based company that assessed the damage, called the area the 'Rainforest Chernobyl' and estimated clean-up would cost at least $6 billion."); PX 483R (Mar. 6, 2007 Amazon Watch press release), at 2 (referencing an "independent damage assessment, by the U.S. firm Global Environmental Operations" that "estimates clean-up to cost at least $6.14 billion"); PX 485R (Mar. 20, 2007 Amazon Watch press release) at 2 (stating that an "independent damage assessment, by the U.S. firm Global Environmental Operations puts clean-up costs at $6.14 billion").

1398 *See supra Facts* § III.C–E.

1399 They were prepared by Donziger's associate, Aaron Marr Page, and his wife, Daria Fisher. *See* DX 731 (Apr. 16, 2006 Email from S. Donziger to A. Page, D. Fisher re: "excellent work on remediation/questions"); *see also supra Facts* § III.F.

1400 PX 3240 (Apr. 20, 2006 Email from A. Page to S. Donziger re: "DOJ ltr.").

1401 DX 731 (Apr. 16, 2006 Email from S. Donziger to A. Page, D. Fisher re: "excellent work on remediation/questions"), at 1 ("[W]ill releasing this now help with the SEC ...?").

1402 *See supra Facts* § III.E.

1403 PX 527R (Oct. 22, 2009 Amazon Defense Coalition press release), at 2; *see* PX 533R (June 2, 2010 post, "The Chevron Pit"), at 3 ("Experts have concluded that the Chevron [sic] discharged at least 345 million gallons of pure crude oil directly into the rainforest ecosystem .... and approximately 11 million gallons of pure crude was spilled during the Exxon Valdez disaster."); PX 513R (Oct. 15, 2008 Chevron–Toxico post), at 2 ("All told, the amount of oil dumped in Ecuador by Texaco is at least thirty times greater than the amount spilled during the Exxon Valdez disaster, according to the plaintiffs in the civil suit."); *see also* PX 4400 (Kim Direct), at Attachments C & D (chart and timeline of "Donziger and/or Co–Conspirators' Use of '30 times Exxon Valdez' Claim").

1404 PX 861 (May 24, 2007 Email from A. Soltani to S. Donziger re: "exxon valdez 30x").

1405 PX 860 (May 24, 2007 Email from S. Donziger to S. Tegel re: "private").

1406 PX 931 (Oct. 29, 2007 Email from S. Donziger to C. Lehane re: "let's talk") ("Totally confidential, but Chevron is hurting and they have asked to go to mediation at end of November. We need to get more press and increase the pressure b/w now and then, to get the price up.").

1407 PX 861 (May 24, 2007 Email from A. Soltani to S. Donziger re: "exxon valdez 30x"); PX 764 (Feb. 14, 2006 Ltr. from D. Russell to S. Donziger re: "Cease and Desist"), at 1 (stating that the estimate was "too high by a substantial margin, perhaps by a factor of ten, or more").

1408 *See* PX 754 (Jan. 30, 2006 Amazon Watch Ltr. from A. Soltani and S. Aird to C. Cox); PX 497R (Mar. 18, 2008 Amazon Watch Ltr. from A. Soltani to C. Cox).

1409 PX 5801 (Nov. 17, 2008 Letter from T. DiNapoli to D. O'Reilly), at 1 ("It appears that Chevron's strategy remains that of denying responsibility for the contamination and, instead, protracting the legal proceedings. I question whether that strategy best serves the company and its shareholders.").

1410 This team included Hinton, Amazon Watch staffer Mitch Anderson, and LAP lobbyist Ben Barnes. PX 1048 (July 11, 2008 Email from K. Hinton to S. Donziger re: "Cuomo") ("I spoke with Andrew Cuomo this morning and told him about the lawsuit and the comptroller's office, etc. He said he would be helpful, if we gave him a good idea about how to do that. You should discuss with Patrick Doherty about how we might leverage Cuomo."); PX 7441 (Apr. 2, 2009 Email chain from S. Donziger to S. Martin, S. Moorhead, K. Caperton, M. Anderson, K. Koenig, and A. Soltani re: "draft ltr for Cuomo"); PX 1106 (Feb. 13, 2009 Email from S.

Donziger to B. Barnes, S. Moorhead, P. Thomasson, and K. Hinton re: "DeNapoli info/instructions for Ben") ("Instructions: (1) That DiNapoli call Andrew Cuomo's office, or write a letter, requesting assistance on the Chevron disclosure matter to enable Cuomo to write a letter to Chevron seeking more information. The person to call is Steve Cohen, Cuomo's chief of staff."); PX 7426 (Feb. 9, 2008 Email from S. Donziger to M. Anderson, P. Paz y Mino, and K. Koenig re: "For Pat Doherty"), at 2 (touting $6 billion damages estimate and claiming that "[t]he amount of pure crude dumped is more than 30 times greater than that spilled during the Exxon Valdez disaster"); PX 7422 (Mar. 23, 2007 Email from K. Koenig to S. Alpern, J. Gresham, A. O'Meara, M. Rosenthal, P. Doherty, I. Lowe, T. Symonds, G. Wong, and S. Donziger re: "Ecuador Court Speeds Up Chevron's $6 Billion Amazon Trial Over Rainforest Contamination") (including press release referring to "only independent damage assessment" of $6 billion and discussing coordination for Chevron annual meeting).

1411 PX 5801 (Nov. 17, 2008 Letter from T. DiNapoli to D. O'Reilly), at 1; PX 1131 (May 4, 2009 letter from A. Cuomo to D. O'Reilly) (referring to Cabrera as "a technical expert [who] has estimated that ... damages assessed against Chevron may be as high as $27 billion").

1412 *E.g.,* PX 7480 (May 2011 Investor Statement on Chevron and *Aguinda v. Texaco*), at 1 ("We also call upon the Company to reevaluate whether endless litigation in the *Aguinda* case is the best strategy for the Company and its shareholders, or whether a more productive approach, such as reaching an equitable negotiated settlement, could be employed to protect shareholder investments and prevent any further reputational harm due to protracted litigation."); PX 5803 (May 25, 2011 press release, "DiNapoli to Chevron: Resolve Amazon Lawsuit, Standoff on Poor Ecological Record Bad for Business"); PX 7498 (May 25, 2012 press release, "NYS Pension Fund Renews Call for Chevron to Resolve Ecuador Lawsuit").

1413 PX 7490 (Sept. 26, 2011 Email from E. Sumberg, S. Thompson, P. Grannis, C. Calhoun, N. Groenwegen, B. Anastassiou, E. Evans re: "Huffington Post: What Chevron Owes the People of Lago Agrio").

1414 PX 7542 (May 25, 2009 Amazon Watch Ltr. to Shareholders), at 2; PX 5804 (May 26, 2011 Amazon Defense Coalition press release), at 1 ("New York State Comptroller Thomas DiNapoli, who manages $780 million in Chevron stock called on the company 'to face reality' and resolve the lawsuit, which is currently under appeal by both parties in Ecuador. 'The entire case is looming like a hammer over shareholders' heads. Investors don't derive any benefit from this never-ending courtroom drama.' ").

1415 *Tobin,* 155 F.3d 636 (finding extortionate campaign of harassment consisting, among other things, of threats to report the victim to Internal Revenue Service and threats to interfere with business by maligning reputation).

1416 PX 7537 (*Crude* Transcript, Theatrical Version), at 52.

1417 PX 172 (Donziger Notebook).

1418 PX 2373R (May 11, 2005 Email from S. Donziger to A. Wray, C. Bonifaz, J. Kohn, J. Bonifaz re: "sked conference call Monday at 10 a.m."), at 1–2; PX 170 (Donziger Notebook).

1419 PX 734 (Oct. 3, 2005 Email from S. Donziger to J. Kohn re: "Lehane's first press plan"), at 2.

1420 *Id.* at 2–3.

1421 *Id.* at 3–4.

1422 *See discussion supra Facts* § VI; *see also* PX 7537 (*Crude* Transcript, Theatrical Version), at 43 (Donziger: "Correa just said that anyone in the Ecuadorian government who approved the so-called remediation is now going to be subject to litigation in Ecuador. Those guys are shitting in their pants right now.").

Fajardo and Donziger lobbied the Prosecutor General's office as intently as they did the Office of the President. *See, e.g.,* PX 75A (June 8, 2007 *Crude* clip), at CRS376–03–CLIP01 (noting Correa's suggestion that "if we put in a little effort at the Public Prosecutors' office, the Attorney General will yield, and will re-open that investigation into the fraud of ... the contract between Texaco and the Ecuadorian Government"); PX 992 (Mar. 11, 2008 Email from P. Fajardo to S. Donziger re: "urgent that we speak about next week"), at 1 ("I have an appointment with the Prosecutor tomorrow morning, we are insisting that he reopen the criminal investigation against Texaco for the remediation."); PX 1067 (Sept. 18, 2008 Email from P. Fajardo to J. Saenz, J. Prieto, S. Donziger, and others re: "Prosecutor's Case") ("the bread is almost ready to be taken out of the oven, but that's a good time to get burned ... Let's all do our best to make sure this action moves forward. I wonder if it's possible to put on more pressure at Court Monday or Tuesday").

1423 PX 8058 (July 18, 2010 Email from S. Donziger to J. Saenz, J. Prieto, and P. Fajardo).

1424 PX 169R (Donziger Notebook), at 41.

1425 PX 172 (Donziger Notebook), at 2.

1426 PX 1103 (Feb. 4, 2009 Email from J. Saenz to S. Donziger, M. Garces, P. Fajardo, and others re: "Nuevo Boletin/importante"), at 3 ("The problem is that in Ecuador, our discourse has been that we haven't had ANYTHING to do with the process at the prosecutor general's office.... So, to publically [*sic*] say that the discovery comes from one of our collaborators ties us in some way to the prosecutorial investigation. And we all agree that we don't want that to happen.").

1427 *Morrison,* 130 S.Ct. at 2884.

1428 *Sekhar v. United States,* —— U.S. ——, 133 S.Ct. 2720, 2726, 186 L.Ed.2d 794 (2013).

1429 18 U.S.C.1951(a).

1430 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).

1431 537 U.S. at 402, 123 S.Ct. 1057.

1432 *Id.* at 405–06, 123 S.Ct. 1057; *see also United States v. Gotti,* 459 F.3d 296, 323 (2d Cir.2006) ("We ... read *Scheidler II* as ... simply clarifying that before liability can attach, the defendant must truly have obtained (or, in the case of attempted extortion, sought to obtain) the property right in question.").

1433 *Gotti,* 459 F.3d at 324.

1434 18 U.S.C. §§ 1341, 1343.

1435 *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 647, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008) (quoting *Schmuck v. United States,* 489 U.S. 705, 712, 715, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (alteration in original)); *United States v. Maze,* 414 U.S. 395, 400, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974) (mails need only be "for the purpose of executing" the scheme) (quoting *Kann v. United States,* 323 U.S. 88, 94, 65 S.Ct. 148, 89 L.Ed. 88 (1944)).

1436 *See, e.g., United States v. Bortnovsky,* 879 F.2d 30, 39 (2d Cir.1989) (noting that "defendant need not actually intend, agree to or even know of a specific mailing to 'cause' mail to be sent as long as he or she 'does an act with knowledge that the use of mails will follow in the ordinary course of business, or where such can reasonably be foreseen' " (internal citations omitted)).

1437 *United States v. Walker,* 191 F.3d 326, 335 (2d Cir.1999); *see also United States v. Pierce,* 224 F.3d 158, 166 (2d Cir.2000) ("The wire fraud statute punishes the scheme, not its success.") (quotation marks and brackets omitted).

1438 *O'Malley v. New York City Transit Auth.,* 896 F.2d 704, 706 (2d Cir.1990) (citations omitted).

1439 *U.S. v. Autuori,* 212 F.3d 105, 116 (2d Cir.2000) (quoting *United States v. Guadagna,* 183 F.3d 122, 129 (2d Cir.1999)).

1440 *Neder v. United States,* 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (holding materiality is an element of a "scheme or artifice to defraud" under the mail and wire fraud statutes).

1441 *Autuori,* 212 F.3d at 118 (quoting *United States v. Mittelstaedt,* 31 F.3d 1208, 1217 (2d Cir.1994)); *id.* ("[U]nder the mail fraud statute, it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading." (internal quotation marks omitted)).

1442 *Pasquantino v. United States,* 544 U.S. 349, 371–72, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (citations omitted).

1443 Numerous emails were sent in furtherance of these schemes.
For example, the ghostwriting of the Cabrera Report by Stratus was coordinated through wire communications. *See, e.g.,* PX 2433 (Feb. 8, 2008 Email from D. Beltman to S. Donziger, A. Maest, P. Fajardo, J. Peers, B. Lazar), supervised by Donziger, PX 979 (Feb. 27, 2008 Email from S. Donziger to D. Beltman re: "Start on report text; human tox annex"), translated into Spanish, PX 980 (Feb. 29, 2008 Email from D. Beltman to info@translatingspanish.com, and A. Maest re: "Ecuador Project"), sent to Ecuador, PX 1019 (Mar. 31, 2008 Email from S. Donziger tocriscadena @hotmail.com re: "table"), and revised by Donziger, PX 1018 (Mar. 30, 2008 Email from D. Beltman to S. Donziger re: "what do u think of this?"). So too were the attempts to conceal it. *See, e.g.,* PX 1315 (May 3, 2010 Email from S. Donziger to E. Westenberger, and others re: "Fajardo edits"); PX 1321 (May 4, 2010 Email from A. Wilson to S. Donziger, and others re: "Fajardo Declaration"); PX 2452 (May 5, 2010 Email from S. Donziger, and others re "aguinda litigation").
Other examples are the communications regarding the ghostwriting by Guerra of Zambrano orders and the early preparation by the LAP team for preparing the judgment. Fajardo kept Donziger apprised of the team's arrangements during Zambrano's first tenure on the case, PX 1751 (Oct. 27, 2009 Email from P. Fajardo to L. Yanza, S. Donziger re "News"), Donziger and Fajardo coordinated research assignments for the judgment, PX 1137 (June 5, 2009 Email from P. Fajardo to S. Donziger re: "BRYAN"), and the two discussed case law and proposed arguments, PX 1141 (June 18, 2009 Email from P. Fajardo to S. Donziger and others re: "THIS IS THE MOST COMPLETE ONE").
"Each of these [wires] was an 'act which is indictable' as [wire] fraud...." *Bridge,* 553 U.S. at 648, 128 S.Ct. 2131. They are not, moreover, a complete list of the wire communications in furtherance of these schemes. The record in this case is replete with other emails in furtherance of the schemes, including many cited elsewhere in this opinion. Still others are included in Appendix 1 to Chevron's Proposed Findings of Fact, although the exhibit is somewhat overinclusive. *See* DI 1848 (Chevron Corp. Proposed Findings of Fact), App'x 1.

1444 18 U.S.C. § 1956.

1445 *Id.* § 1961(1).

1446 *Id.* § 1956(a)(2).

1447 *Id.* § 1956(b)(7)(A).

1448 *Id.* § 2(b).

1449 In Appendix 2 of its Proposed Findings of Fact, Chevron lists a number of wire transfers it asserts were money laundering. *See* DI 1848 (Chevron Corp. Proposed Findings of Fact), App'x 2. The Court need not find that each of these transfers constituted money laundering.

1450 PX 586 (Collection of Chase Bank statements for accounts referred to as "Law Firm Account" and "Ecuador Case Account"), at 3 (reflecting deposit of $1.75 million on March 23, 2007 from Gibraltar-based account); Donziger Jan. 18, 2011 Dep. Tr. at 3212:20–23 (acknowledging that "Russ DeLeon is someone [he] introduced to the Lago Agrio case as a source of financing").

1451 PX 846 (Mar. 29, 2007 Email from S. Donziger to R. DeLeon re: "Update memo"), at 1 (discussing deposit of DeLeon's funds); PX 586 (Collection of Chase Bank statements for accounts referred to as "Law Firm Account" and "Ecuador Case Account"), at 3 (reflecting deposit of $1.75 million on March 23, 2007 from Gibraltar-based account and subsequent transfer to Kohn Swift & Graf).

1452 PX 585 (Summary of 2005–2013 Transfers to Selva Viva Acct. Ending 5004 from S. Donziger, Kohn Swift & Graf, and Foreign Entities), at 1, 2 (listing wire transfers from Kohn Swift & Graf to Selva Viva); PX 641 (June 12, 2009 Texaco–Ecuador Kohn Swift & Graf Expenses 1993 to May 31, 2009), at 2.
Kohn Swift & Graf identified the expenses for which DeLeon's funds were used in its record keeping. *See* PX 641 (June 12, 2009 Texaco–Ecuador Kohn Swift & Graf Expenses 1993 to May 31, 2009), at 2 (identifying "Investor's Expenses"). There is no evidence of any other investor during that period of the case.

1453 *See* PX 641 (June 12, 2009 Texaco–Ecuador Kohn Swift & Graf Expenses 1993 to May 31, 2009), at 2 (reflecting payments to Stratus and UBR between March 30, 2007 and November 30, 2007); PX 2430 (July 24, 2007 Ltr. From J. Kohn to V. Uhl reflecting payment to Uhl, Baron, Rana & Assocs.); PX 596 (Sept. 6, 2007 Ltr. From J. Kohn to V. Uhl reflecting payment to Uhl,

Baron, Rana & Assocs.); PX 635 (Oct. 18, 2007 Ltr. From J. Kohn to V. Uhl reflecting payment to Uhl, Baron, Rana & Assocs.); PX 4900R (Dahlberg Direct) ¶ 122 (regarding payments to UBR and Villao).

1454 PX 894 (Aug. 9, 2007 Email from L. Yanza to S. Donziger re: "bank information urgent") ("[Kohn] ha[s] to deposit 50k so we can pay the advances to the consultants so they will start their work as soon as possible. I hope it is deposited by Wednesday at the latest. I'll be in touch that day to arrange all of this with Huao.")

1455 PX 897 (Aug. 14, 2007 Email from S. Donziger to K. Wilson and J. Kohn re: "Critical money transfer"), at 3.

1456 PX 578 (Banco Pichincha Statement), at 6 (reflecting Aug. 15, 2007 transfer of $49,998 from Kohn Swift & Graf); PX 2427 (Oct. 26, 2007 Email from K. Wilson to S. Donziger and J. Kohn), at 3 (reflecting payment of $50,000 to ADF on Aug. 15, 2007).

1457 PX 578 (ADF Account Statement), at 6 (reflecting transfer to "Cabrera Vega, Richard–Stalin" on Aug. 17, 2007); PX 590 (Aug. 17, 2007 Account-to-Account Transfer Receipt between ADF and Cabrera Vega); PX 591 (Aug. 17, 2007 Ltr. from J. Fajardo to Banco Pichincha Manager); PX 593 (Banco Pichincha Record of Cash Transactions for the Frente).

1458 PX 913 (Sept. 12, 2007 Email from L. Yanza to S. Donziger re: "Let's not give Texaco the pleasure of stopping the PG") ("I think we should think ahead and not give those Texaco sons of bitches the pleasure, using the same mechanism as weeks ago, meaning, for you to send us money to the secret account to give it to the Wuao ...."); PX 967 (Feb. 8, 2008 Email from L. Yanza to S. Donziger); PX 917 (Sept. 17, 2007 Email from L. Yanza to S. Donziger) ("I hope you make a deposit right away because I offered to give the Wao another advance tomorrow and I don't want to look bad.").

1459 PX 916 (Sept. 16, 2007 Email from S. Donziger to K. Wilson re: "quito account") ("The 50,000 to the Frente goes to the second account ... not the primary account to which we usually transfer funds.").

1460 PX 578 (ADF Account Statement), at 6 (reflecting Sept. 17, 2007 transfer from Kohn Swift & Graf).

1461 18 U.S.C. § 1503.

1462 *United States v. Quattrone*, 441 F.3d 153, 170 (2d Cir.2006).

1463 *United States v. Kumar*, 617 F.3d 612, 620–21 (2d Cir.2010) (noting that courts afford Section 1503 "a generally non-restrictive reading") (internal quotations omitted); *see also United States v. Aguilar*, 515 U.S. 593, 598, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (noting that "the 'Omnibus Clause' serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice").

1464 *Quattrone,* 441 F.3d at 170.

1465 *Id.* (quoting *Aguilar,* 515 U.S. at 599, 115 S.Ct. 2357).

1466 *United States v. Coiro,* 922 F.2d 1008, 1017 (2d Cir.1991).

1467 *See supra Facts* § VII.C.1.c.

1468 *E.g.,* PX 1319 (May 3, 2010 Email from E. Yennock to LAPs' U.S. Counsel, including Donziger).

1469 *See id.* Ed Yennock of Patton Boggs instructed Donziger to "confirm[ ] that [the declaration] [wa]s accurate."

1470 PX 1316 (May 3, 2010 Email from E. Westenberger to others) ("This is why we struggled with who would sign the declaration. If Steve [Donziger] signs, he will most certainly be deposed. Same for any other counsel in the US. We figured that with [Fajardo], they likely would not slow down the process by deposing him.").

1471 *See supra Facts* § VII.C.1.c.

1472 The Court makes no finding as to whether Patton Boggs, Emery Celli, or any of their attorneys committed obstruction of justice. It suffices to find, as the Court does, that Donziger knowingly caused the Fajardo Declaration to be false and misleading and to be filed. He is liable as a principal in those circumstances. 18 U.S.C. § 2(b).

1473 *Quattrone,* 441 F.3d at 170; *see, e.g.,* Tr. (Donziger) 2569:1–7 ("My role at the time was to try to organize legal representation for those involved [in the Stratus Section 1782 proceeding], and I hired different counsel at different times at that time for the Lago Agrio communities.").

1474 Donziger Jan. 19, 2011 Dep. Tr. at 3363:18–20.

1475 18 U.S.C. § 1503; *see also United States v. Ruggiero,* 934 F.2d 440, 445 (2d Cir.1991).

1476 18 U.S.C. § 1512.

1477 *Id.* § 1512(b)(3).

1478 *United States v. Amato,* 86 Fed.Appx. 447, 450 (2d Cir.2004) (finding evidence sufficient to support conviction for witness tampering where defendant, "[c]oncerned [witness] would testify against him ... directed intermediaries ... to reach out to [witness] and deliver a message" despite absence of evidence of intent behind or effect of message).

1479 *United States v. Thompson,* 76 F.3d 442, 452 (2d Cir.1996).

1480 *United States v. Price,* 443 Fed.Appx. 576, 582 (2d Cir.2011).

1481 *Thompson,* 76 F.3d at 453.

1482 *See supra Facts* § V.D.

1483 *United States v. Rodolitz,* 786 F.2d 77, 81–82 (2d Cir.1986) ("The most obvious example of a section 1512 violation" is "the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it....").

1484 18 U.S.C. § 1952.

1485 18 U.S.C. § 1961(1)(C).

1486 18 U.S.C. § 1952(a)(3) (elements of Travel Act violation include: (1) use of the "mail or any facility in interstate or foreign commerce," (2) with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," followed by (3) performance of or an attempt to perform an act of promotion, management, establishment, carrying on, or facilitation of the enumerated unlawful activity).

1487 *Id.*

1488 *See United States v. Kozeny,* 664 F.Supp.2d 369 (S.D.N.Y.2009) (declining defendant's motion for entry of judgment of acquittal or new trial following conviction for conspiring to violate the FCPA and Travel Act in furtherance of FCPA violation); *Dooley v. United Techs. Corp.,* No. 91 Civ. 2499, 1992 WL 167053, at *9 (D.D.C. June 16, 1992) (holding that violations of the Travel Act based on conduct allegedly violating the FCPA sufficiently stated a RICO predicate act); *United States v. Young & Rubicam,* 741 F.Supp. 334 (D.Conn.1990) (denying motion to dismiss RICO count premised on violation of Travel Act through bribery prohibited by FCPA); *see also Envtl. Tectonics v. W.S. Kirkpatrick, Inc.,* 847 F.2d 1052 (3d Cir.1988) (finding allegations that company bribed foreign government officials over period of time to procure military contract sufficient to allege pattern of racketeering activity premised on FCPA violations).

1489 *See* 15 U.S.C. § 78dd–2(a)(3); *see also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. S.E. Schreiber,* 327 F.3d 173, 179–80 (2d Cir.2003) (listing factors).
The FCPA includes an "[e]xception for routine governmental action" where the payment is intended "to expedite or to secure the performance of a routine governmental action by a foreign official...." *See* 15 U.S.C. § 78dd–2(b). That exception plainly does not apply here, where the payments were intended to permit Stratus to write the Cabrera Report.

1490 *Cf. United States v. Carson,* No. SACR 09–00077–JVS, 2011 WL 7416975, at *4 (C.D.Cal.2011) (holding that presumption against extraterritoriality does not apply because "[a]ll the elements under the Travel Act were allegedly satisfied in California, even if the target of Defendants' commercial bribery scheme was overseas").

1491 15 U.S.C. § 78dd–2(h)(1)(A)–(B).

1492 *See* PX 1750 (Donziger Direct) ¶ II.1.

1493 *S.E.C. v. Straub,* No. 11 Civ. 9645(RJS), 2013 WL 4399042, at *1 (S.D.N.Y. Aug. 5, 2013).

1494 *See* Information at 18–19, *United States v. Brown,* No. H–060cr0316 (S.D.Tex. Sept. 11, 2006) (alleging that transfer of funds to bank account for use as improper payments for PetroEcuador officials satisfied interstate commerce element).

1495 *See, e.g.,* PX 895 (Aug. 14, 2007 Email from S. Donziger to K. Wilson and J. Kohn re: "Critical money transfer") ("Pls transfer 50,000 to the following account in Ecuador.").

1496 *See* PX 578 (Account Statement, ADF) at 6 (reflecting $50,000 wire from Kohn Swift & Graf); PX 901 (Aug. 15, 2007 Email from K. Wilson to S. Donziger, J. Kohn, K. Kenney re: "Frente Wire") ("The wire transaction for Frente has been completed.").

1497 *See, e.g.,* PX 850 (Apr. 17, 2007 Email from L. Yanza to S. Donziger re: "A couple of things") ("We have met with Richard and everything is under control. We gave him some money in advance."); PX 888 (July 26, 2007 Email from L. Yanza to S. Donziger re: "pissed off") ("Tonight I have to coordinate the new request for money with the huao.... [T]he huo is asking for other technical field implements."); PX 894 (Aug. 9, 2007 Email from L. Yanza to S. Donziger re: "bank information urgent").

1498 *United States v. Kay,* 513 F.3d 432, 449 (5th Cir.2007).

1499 *See supra Facts* § V.A.

1500 *E.g.,* PX 1279 (Mar. 30, 2010 Email from J. Prieto to S. Donziger, L. Yanza, and P. Fajardo re: "Protection Action").

1501 15 U.S.C. § 78dd–2(a).

1502 *See Rotec Indus. Inc. v. Mitsubishi Corp.,* 163 F.Supp.2d 1268, 1278–79 (D.Or.2001).

1503 *United States v. Liebo,* 923 F.2d 1308, 1310–11 (8th Cir.1991); *see also Complaint, SEC v. UTStarcom, Inc.,* No. 09–cv–6094 (N.D.Cal. Dec. 31, 2009).

1504 Complaint, *SEC v. Schering–Plough Corp.,* No. 04–cv–945, (D.D.C. June 9, 2004).

1505 *See, e.g.,* PX 901 (Aug. 15, 2007 Email from K. Wilson to S. Donziger, J. Kohn, K. Kenney re: "Frente Wire") ("The wire transaction for Frente has been completed."); PX 913 (Sept. 12, 2007 Email from L. Yanza to S. Donziger and P. Fajardo re: "Let's not give Texaco the pleasure of stopping the PG") ("send ... money to the secret account to give it to the Wuao").
Donziger likewise provided Cabrera with an office, an assistant, and life insurance. PX 877 (July 1, 2007 Email from Fajardo to S. Donziger and L. Yanza re: "Worried") (advocating that the team provide Cabrera with an office and an assistant, to which Donziger replied that he was "on it."); *see also* Jan. 29, 2011 Donziger Dep. Tr. 3808:14–3808:16 (reviewing email and stating "it looks to me like insurance for Cabrera was purchased").

1506 15 U.S.C. § 78dd–2(a)(3).

1507 15 U.S.C. § 78dd–3(f)(2)(A).

1508 15 U.S.C. § 78dd–2(h)(3)(A).

1509 *See supra Facts* § V.A.; *see also* PX 871 (June 12, 2007 Email string between L. Yanza and S. Donziger); PX 913 (Sept. 12, 2007 Email from L. Yanza to S. Donziger and P. Fajardo).

1510 PX 895 (Aug. 14, 2007 Email from S. Donziger to K. Wilson and J. Kohn re: "Critical money transfer") ("Pls transfer 50,000 to the following account in Ecuador.").

1511 PX 894 (Aug. 9, 2007 Email from L. Yanza to S. Donziger re: "bank information urgent") ("[Kohn] ha[s] to deposit 50k so we can pay the advances to the consultants so they will start their work as soon as possible. I hope it is deposited by Wednesday at the latest. I'll be in touch that day to arrange all of this with Huao.").

1512 PX 578 (ADF Account Statement), at 6 (reflecting transfer to "Cabrera Vega, Richard Stalin" on Aug. 17, 2007); PX 590 (Aug. 17, 2007 Account–to–Account Transfer Receipt between ADF and Cabrera Vega); PX 591 (Aug. 17, 2007 Ltr. from J. Fajardo to Banco Pichincha Manager); PX 593 (Banco Pichincha Record of Cash Transactions for the ADF).

1513 PX 348 ("The Expert [Cabrera] is hereby reminded that he is an auxiliary to the Court for purposes of providing to the process and to the Court scientific elements for determining the truth.").

1514 *United States v. Kay,* 359 F.3d 738, 755 (5th Cir.2004).

1515 *See, e.g.,* DI 1849, Ex. I (Information at 6–9, 14, *United States v. Pride Forasol S.A.S.,* No. 4:10–cr–771 (S.D.Tex. Nov. 4, 2010)) (alleging that bribery of Indian court official in order to obtain favorable judgment constituted effort to obtain or retain business); Ex. J (Plea Agreement at 12, *United States v. Brown,* No. H–06–cr–316 (S.D.Tex. Sept. 14, 2006)) (noting bribes to court officials provided business advantage to subsidiaries).

1516 18 U.S.C. § 1961(5).

1517 *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

1518 *Id.* at 240, 109 S.Ct. 2893.

1519 *First Capital Asset Mgmt. v. Satinwood, Inc.,* 385 F.3d 159, 181 (2d Cir.2004) (quoting *GICC Capital Corp. v. Tech. Fin. Grp., Inc.,* 67 F.3d 463, 466 (2d Cir.1995)).

1520 *Cofacredit S.A. v. Windsor Plumbing Supply Co.,* 187 F.3d 229, 242 (2d Cir.1999).

1521 *First Capital Asset Mgmt.,* 385 F.3d at 181.

1522 18 U.S.C. § 1961(1).

1523 *CGC Holding, Co. LLC v. Hutchens,* 824 F.Supp.2d 1193, 1210 (D.Colo.2011); *see also United States v. Chao Fan Xu,* 706 F.3d 965, 978–79 (9th Cir.2013) (finding a domestic pattern where, in the absence of the domestic conduct, the conduct abroad and the scheme itself "would have been a dangerous failure").

1524 *Cf. Norex Petroleum Ltd. v. Access Indus., Inc.,* 631 F.3d 29 (2d Cir.2010).

1525 18 U.S.C. § 1964(c).

1526 *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 769 (2d Cir.1994) (internal quotation marks omitted).

1527 *Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 120 (2d Cir.2003).

1528 *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006).

1529 *Marshall & Ilsley Trust Co. v. Pate,* 819 F.2d 806, 809 (7th Cir.1987); *see also Terminate Control Corp. v. Horowitz,* 28 F.3d 1335, 1347 (2d Cir.1994) (noting that *Marshall* "appears to be a correct reading of § 1964(c)" but not so holding).

1530 DI 1861 (Defs.' Mem. of Law in Supp. Mot. to Dismiss for Lack of Jurisdiction), at 16.

1531 *Cf. Lerner,* 318 F.3d at 123 ("The mere recitation of the chain of causation alleged by the plaintiffs is perhaps the best explanation of why they do not have standing in this case.") (quoting *Newton v. Tyson Foods, Inc.,* 207 F.3d 444, 447 (8th Cir.2000)).

1532 *See supra Facts* § XIII.A, *Discussion* § I.A.

1533 *Hemi Grp., LLC v. City of New York,* 559 U.S. 1, 15, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010).

1534 *See infra Discussion* § VII.B.

1535 *Cf. Anza,* 547 U.S. at 459, 126 S.Ct. 1991; *see also Holmes v. Sec. Investor Protection Corp.,* 503 U.S. 258, 272–73, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

1536 *Holmes,* 503 U.S. at 269–70, 112 S.Ct. 1311.

1537 PX 558 (Jan. 5, 2011 retainer agreement).

1538 The retainer agreement contains New York governing law clauses, PX 558 ¶¶ (10)(a), 11, which control under N.Y. Gen. Oblig. L.. § 5–1401(1).

1539 PX 558 (Jan. 5, 2011 retainer agreement) ¶ (3)(a) (the 6.3 percent is the product of 31.5 percent of the Total Contingency Fee Payment, which is 20 percent of all funds collected).
It is conceivable that the percentage of any Judgment proceeds to which Donziger is entitled has been slightly diluted subsequently in order to accommodate giving equity to new investors, but this neither matters nor is persuasively shown on the record.

1540 *See id.* ¶ (3)(b).

1541 *Id.* ¶ (3)(d).

1542 *Id.* ¶ (3)(a).

1543 *See supra Facts* § XIII.A.

1544 *United States v. Zichettello,* 208 F.3d 72, 99 (2d Cir.2000).

1545 *Salinas v. United States,* 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see also* 18 U.S.C. § 371.

1546 *Salinas,* 522 U.S. at 66, 118 S.Ct. 469.

1547 DI 283 (Am. Compl.) ¶¶ 8–18.

1548 *See supra Facts* § II.C.1.

1549 N.Y. Jud. L. § 487. The statute provides for treble damages and criminal sanctions against "[a]n attorney or counselor who ... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

1550 *Supra Facts* § V.D.

1551 *Supra Facts* § XI.A.3.b.iii.

1552 DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 347–48.

1553 *Id.* at 352.

1554 *See, e.g., City of New York v. Mickalis Pawn Shop, LLC,* 645 F.3d 114, 142–45 (2d Cir.2011); *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41, 50–52 (2d Cir.1996).

1555 *Chevron Corp. v. Donziger,* 886 F.Supp.2d 235, 264–67 (S.D.N.Y.2012).

1556 DI 1857 (Donziger Defs.' Post-trial Reply Mem. of Law), at 34–35.

1557 *E.g.,* DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 23–28, 48–51, 52–53; Tr. (Donziger closing) 2883:6–18; Tr. (Donziger opening) 31:10–24; DI 1600 (Defs.' Trial Brief Requesting Judicial Notice of Four Ecuadorian Court Decisions).

1558 *See, e.g.,* DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 23–28.

1559 Tr. 195:16–198:25 (PX 399, PX 400), 456:14–456:24 (PX 429), 457:17–459:8 (PX 430), 459:16–25 (PX 431), 2958:12–2959:11 (DX 8095).

1560 Fed.R.Evid. 801(c).
Statements and conclusions in court rulings and documents are inadmissible hearsay absent a relevant exception. *E.g., United States v. Sine,* 493 F.3d 1021, 1036 (9th Cir.2007); *Herrick v. Garvey,* 298 F.3d 1184, 1191–92 (10th Cir.2002); *United States v. Jones,* 29 F.3d 1549, 1554 (11th Cir.1994). Were they not, Fed.R.Evid. 803(22), which creates a hearsay exception for evidence of a judgment of final conviction, would have been superfluous. *See Strauss v. Credit Lyonnais, S.A.,* 925 F.Supp.2d 414, 447 (E.D.N.Y.2013) (judgment of conviction admissible pursuant to exception to hearsay rule).

1561 Fed.R.Evid. 803(8).

1562 *Herrick,* 298 F.3d at 1192; *Jones,* 29 F.3d at 1554; *Nipper v. Snipes,* 7 F.3d 415, 417 (4th Cir.1993); *United States v. Nelson,* 365 F.Supp.2d 381, 388 (S.D.N.Y.2005); *L–3 Commc'ns Corp. v. OSI Sys., Inc.,* 02 Civ. 9144(PAC), 2006 WL 988143, at *3 (S.D.N.Y. Apr. 13, 2006); 5 Weinstein's Federal Evidence § 803.10[1], at 5–803 (2d ed.2002).
For the sake of completeness, we note that defendants at one point requested that the Court take judicial notice of the Ecuadorian decisions enumerated above (other than the National Court of Justice decision), arguing that the decisions if so noticed would become "*prima facie* evidence of the facts and opinions stated therein." DI 1600 (Defs.' Trial Brief Requesting Judicial Notice of Four Ecuadorian Court Decisions). The Court declined to do so in a memorandum decision filed November 5, 2013. DI 1683 (Nov. 5, 2013 Order).

1563 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 3.

1564 *See id.* at 48–51.

1565 PX 430 (Appellate Judgment), at 10. The Court notes also that, although not discussed by the parties, the National Court of Justice stated that "it is not within its scope of [the appellate] court to have jurisdiction to hear collusive action cases ... or procedural

fraud." DX 8095 (Opinion of Ecuadorian National Court of Justice), at 95.

1566 PX 431 (Appellate Clarification Order), at 4.

1567 Ecuador Code of Civ. P. Art. 838; DI 1413–8, at 52.

1568 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 26. Although the Court, relying on the declarations submitted on the preliminary injunction motion, indicated its then understanding that the intermediate appellate court would review the facts and law *de novo,* the additional evidence presented at trial reveals that this conclusion was premature. Moreover, as the appeal in this case later proceeded, that understanding proved incorrect. *See Chevron Corp. v. Donziger,* 768 F.Supp.2d 581, 621 (S.D.N.Y.2011). Further, the Patton Boggs Invictus Memo stated its understanding that "the standard of review is not *de novo.*" PX 2382 (Invictus memo), at 24.

1569 PX 430 (Appellate Judgment).

1570 *Id.* at 11.

1571 *Supra Facts* § XII.A.2.

1572 PX 1211 (Jan. 7, 2010 Email from L. Garr to J. Sáenz), at 1.
The appellate court itself noted "that at this stage alone there were almost two hundred record binders (about twenty thousand pages), not counting the more than two hundred thousand papers in the first instance case." PX 430 (Appellate Judgment), at 2. The parties did not indicate whether the appellate court's review "on the merit of the record" consisted of: (1) the record binders only (preventing it from reviewing and evaluating the 200,000 pages of trial evidence), or (2) the 20,000 pages in record binders and the 200,000 pages of trial evidence (which it could not have reviewed in five weeks). The appellate court's review was not *de novo* in either case.

1573 PX 410 (Nov. 29, 2011 Certificate of Lottery Assignment on Appellate Panel).

1574 PX 430 (Appellate Judgment).

1575 *Cf.* PX 4200 (Rayner Direct) ¶ 3(b) (stating that it would have been impossible for Judge Zambrano to have read the approximately 236,000 pages of Lago Agrio case record in eight weeks).

1576 *Supra Facts* § XII.B.

1577 DX 8095 (Opinion of Ecuadorian National Court of Justice), at 95, 97–98.

1578 *Id.* at 157.

1579 As with Chevron's appeal to the intermediate appellate court, the National Court of Justice could not have evaluated Chevron's bribery claim or any of its allegations concerning Guerra, as Guerra had not yet come forward when Chevron filed its appeal.

1580 Restatement (Third) of the Foreign Relations Law of the United States § 482(1)(a); *see also* N.Y. CPLR § 5304(a)(1) ("A foreign country judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."); *cf. Hilton v. Guyot,* 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (holding that if the foreign court provided a full and fair trial, "under a system of jurisprudence likely to secure an impartial administration of justice ... and there is nothing to show either prejudice ... or fraud in procuring the judgment," it should not be "tried afresh").

1581 *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1410 (9th Cir.) (declining to recognize or enforce Iranian judgment), *cert. denied,* 516 U.S. 989, 116 S.Ct. 519, 133 L.Ed.2d 427 (1995).

1582 *Bridgeway Corp. v. Citibank,* 201 F.3d 134, 142 (2d Cir.2000) (affirming district court's refusal to recognize a 1993 Liberian

judgment because the Liberian judicial system then did not provide impartial tribunals or procedures compatible with the requirements of due process).

1583 *Soc'y of Lloyd's v. Ashenden,* 233 F.3d 473, 477 (7th Cir.2000) (internal quotation marks and citations omitted).

1584 *Id.* at 477 (in evaluating the law of a foreign nation, courts are "not limited to the consideration of evidence that would be admissible under the Federal Rules of Evidence; any relevant material or source may be consulted").

1585 Courts are obliged to do so in other circumstances as well including the determination whether the enforce a foreign judgment that is presented for enforcement and the determination of the availability of a foreign forum for purposes of a *forum non conveniens* motion. (The latter is determined under a different standard that is far more forgiving of problems with foreign legal systems.)

1586 Álvarez is an impressively credentialed expert who has practiced law in Ecuador for 43 years and has held numerous elected and appointed public offices and legal academic positions in that country. PX 6200 (Álvarez Direct) ¶¶ 8–23. In addition, he has been a weekly columnist for 19 years, covering legal and political issues for two major newspapers in Ecuador.

In *Naranjo,* the Second Circuit characterized Álvarez as "an avowed political opponent of the country's current President, Rafael Correa." *Chevron Corp. v. Naranjo,* 667 F.3d 232, 238 (2d Cir.2012). The evidence presented at trial demonstrates that he and Correa never were political opponents. Álvarez ran for president of Ecuador in 1992 for the Christian Democratic Party at a time when President Correa was not publicly known and his political party did not exist. Tr. (Álvarez) 2032:14–25. Further, when asked about his position regarding President Correa, Álvarez "acknowledge[d] the positive actions or undertakings that [President Correa] has carried out on behalf of Ecuador," but explained that, "as an Ecuadorian citizen, as an attorney, and as a university professor, as a father and grandfather in my family, I cannot hold back from analyzing and criticizing President Correa's actions, which constitute violations of the rule of law that lead to a lack of independence in the branches or powers of the state and interference in the functioning of the Ecuadorian judiciary." *Id.* at 2033:1–14.

It was mentioned also that the Court drew "significant support" from Álvarez in granting the preliminary injunction. *Naranjo,* 667 F.3d at 238 n. 9. Defendants had ample opportunity at trial to submit evidence on this point, but elected not to do so. The Court now has evaluated Álvarez's demeanor among other things and finds that he is a credible witness. And although the Court continues to draw support from Álvarez's testimony, it draws significant support also from the U.S. Department of State's Country Reports and the statements of Donziger and his colleagues. *See generally Bridgeway,* 201 F.3d at 143 (upholding district court's reliance on such reports in concluding that Liberian judicial system was not fair and impartial and did not comport with the requirements of due process).

1587 PX 6200 (Álvarez Direct) ¶ 122.

1588 *Id.* ¶ 25.

1589 *Id.* ¶ 26.

1590 *Id.* ¶ 27.

1591 *Id.*

1592 *Id.* ¶ 28.

1593 *Id.* ¶ 29.

1594 *Id.*

1595 *Id.* ¶¶ 30–31.

1596 *Id.* ¶ 31.

1597 *Id.* ¶ 32.

1598 *Id.* ¶ 33.

1599 *Id.* ¶ 35.

1600 *Id.* ¶ 36.

1601 *Id.* ¶¶ 36–37.

1602 *Id.* ¶ 38.

1603 *Id.* ¶ 39 ("In addition, threats of criminal prosecution were made against both the members of the Constitutional Tribunal and the original 57 representatives.").

1604 *Id.*

1605 *Id.* ¶ 43.

1606 *Id.* ¶ 44

1607 *Id.* ¶ 46.

1608 *Id.* ¶ 48.

1609 *Id.* ¶ 50.

1610 *Id.* ¶¶ 39–51, 119.

1611 *Id.* ¶¶ 52–61.

1612 *Id.* ¶¶ 52–56, 66, 74.

1613 *Id.* ¶¶ 58–61; *see also id.* ¶ 60 ("President Correa has stated that 'I really, really hate the big multi-national companies....' ").

1614 *Id.* ¶ 60.

1615 *Id.* ¶ 66.

1616 *Id.* ¶ 67 (quoting *From the Judiciary Council to the Nation,* Resolution No. 043–2010, June 22, 2010).

1617 *Id.*

1618 *Id.* ¶ 77.

1619 *Id.* ¶¶ 78, 80.

1620 *Id.* ¶¶ 83–85.

1621 *Id.* ¶¶ 83, 85, 107.

1622 *Id.* ¶ 86.

1623 *Id.* ¶ 92.

1624 PX 1500 (Report of International Oversight Committee), at 43; *see also* PX 6200 (Álvarez Direct) ¶ 115.

1625 PX 6200 (Álvarez Direct) ¶ 109.

1626 *Id.* ¶¶ 110–111.

1627 *Id.* ¶ 117.

1628 *Id.* ¶ 118.

1629 *Id.* ¶¶ 93–94.

1630 *Id.* ¶ 95.

1631 *Id.*

1632 *Id.* ¶ 96.

1633 *Id.* ¶ 97.

1634 *Id.* ¶ 98; *see also id.* ("The judicial officers who arranged for and allowed this analysis were sanctioned by the Transitional Judicial Council, while Judge Paredes was not.").

1635 *Id.* ¶ 99.

1636 *Id.* ¶ 101. It is worth noting that Judge Encalada left Ecuador and sought asylum in Colombia shortly after making her statement. *Id.*

1637 *Id.* ¶ 102.

1638 *Id.* ¶ 104.

1639 *See, e.g., id.* ¶ 70 (a former President of the Supreme Court said in January 2010 that "judges are obeying certain government influences.... There are judges who have been instructed, who because of their position or for other reasons, do improper things, and that is the way justice is administered in general, and that's why the country is not progressing, nor will it make much progress as long as it has no independent judiciary system"); *id.* (another former Supreme Court justice wrote that "[s]ince 2008, the administration of justice has entered an institutional crisis.... [T]here is a marked trend whereby the Executive Branch is taking over all sorts of duties, and the Judiciary has not been able to escape this trend"); *id.* (the Chairman of the special committee that selected the justices of the Supreme Court in 2005 declared recently that "[t]he great disgrace of the court system is that political interests can't resign themselves to not interfere with the courts.... The current constitution has minimized the power of the Court; that is evident in its rulings. Political influences have turned out to be ruinous"); *id.* ¶ 57 (an attorney and academic wrote in June

2009 that "what we are experiencing on a daily basis, those of us who are involved in judicial activity, cannot be worse. With few exceptions, we find corruption at every step, delays all around; alarming incompetence, undue pressure and interference, and on and on, to the point that at this time justice in Ecuador is just one more item up for sale").

1640 PX 1234 (2010 Investment Climate Statement), at 4, 8; PX 1478 (2011 Investment Climate Statement), at 4, 7.

1641 PX 1234 (2010 Investment Climate Statement), at 4; PX 1478 (2011 Investment Climate Statement), at 4.

1642 PX 1108 (2008 Human Rights Report), at 3; PX 1252 (2009 Human Rights Report), at 4; ("While the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases.... Judges occasionally reached decisions based on media influence or political and economic pressures.").

1643 PX 1108 (2008 Human Rights Report), at 3; PX 1252 (2009 Human Rights Report), at 4.

1644 PX 9A (Mar. 30, 2006 *Crude* Clip).

1645 PX 7A (Mar. 30, 2006 *Crude* Clip), at CRS–053–02–CLIP–04; PX 8A (Mar. 30, 2006 *Crude* Clip).

1646 PX 67A (Jun. 6, 2007 *Crude* Clip), at CRS–350–04–CLIP–01.

1647 PX 11A (Apr. 3, 2006 *Crude* Clip), at CRS–060–00–CLIP–04.

1648 PX 81A (Undated *Crude* Clip), at CRS–129–00–CLIP–02.

1649 PX 5A (Mar. 30, 2006 *Crude* Clip), at CRS–052–00–CLIP–6; PX 67A (Undated *Crude* Clip), at CRS–350–04–CLIP–01.

1650 PX 81A (Undated *Crude* Clip), at CRS–129–00–CLIP–02.

1651 PX 853 (Apr. 28, 2007 ROE Press Release), at 1.

1652 PX 844 (Mar. 21, 2007 Email from M. Eugenia Yepez Relegado to S. Donziger re: "report") (capitals in original, italics added); *see* Tr. (Ponce) 2303:20–2304:2.

1653 PX 487R (Apr. 27, 2007 ROE Press Release); PX 853 (Transcript of Correa Radio Address).

1654 PX 2477A (Apr. 26, 2007 *Crude* Clip).

1655 *Supra Facts* § VI.

1656 PX 2503 (*Correa says the judgment against Chevron in Ecuador must be respected,* ULTIMAHORA, Feb. 19, 2011).

1657 *See, e.g.,* PX 7511 (*Ecuador's president denounces Chevron as 'enemy of our country,'* The Raw Story, Aug. 17, 2008); PX 7516 (Tr., Excerpt from *Cadena Presidencial,* Pres. Correa, Sept. 14, 2013); PX 7518 (*Chevron tried to approach Correa, negotiating with the White House,* El Telégrafo, Sept. 16, 2013); PX 7519 *(Chevron managed nine teams of experts in order to 'suffocate' Ecuador,* El Telégrafo, Sept. 17, 2013); PX 7520 (Tr., *Enlace Presidencial,* Pres. Correa, Sept. 21, 2013); PX 7526 (Tr. *Cadena Presidencial,* Pres. Correa, Sept. 28, 2013).

1658 *Supra Facts* § IX.A.4.
It bears mention that unlike Zambrano, Álvarez stated that he has been labeled a traitor and someone who "sold out his country" as a result of the opinions he presented to the Court. Tr. (Álvarez) 2008:9–2011:21.

* * *

1659 "Evidence that the judiciary was dominated by the political branches of government ... support[s] a conclusion that the legal system was one whose judgments are not entitled to recognition." Restatement (Third) of the Foreign Relations Law of the United States S S S S S S S S § 482 cmt. b; *see also Bridgeway,* 201 F.3d at 142 n. 3.

1660 It fails also because Chevron has proved that it did not have a full and fair opportunity to defend itself. *See Republic of Ecuador,* 638 F.3d at 400 ("Collateral estoppel bars relitigation of an issue that has already been fully and fairly litigated in a prior proceeding.") (internal quotation marks and citation omitted).

1661 *Ehrenfeld v. Mahfouz,* 489 F.3d 542, 547 (2d Cir.2007), *certified question accepted sub nom. Ehrenfeld v. Bin Mahfouz,* 9 N.Y.3d 838, 840 N.Y.S.2d 754, 872 N.E.2d 866 (2007), and *certified question answered sub nom. Ehrenfeld v. Bin Mahfouz,* 9 N.Y.3d 501, 851 N.Y.S.2d 381, 881 N.E.2d 830 (2007).

1662 Donziger's Ecuadorian travel records show that he spent approximately 187 out of 1,460 days in Ecuador between 2007 and 2011. PX 1509 (Donziger's Ecuador Travel Records). While he of course has not spent every moment of his life in New York that was not spent in Ecuador, the Court infers that a majority of that time was spent here.

1663 *See* Tr. (Dahlberg) 871:9–25; PX 4900 (Dahlberg Direct), at 16.

1664 PX 558 (Donziger Jan. 2011 Retainer Agreement).

1665 *Id.* at 1.

1666 *Id.*

1667 *Id.* ¶ 3.

1668 *Id.* at 1–2.

1669 *Id.* ¶ 1.

1670 *Id.* ¶ 2(b).

1671 *Id.* (emphasis added).

1672 *Id.* ¶¶ 10(a), 11.

1673 PX 3200 (Russell Direct) ¶ 32 ("At times, Donziger worked on this case in Ecuador, but he also directed the team's activities from Manhattan by phone and email.").
The LAP representatives appear to concede that Donziger ran the case out of his apartment. Tr. (Gomez Opening) 40:3–4; *see also* Woods June 18, 2013 Dep. Tr. at 159:24–160:16.

1674 PX 0616 (Ecuador Case Project Account—2758; Law Firm Account—0218); PX 617 (S. Donziger Personal Checking Account—5365). The Court takes judicial notice of the fact that the routing number at the bottom of a check corresponds to the state in which the account was opened.

1675 *E.g.,* PX 4900 (Dahlberg Direct) ¶¶ 44, 50, 58, 71, 75, 78.

1676 *E.g.,* PX 559 (Fajardo Retention Agreement), at 6; PX 553 (Patton Boggs Retention Agreement), at 7; PX 544 (Emery Celli Retention Agreement), at 4 (signed by Donziger and Fajardo); PX 566 (H5 Retention Agreement), at 5; PX 552 (Burford Agreement), at 32 (listing Piaguaje but not Camacho as a claimant).

1677 *E.g.,* PX 566 (H5 Retention Agreement), at 6–7; PX 552 (Burford Agreement), at 37.

1678 PX 1063 (Sept. 9, 2008 Email from S. Donziger to L. Yanza), at 1.

1679 PX 3100 (Bogart Direct) ¶ 5; PX 566 (H5 Retention Agreement). PX 2196 shows that Donziger exchanged 583 text messages with individuals from H5 between September 14, 2009 and May 13, 2011. The exhibit is not entirely clear as to whether Donziger and H5 called one another 1,287 times or spoke for 1,287 minutes but, in either case, it is clear that they communicated extensively. PX 2196 (Donziger's Call Volume), at 2.

1680 PX 3100 (Bogart Direct) ¶ 6. Patton Boggs, Donziger, and Burford spent "a number of months" negotiating the funding deal. *Id.* ¶ 7.

1681 *E.g.,* PX 1310 (Apr. 30, 2010 Email from E. Daleo to J. Brickell, I. Maazel, S. Donziger, L. Garr, J. Abady, A. Wilson, N. Economou, I. Moll, A. Woods, and W. Narwold re: 1:00 Invictus Meeting in New York); PX 1386 (July 4, 2010 Email from S. Donziger to S. Seidel, N. Economou, C. Bogart, J. Molot, and J. Tyrrell re: Next Steps, Invictus Draft Budget); PX 1394 (July 13, 2010 Email from NYScanner@PattonBoggs.com to S. Sepulveda re: Ecuador—Invictus Chart).

1682 PX 3100 (Bogart Direct) ¶ 7.

1683 The Court recognizes that Donziger did not spend all of the 1,273 days that he was not in Ecuador between 2007 and 2011 in New York. That the center of his operations, home, and family are were located in New York, however, permits an inference that he spent much of that time in New York. Absent evidence to the contrary, the Court thus infers that at least some if not most of the documented communications at issue were received in or made from New York.

1684 PX 962 (Jan. 24, 2008 Email from D. Beltman to S. Donziger and A. Maest re: Draft Outline of the Cabrera Report); PX 2433 (Feb. 8, 2008 Email from D. Beltman to S. Donziger, A. Maest, J. Peers, B. Lazar, and P. Fajardo re: Draft Outline of the Cabrera Report) ("These revisions are based on what we talked about last Friday."); PX 978 (Feb. 27, 2008 Email from D. Beltman to S. Donziger re: Start on Report Text) (attaching a draft of the Cabrera Report asking for guidance and edits); PX 985 (Mar. 5, 2008 Email from D. Beltman to S. Donziger re: Annex Tracking Table); PX 987 (Mar. 6, 2008 Email Chain Between D. Beltman and S. Donziger re: Translation of Uhl Report); PX 1018 (Mar. 30, 2008 Email Chain Between D. Beltman and S. Donziger re: Table of Calculated Damages); PX 1030 (Apr. 2, 2008 Email from D. Beltman to S. Donziger and A. Maest re: List of Items Moving Forward); PX 1060 (Aug. 15, 2008 Email from D. Beltman to S. Donziger and J. Kohn re: Work Status) (updating Donziger on each aspect of Stratus' work, per Donziger's request).

1685 PX 1207 (Jan. 11, 2010 Email from S. Donziger to D. Beltman and Response re: "30x Valdez"); PX 1110 (Mar. 1, 2009 Email from S. Donziger to D. Beltman re: "30x Valdez"); PX 1669 (Jan. 10–12, 2009 Email Chain Between C. Mitchell, S. Donziger, E. Bloom, S. Saucedo, and D. Beltman re: Cabrera Report).

1686 PX 1079 (Nov. 5, 2008 Email chain Between D. Beltman and S. Donziger re: Clapp); PX 2438 (May 14, 2008 Email chain Between D. Beltman and S. Donziger re: "Urgent Issue") (discussing need to keep the Clapp report away from the press).

1687 PX 1667 (Sept. 24, 2008 Email from D. Beltman to S. Donziger, A. Maest, and J. Peers re: "Draft Press Release").

1688 Donziger Jan. 14, 2011 Dep. Tr. at 2794:10–20.

1689 PX 2205 (Proceedings in Which Fajardo Declaration Was Filed); PX 1304 (Apr. 24, 2010 Email chain Between S. Donziger, A. Wilson, J. Abady, I. Maazel, E. Westenberger re: "Fajardo Letter"); PX 1313 (May 3, 2010 Email from E. Yennock to S. Donziger and others re: "Fajardo Declaration"); PX 1315 (May 3, 2010 Email from S. Donziger to E. Westenberger and others re: "Fajardo Declaration Edits").

1690 PX 551 (Oct. 18, 2010 Retainer Agreement with Emery Celli Brinckerhoff & Abady, LLC); PX 1319 (May 3, 2010 Email from I. Maazel to others).

1691 Tr. (Shinder) 1268:4–1273:19.

1692 Tr. (Russell) 298:5.

Russell testified that in summer 2004, he "did [his] work from both the United States and Ecuador, and communicated the

activities of the scientific team primarily by email with Donziger when he was in New York City and also when he was in Ecuador.... All of [his] work was performed at Donziger's direction." PX 3200 (Russell Direct) ¶ 24.

1693 DX 1750 (Donziger Direct) ¶ 113; Tr. (Russell) 394:6–19.

1694 PX 1094 (Jan. 4, 2009 Email from K. Hinton to S. Donziger re: "Planning"); PX 2444 (Feb. 3, 2009 Email from S. Donziger to K. Hinton re: "DiNapoli"); PX 1106 (Feb. 13, 2009 Email from S. Donziger to B. Barnes, S. Moorhead, P. Thomasson, and K. Hinton re: "D[i]Napoli info/instructions for Ben"); PX 1133 (May 5, 2009 Email Chain Between S. Donziger and K. Hinton re: "Cuomo Letter"); PX 1132 (May 5, 2009 Email chain among S. Donziger, A. Woods, and K. Hinton re: "Bob McCarty"); PX 1228 (Feb. 17, 2010 Email chain between S. Donziger, A. Woods, K. Hinton, L. Garr, and H. Shan re: "Blog Advice"); PX 1456 (Nov. 5, 2010 Email from S. Donziger to H. Shan, M. Ramos, M. Anderson, B. Tarbatton, K. Koenig, A. Woods, K. Hinton re: "Blogging and Such") (chastising the recipients for failing to blog about the "case and the struggle of the Amazonian communities" more frequently).

1695 PX 1048 (July 11, 2008 Email from K. Hinton to S. Donziger); PX 1131 (May 4, 2011 Ltr. from A. Cuomo to D. O'Reilly [Chevron]); PX 2445 (May 11, 2009 Ltr. from C. James [Chevron] to A. Cuomo).

1696 PX 1106 (Feb. 13, 2009 Email from S. Donziger to B. Barnes, S. Moorhead, P. Thomasson, and K. Hinton); PX 7489 (Nov. 17, 2008 Ltr. from T. DiNapoli to Chevron); PX 5802 (Dec. 6, 2010 Ltr. from P. Doherty at the Office of T. DiNapoli to Chevron); PX 7457 (Apr. 18, 2010 Email from M. Anderson to S. Donziger and A. Woods re: "DiNapoli Investor Statement").

1697 This occurred in summer 2005 when, according to Berlinger, "a charismatic American environmental lawyer named Steven Donziger knocked on my Manhattan office door. He was running a class-action lawsuit on behalf of 30,000 Ecuadorian inhabitants of the Amazon rainforest and was looking for a filmmaker to tell his clients' story." *Chevron Corp. v. Berlinger,* 629 F.3d 297, 302–03 (2d Cir.2011) (quoting *In re Application of Chevron Corp.,* 709 F.Supp.2d 283, 287 (S.D.N.Y.2010)) (emphasis omitted).

1698 *See Aguinda v. Texaco, Inc.,* 93 Civ. 7527(JSR).

1699 *See Yaiguaje et al. v. Chevron Corp.,* 10 Civ. 316(LBS).

1700 *In re Application of Chevron Corp.,* 10 MC 1(LAK) [DI 6]; *In re Application of Chevron Corp.,* 10 MC 2(LAK) [DI 17].

1701 *Kronisch v. United States,* 150 F.3d 112, 130 (2d Cir.1998), *overruled on other grounds Rotella v. Wood,* 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000).

1702 *Sunward Electronics, Inc. v. McDonald,* 362 F.3d 17, 23 (2d Cir.2004).

1703 *PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1109 (2d Cir.1997).

1704 *Pennie & Edmonds v. Austad Co.,* 681 F.Supp. 1074, 1078 (S.D.N.Y.1988); *see also Grove Press, Inc. v. Angleton,* 649 F.2d 121, 122 (2d Cir.1981).

1705 *Girl Scouts of U.S. v. Steir,* 102 Fed.Appx. 217, 219 (2d Cir.2004) (citation omitted).

1706 *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.,* 98 F.3d 25, 29 (2d Cir.1996).

1707 *Sunward,* 362 F.3d at 23 (citing *CutCo Indus., Inc. v. Naughton,* 806 F.2d 361, 367 (2d Cir.1986)).

1708 *PDK Labs,* 103 F.3d at 1109.

1709 *Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 170–71 (2d Cir.2010).

1710 *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 168 (2d Cir.2013).

1711 *Fischbarg v. Doucet,* 38 A.D.3d 270, 273, 832 N.Y.S.2d 164, 167 (1st Dep't), *aff'd* 9 N.Y.3d 375, 849 N.Y.S.2d 501, 880 N.E.2d 22 (2007).

1712 *Id.* at 274–75, 832 N.Y.S.2d 164; *see also Pennie,* 681 F.Supp. at 1078.

1713 *See SEC v. Softpoint, Inc.,* 95 Civ. 2951(JSR), 2012 WL 1681167, at *3 (S.D.N.Y. May 9, 2012) (personal jurisdiction existed where the defendant "transacted business in New York when he litigated the case that resulted in the judgment the SEC now seeks to enforce. This enforcement action arises directly from the litigation in which Cosby participated. Moreover, Cosby's appeal to courts located in New York constituted purposeful availment of the state's privileges, and he could reasonably foresee that, if he did not prevail, the SEC might enforce the judgment against him in the very courts to which he had turned.").

1714 *Ehrenfeld v. Bin Mahfouz,* 9 N.Y.3d 501, 509, 851 N.Y.S.2d 381, 881 N.E.2d 830 (2007).

1715 *Chloe,* 616 F.3d at 170–71.

1716 *Kronisch v. United States,* 150 F.3d 112, 130 (2d Cir.1998) (quoting *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 466–67, 527 N.Y.S.2d 195, 522 N.E.2d 40, 43 (1988)).

1717 *Licci,* 732 F.3d at 168–69 (there was personal jurisdiction over the Lebanese Canadian Bank in New York where the bank engaged in transactions with correspondent New York accounts to funnel money to terrorist organizations that injured or killed plaintiffs or their family members); *see also Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC,* 450 F.3d 100, 104 (2d Cir.2006) ("In cases where claims have been dismissed on jurisdictional grounds for lack of a sufficient nexus between the parties' New York contacts and the claim asserted, the event giving rise to the plaintiff's injury had, at best, a tangential relationship to any contacts the defendant had with New York. In fact, in those cases, the injuries sustained and the resulting disputes bore such an attenuated connection to the New York activity upon which the plaintiffs attempted to premise jurisdiction that the disputes could not be characterized as having 'arisen from' the New York activity."); *Sunward,* 362 F.3d at 23–24; *Kronisch,* 150 F.3d at 130–31.

1718 *Licci,* 732 F.3d at 169.

1719 103 F.3d 1105 (2d Cir.1997).

1720 *Id.* at 1109.

1721 *Id.* at 1109–10.

1722 *Id.* at 1107.

1723 *Id.* at 1110–11.

1724 *See supra note* 1304.

1725 32 A.D.2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969).

1726 *Id.* at 425, 302 N.Y.S.2d 961.

1727 *Id.* at 426, 302 N.Y.S.2d 961.

1728 *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. BP Amoco P.L.C.,* 319 F.Supp.2d 352, 360 (S.D.N.Y.2004).

1729 Tr. (Donziger) 2635:11–22.

1730 Camacho Dep. Tr. at 94:12–14, 105:20–22, 108:23–24, 133:20–21, 196:8–11, 219:18–20; J. Piaguaje Dep. Tr. at 53:24–54:3.

1731 The LAP Representatives argue that any fraudulent actions that Donziger took were not and could not have been in their interest. First, not all of the relevant actions that Donziger took in New York in and of themselves were illegal. More importantly, the LAPs effectively gave Donziger, Fajardo, and their other lawyers carte blanche to do as they saw fit. Tr. (J. Piaguaje) 2388:23–2389:1 ("Q. You approved of each and every one of the actions undertaken by Mr. Fajardo in all the courts in which he represented you, correct? A. Yes."). Those attorneys endeavored unwaiveringly to obtain the money damages and remediation that their clients sought. To the extent that those clients buried their heads in the sand and did not ask questions of their attorneys, they cannot now use their past indifference to means to escape accountability for their part in the fraud.

1732 *Cf. Fischbarg,* 38 A.D.3d at 273, 832 N.Y.S.2d 164.

1733 *Cf. Sunward,* 362 F.3d at 23.

1734 2012 WL 1681167, at *3.

1735 Chevron argues also that the Court has general personal jurisdiction over the LAP Representatives under CPLR Section 301. In view both of the sanctions ruling and the strength of showing of personal jurisdiction under Section 302(a)(2), the Court declines to address that argument.

1736 The Second Circuit in *Licci* observed that it would be anomalous if the court were to find that the due process requirements were not met in a case in which personal jurisdiction existed under N.Y. CPLR 302(a)(1). *See Licci,* 732 F.3d at 170.

1737 *Id.* (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 127 (2d Cir.2002)) (alterations in original).

1738 *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

1739 *Chloe,* 616 F.3d at 164 (citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113–14, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)).

1740 *Bank Brussels,* 305 F.3d at 129–30 (internal quotation marks omitted).

1741 DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 17–18.

1742 DI 127, DI 128.

1743 Tr. (J. Piaguaje) 2387:23–2388:3.

1744 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 55–57.

1745 DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 33–38.

1746 *Chevron v. Salazar,* 807 F.Supp.2d 189 (S.D.N.Y.2011).

1747 The LAP Representatives persist, in the face of the evidence, falsely to assert that Chevron merged with Texaco. DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 34 ("Texaco merged with Chevron").
Donziger's post-trial memorandum is slightly less inaccurate but misleading nonetheless. It states that "Texaco became a wholly owned subsidiary of Chevron in 2001 and, between 2001–2005 the combined company was known as ChevronTexaco." DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 7 n. 12. The first part of the sentence is consistent with the facts but also is inconsistent with any merger of Texaco and Chevron—merged companies do not become parent and subsidiary. The second part of the sentence seeks to imply that a parent company and a wholly owned subsidiary are a "combined company" and that the

parent is liable for the debts and obligations of the subsidiary. That of course is not so unless the corporate veil is pierced or the separate corporate existence of the subsidiary is disregarded on another basis. Moreover, there is no evidence that any "combined company" ever was known as ChevronTexaco. *Supra note* 426.

1748 PX 3000 (Reis Vega Direct) ¶ 8.

1749 *Chevron v. Salazar,* 807 F.Supp.2d at 193, 196, 198.

1750 This Court referred also to the fact that the panel in *Republic of Ecuador v. Chevron Corp.,* 638 F.3d 384 (2d Cir.2011), which had been misinformed that Texaco had merged into Chevron and that Chevron was the surviving company, stated that "lawyers from ChevronTexaco" had reaffirmed Texaco's statements. *Chevron v. Salazar,* 807 F.Supp.2d at 197 n. 23. As this Court pointed out, the lawyers in question were Messrs. Veiga and Timms, whose names appeared on Texaco's brief in *Aguinda*. As the Court further noted, they had been with Texaco for years before the Chevron transaction. Even assuming that they were Chevron employees at the time of the *Aguinda* appeal, they acted as attorneys for Texaco and their statements as Texaco's attorneys did not bind Chevron. *Id.* In any case, the evidence at this trial showed, and the Court finds, that Reis Veiga, at least, was an employee of Texaco, not Chevron, in 2001 when the *Aguinda* appeal was decided. PX 3000 (Reis Veiga Direct) ¶ 7.

1751 *See* DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 55–56; DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 33–35.

1752 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 55–56 (emphasis in original).

1753 Texaco Mem. in Support of Renewed Motion to Dismiss at 12–13, *Aguinda v. Texaco Inc.,* 93 Civ. 7527(JSR) (S.D.N.Y. filed Jan. 11, 1999). A copy of a portion of this filing, which appears to be missing from the court file (which antedated electronic filing), is PX 8004.

It should be noted also that the memorandum described the offer in general terms and referred for the precise language to certain appendices. *Id.* at 13 n. 7. The appendices do not appear to be in the record of this case, and the Court has not located them in the record of *Aguinda*. Texaco's *Aguinda* reply memorandum, however, stated the offer as having been "to satisfy any judgment in plaintiffs' favor, reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act." PX 8007 (Excerpt of Texaco Reply Mem. in Support of Renewed Motion to Dismiss, *Aguinda v. Texaco Inc.,* 93 Civ. 7527(JSR), DI 142 (S.D.N.Y. filed Jan. 25, 1999)), at 3.

1754 *Aguinda v. Texaco Inc.,* 142 F.Supp.2d 534, 539 (S.D.N.Y.2001) (relying only on agreements to being sued on the claims asserted, to accept service of process, and to limited waiver of statute of limitations); *Aguinda v. Texaco Inc.,* 303 F.3d 470 (2d Cir.2002) (the one respect in which the Circuit modified the order was to expand the duration of the limited limitations waiver from 60 days to one year). *Id.* at 478–79. It did not even mention the conditions relied upon by Judge Rakoff.

As noted in *Chevron Corp. v. Salazar,* 807 F.Supp.2d 189 (S.D.N.Y.2011), the Court is aware that a footnote in *Republic of Ecuador v. Chevron Corp.,* 638 F.3d 384 (2d Cir.2011), while recognizing that Judge Rakoff had not expressly adopted Texaco's offer, stated that he implicitly did so by granting the *forum non conveniens* dismissal. 638 F.3d at 389 n. 4. For reasons stated there, that observation was *dictum* with which this Court respectfully disagrees. *See* 807 F.Supp.2d at 196–98. Nothing turns on this difference of view, however, for reasons discussed in the ensuing text.

1755 PX 8003 (Stipulation and order, *Aguinda v. Texaco Inc.,* 93 Civ. 7527(JSR), DI 159 (S.D.N.Y. filed June 27, 2001)).

1756 Moreover, if there were any ambiguity on that point, that ambiguity would raise a question of fact. The Court finds that the reservation of rights to contest an Ecuadorian judgment limited only the grounds on which such a judgment could be contested and limited those only to grounds permitted by the New York Recognition Act. It did not limit the venues in which or procedural vehicles by which any such judgment could be attacked.

1757 *Republic of Ecuador,* 638 F.3d at 397 ("Chevron has thus reserved its right to challenge any judgment issued in Lago Agrio on the grounds that the Ecuadorian judicial system 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law,' that the judgment itself 'was obtained by fraud,' or that 'the proceeding in [Lago Agrio] was contrary to an agreement between the parties.' [citation omitted] Nothing in that reservation of rights purports to restrict the kind of forum or type of proceeding in which Chevron can raise those defenses.").

1758 The LAP Representatives' equitable estoppel argument is entirely without merit.

1759 DI 307 (Donziger Defs.' Answer); DI 311 (LAP Reps.' Answer).

1760 DI 1851 (Lap Reps.' Post-trial Mem. of Law), at 25.

1761 *E.g., Harbison v. Little,* 723 F.Supp.2d 1032, 1038 (M.D.Tenn.2010) (collecting cases); *United States v. Livecchi,* 605 F.Supp.2d 437, 451 (W.D.N.Y.2009) *aff'd,* 711 F.3d 345 (2d Cir.2013); *U.S. Surgical Corp. v. Hosp. Products Int'l Pty. Ltd.,* 701 F.Supp. 314 (D.Conn.1988) ("Insofar as any claim or defense urged by the defendant is founded upon a particular prior art reference to which sufficient reference is not made in the post-trial brief, such claim or defense is deemed abandoned."); *see also K & N Eng'g, Inc. v. Spectre Performance,* EDCV 09–01900–VAP, 2011 WL 6133258, at *10 (C.D.Cal. Dec. 8, 2011).

1762 DI 600 (LAP Reps. Mot. for Judgment on the Pleadings).

1763 DI 601 (LAP Reps. Mem. of Law), at 19–24.
The principal point of the Rule 9(b) argument was that the complaint did not sufficiently allege any misstatements by Camacho and Piaguaje. It argued also that it did not sufficiently allege proximate cause, but allegations of causation are not covered by Rule 9(b) because they are not "circumstances constituting fraud." *See, e.g., Wilamowsky v. Take–Two Interactive Software, Inc.,* 818 F.Supp.2d 744, 753 n. 7 (S.D.N.Y.2011) (collecting cases).

1764 DI 634 (Nov. 27, 2012 Memo. Endorsement).

1765 DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 25–29.

1766 To the extent the LAP Representatives suggest otherwise, the suggestion is frivolous. "Whether a complaint complies with the Rule, ... depends 'upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary to give notice to the adverse party and enable him to prepare a responsive pleading.' *In re Cardiac Devices Qui Tam Litig.,* 221 F.R.D. 318, 333 (D.Conn.2004) (internal quotation marks omitted). In particular, 'where the alleged fraudulent scheme involved numerous transactions that occurred over a long period of time, courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct.' *Id.; see United States ex rel. Bledsoe v. Cmty. Health Sys.,* 501 F.3d 493, 509–10 (6th Cir.2007); *State Farm Mut. Auto. Ins. Co. v. James M. Liguori, M.D., P.C.,* 589 F.Supp.2d 221, 237 (E.D.N.Y.2008); *United States ex rel. Taylor v. Gabelli,* 345 F.Supp.2d 313, 326 (S.D.N.Y.2004); *Cardiac Devices,* 221 F.R.D. at 333 (collecting cases); *United States ex rel. Franklin v. Parke–Davis,* 147 F.Supp.2d 39, 47 (D.Mass.2001)." *United States v. Wells Fargo Bank, N.A.,* 972 F.Supp.2d 593, 616, No. 12 Civ. 7527(JMF), 2013 WL 5312564, at *16 (S.D.N.Y. Sept. 24, 2013). In the circumstances of this case, the amended complaint complied with Rule 9(b).

1767 *See Torry v. Northrop Grumman Corp.,* 399 F.3d 876, 878 (7th Cir.2005); 3 Moore's Federal Practice ¶ 15.18[1] (3d ed. 2013); *see also Madeja v. Olympic Packers, LLC,* 310 F.3d 628, 636 (9th Cir.2002) (parenthetical).

1768 "Even when a party does not move for leave to amend, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial." 3 Moore's Federal Practice ¶ 15.18 [3], at 15–95.

1769 DI 307 (Donziger Defs.' Answer), at 71; DI 311 (LAP Reps.' Answer), at 91.
That defense was dismissed in part in the Count 9 Action, *Chevron Corp. v. Salazar,* No. 11 Civ. 3718(LAK), 2011 WL 3628843, at *6–10 (S.D.N.Y. Aug. 17, 2011). To the extent the dismissal was on the sufficiency of the defense generally (as opposed to its alleged applicability to legal and declaratory claims), the ruling is entirely applicable here, as the pleadings in the Count 9 Action and this case are the very same documents.

1770 Tr. (Opening) 40:20–41:1.

1771 Tr. (Reis Veiga) 91:25–94:10, 143:8–149:12, 150:8–152:15; Tr. (Callejas) 807:9–809:19; Tr. 1944:22–1945:20.

1772 The only explicit mention of the defense is in a footnote in the LAP Representatives' initial trial brief in which they state: "Similarly, the Lago Agrio Plaintiffs reserve the rights to brief the unclean hands defense if and when Chevron makes plain the specific nature of the equitable relief it seeks." DI 1851 (LAP Reps. Post-trial Mem. of Law), at 30 n. 8. Defendants in their reply brief make factual assertions that could be intended to support this defense, but nowhere do they state specifically any such intent.

1773 12 Moore's Federal Practice § 60.21(4)(i); *see Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (2d Cir.1960) (dictum).

1774 Defendants' other factual allegations of Chevron misconduct that could be construed to support an unclean hands defense relate to (1) the *Aguinda forum non conveniens* dismissal, (2) the Section 1782 proceedings, (3) the inspection of the Guanta site, (4) *ex parte* meetings with Ecuadorian judges, (5) lobbying efforts in the United States and Ecuador, and (6) Chevron's litigation tactics. The record does not support a finding of unclean hands as to any of these allegations.

1775 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 15.
Borja in 2009 worked for a company called InterIntelg, which "was a contractor for ... Texaco." Borja Mar. 15, 2011 Dep. Tr. at 59:7–15.

1776 DX 31 (Aug. 31, 2009 Ltr. from T. Cullen to W. Pesantez), at 1 ("Patricio Garcia Ortega [was] a political coordinator for Alianza País.").

1777 *See* PX 2531 (Excerpts of video of May 11, 2009 Meeting between Carlos Patricio Ortega, Aulo Gelio Servio Tulio Ávila Cartagena, Pablo Almeida, Rubén Darío Miranda Martínez, and Diego Borja); PX 2531A (Transcript of Same); PX 2532 (Excerpts of video of May 15, 2009 Meeting between Judge Juan Evangelista Nuñez Sanabria, Aulo Gelio Servio Tulio Ávila Cartagena, Pablo Almeida, Wayne Douglas Hansen, and Diego Fernando Borja Sanchez); PX 2532A (Transcript of Same); PX 2533 (Excerpts of video of June 5, 2009 Meeting between Judge Juan Evangelista Nuñez Sanabria, Juan Pablo Novoa Velasco, Diego Fernando Borja, and Wayne Hansen); PX 2533A (transcript of same).

1778 DX 31 (Aug. 31, 2009 Ltr. from T. Cullen to W. Pesantez).

1779 DX 30 (Chevron Aug. 31, 2009 Press Release).

1780 *Id.*

1781 PX 2524 (Sept. 1, 2009 Email from S. Donziger to S. Donziger), at 3.

1782 Borja Mar. 15, 2011 Dep. Tr. at 21:12–16; PX 2527 (U.S. Dep't of Homeland Security Asylum Record for D. Borja).

1783 Borja Mar. 15, 2011 Dep. Tr. at 24:14–25:1.

1784 PX 2525 (Nuñez Recusal Motion).

1785 Even if the recordings were not hearsay, they would not get defendants where they wish to go. Although Borja claimed that the bribe scheme was a set up, he did not say that Chevron knew about it or was involved in it in any way. PX 1200 (Email from A. Goelman to S. Donziger, J. Kohn, W. Taylor, J. Hall re: "The Escobar–Borja tapes"), at 1–2; *see* DX 39–57 (Borja–Escobar Recording Transcripts).

1786 *E.g.,* PX 2534A (June 22, 2009 Borja Recording), at 2–3, 5–9; PX 2533A (June 5, 2009 Borja Recording), at 16 ("In the ruling I say that so many millions have to be issued for remediation every month.").

1787 *Holm v. First Unum Life Ins. Co.,* 7 Fed.Appx. 40, 41 (2d Cir.2001) (alteration in original).

1788 *Specialty Minerals, Inc. v. Pluess–Staufer AG,* 395 F.Supp.2d 109, 112 (S.D.N.Y.2005) (alteration in original).

1789 PX 1200 (Email from A. Goelman to S. Donziger, J. Kohn, W. Taylor, J. Hall re: "The Escobar–Borja tapes"), at 1.

1790 DI 1851 (LAP Reps.' Post-trial Mem. of Law), at 40; DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 59–61.

1791 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 60.

1792 DI 134 (Coronel Aff.) ¶ 2.

1793 PX 9A (Mar. 30, 2006 *Crude* Clip).

1794 PX 179 (Donziger Notebook), at 3.

1795 PX 7A (Mar. 30, 2006 *Crude* Clip), at CRS–053–02–CLIP–04.

1796 PX 11A (Apr. 3, 2006 *Crude* Clip), at CRS060–00–CLIP–04.

1797 PX 16A (Dec. 6, 2006 *Crude* Clip), at CRS138–01–CLIP–01x (the LAPs have "gone basically from a situation where we couldn't get in the door to meet many of these people in these positions [in the government] to one where they're actually asking us to come and asking what they can do....").

1798 *Supra Discussion* § VII.C.

1799 *See supra* note 1110.

1800 *See supra Facts* § VII.E.2.

1801 PX 1389 (July 10, 2010 Email Chain Between J. Tyrrell, S. Seidel, C. Bogart, and J. Molot), at 7.

1802 *Leasco Corp. v. Taussig,* 473 F.2d 777, 786 (2d Cir.1972).

1803 *Id.*

1804 *Lee v. Bickell,* 292 U.S. 415, 421, 54 S.Ct. 727, 78 L.Ed. 1337 (1934); *Donovan v. Pennsylvania Co.,* 199 U.S. 279, 304, 26 S.Ct. 91, 50 L.Ed. 192 (1905); *see, e.g., Bruce v. Martin,* 680 F.Supp. 616, 622 (S.D.N.Y.1988).

1805 DI 1850 (Donziger Defs.' Post-trial Mem. of Law), at 60.

1806 DI 1197, at 6, 9; DI 1211, at 6, 9; DI 1370, at 3; DI 1415, at 3; DI 1442, at 4.

1807 *See e.g.,* Tr. (Donziger Closing) 2921:7–13 ("THE COURT: Suppose [Chevron] could have gotten a dollar-for-dollar judgment.... Against whom? Who is going to pay it? Mr. Donziger?" Donziger's counsel responded, "I don't think he has got that kind of money."); DX 1750 ¶ 127 (Donziger's claim that he was "operating under constant pressure of lack of resources"); Tr. (Donziger) 2619:6–23 (affirming statements to the Court about "lacking resources to defend in this case"); DI 1197, at 6, 9; DI 1211, at 6, 9; DI 1370, at 3; DI 1415, at 3; DI 1442, at 4.

1808 *Philip Morris USA Inc. v. Scott,* —— U.S. ——, 131 S.Ct. 1, 4, 177 L.Ed.2d 1040 (2010); Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 Harv. L.Rev.. 687, 716. (1990) ("Damages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy.").
* * *

1809 By contrast, the Supreme Court has instructed lower courts to take a flexible approach when determining whether to grant equitable relief. *Hecht Co. v. Bowles, supra,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944) ("[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mo[ ]ld each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") When considering whether to grant equitable relief, courts should "balance[ ] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. U.S.,* 321 U.S. 414, 440, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

1810 *See Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 68 (2d Cir.1999) ("an injunction ... is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief.").

1811 *Beatty v. Guggenheim Exp. Co.,* 225 N.Y. 380, 386, 122 N.E. 378 (1919).

1812 "[A]ssets acquired by fraud are subject to a constructive trust for the benefit of the defrauded party." *SEC v. Credit Bancorp, Ltd.,* 290 F.3d 80, 88 (2d Cir.2002) (citing Restatement (First) of Restitution § 166 (1936)); *see also* 4 Pomeroy § 1053. While New York law often speaks of claims to impose constructive trusts having four elements—(1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment—the key is unjust enrichment, "since the purpose of the constructive trust is [its] prevention." *In re First Central Fin. Corp.,* 377 F.3d 209, 212 (2d Cir.2004) (citations omitted) (affirming constructive trust for *pro rata* distribution to defrauded investors). To put it simply, "a constructive trust is a flexible device and must not be bound by an 'unyielding formula.' " *Golden Budha Corp. v. Canadian Land Co. of America, N.V.,* 931 F.2d 196, 202 (2d Cir.1991) (party adequately pleaded the elements of a constructive trust where the district court determined that all elements other than unjust enrichment were lacking).

1813 George Taylor Bogert et al., The Law of Trusts and Trustees § 471, at 41–42 (3d ed. 2009) ("Bogert") (footnotes omitted).

1814 PX 558 (Jan. 5, 2011 retainer agreement).

1815 The retainer agreement contains New York governing law clauses, PX 558, ¶¶ 10(a), 11, which control under N.Y. Gen. Oblig. L.. § 5–1401(a).

1816 *Id.* ¶ 3(a) (the 6.3 percent is the product of 31.5 percent of the Total Contingency Fee Payment, which is 20 percent of all funds collected).

It is conceivable that the percentage of any Judgment proceeds to which Donziger is entitled has been slightly diluted subsequently in order to accommodate giving equity to new investors, but this neither matters nor is persuasively shown on the record.

1817 *See id.* ¶ 3(b).

1818 *Id.* ¶ 3(d).

1819 PX 558 ¶ 3(a).

1820 Prior to the entry of the Judgment, Donziger's retainer agreement was "an executory contract" for the payment of his retainer and reimbursement of his expenses plus a "transfer of a future fund [*i.e.,* his share of the collections on the Judgment] upon which specific performance [would] be granted when the fund [came] into existence." *Brandes v. North Shore University Hosp.,* 18 Misc.3d 1112(A), 856 N.Y.S.2d 496, 2008 WL 80629, at *3 (Sup.Ct. Queens Co. Jan. 8, 2008) (citing *Williams v. Ingersoll,* 89 N.Y. 508 (1882)). The fund came into existence "when there [wa]s a judgment," *i.e.,* on February 14, 2011. *Aponte v. Maritime Overseas Corp.,* 300 F.Supp. 1075, 1077 (S.D.N.Y.1969). His rights to payments when the fund came into existence, *i.e.,* when judgment was entered, as well as his rights against that fund once it came into being, were and are, respectively, assignable. *Id.* at 1077; N.Y. Gen. Oblig. L. . § 13–101; David D. Siegel, *Practice Commentaries,* 7B McKinney's Consol. Laws of N.Y.—CPLR 5501 TO 5500 C5201:9, at 66–67 (McKinney 1997). Accordingly, his claims to the contingent fee, to his monthly retainer, and to expense reimbursements at all relevant times were and remain property subject to execution and attachment under New York law. N.Y. CPLR § 5201(b) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment."); § 6202 ("Any ... property against which a money judgment may be enforced as provided in section 5201 is subject to attachment.").

1821 Donziger testified that he has been given shares in Amazonia based on his proportionate equity interest in the LAPs' claim. Donziger June 25, 2013 Dep. Tr. at 632:4–9, 633:15–634:2. *See also supra* note 1110.

1822 *Beatty,* 225 N.Y. at 389, 122 N.E. 378.

1823 *Chevron Corp. v. Donziger (Donziger II),* 800 F.Supp.2d 484 (S.D.N.Y.2011); DI 328 (May 31, 2011 order severing Count 9).

1824 667 F.3d 232 (2d Cir.2012).

1825 *Naranjo,* 667 F.3d at 240.

1826 *Id.* at 245.

1827 *Id.* at 246.

1828 *Id.* at 242.

1829 *Id.* at 234.

1830 DI 1857 (Donziger Defs.' Post-trial Reply Mem. of Law), at 11.

1831 *Naranjo,* 667 F.3d at 239 n. 11.

1832 The only reason the Recognition Act has *any* application to this case is because defendants pled collateral estoppel in their answers and attempted to rely on the Ecuadorian Judgment as a basis for that defense. In so doing, they recognized that the recognizability and enforceability of the Judgment under the Recognition Act was an essential element of their collateral estoppel defense. *See supra Discussion* § VII.

1833 Tr., Sept. 26, 2013 (Hr'g on LAPs' Pet. for Writ of Mandamus), at 0:11:21–11:29.

1834 *Id.* at 00:01:58–2:15.

1835 *See Naranjo,* 667 F.3d at 243.

1836 *Id.*

1837 *Id.* at 244.

1838 DI 1857 (Donziger Defs.' Post-trial Reply Mem. of Law), at 12.

1839 DI 445–14 (*Naranjo* Oral Arg. Tr.), at 76:19–77:1, 77:16–78:14.

1840 *Id.* 78:15–21.

1841 *Naranjo,* 667 F.3d at 246 n. 17.

1842 Tr. (Shinder) 1298:21–1299:4.

1 DI 1751–1 (Velázquez Decl.), Ex. A at 2.

2 DI 1702–1 (Albán Decl.) ¶ 31.

3 Tr. (Zambrano) 1720:3–5.

4 DI 1751–1 (Velázquez Decl.), Ex. A at 1–2.

5 *Id.* at 2.

6 DI 1702–1 (Albán Decl.) ¶ 32.

7 *Id.* ¶ 33.

8 DI 1751–1 (Velázquez Decl.), at 2.

9 *Id.*

10 Tr. (Zambrano) 1693:18–23.

11 That of course is a hotly contested issue, but Zambrano's testimony as to what materials properly could have been considered in deciding the case nonetheless has value, particularly as the thrust of his testimony was that everything was done with utter propriety.

12 *Id.* 1608:21–22.

13 *Id.* 1691:10–14.

14 *Id.* 1692:25–1693:3.

15 *Id.* 1694:13–25.

16 To the extent the Court has made a determination of Ecuadorian law, its conclusion is one of law. Fed.R.Civ.P. 44.1.

17 PX 399 (Lago Agrio Judgment (Spanish)).

18 PX 3700 (Leonard Direct) ¶ 3.

19 *Id.* ¶ 34.

20 *Id.* ¶ 35.

21 *Id.* ¶ 36.

22 *Id.* ¶ 37.

23 *Id.* ¶ 38.

24 PX 435 (Fusion Memo).

25 PX 433 (January 2007 Index Summary); PX 865 (June 2007 Index Summary).

26 PX 437 (Fajardo Trust Email).

27 PX 438 (Draft Alegato).

28 PX 928 (Clapp Report).

29 PX 439–441 (Selva Viva Database).

30 PX 3800 (Juola Direct) ¶ 27.

31 *Id.* ¶ 29. OCR "is a process by which hard copies are scanned and processed to create electronic files that can be viewed on the computer." Dr. Juola explained that "OCR stands for optical character recognition. It's the process of taking an image which is—if you think about how a newspaper photo is constructed it's essentially a collection of black dots or white dots, and from that black or white dots, extracting the text, the characters that would actually comprise the language inside that document." Tr. (Juola) 1544:17–22. Dr. Juola concluded that the overall scanning quality of the Lago Agrio record was high, and that no more than 1–1.5% of the documents in the court record were unsearchable. PX 3800 (Juola Direct) ¶ 32. His team analyzed each of the unsearchable documents by hand. *Id.* ¶ 33.

32 PX 3800 (Juola Direct) ¶ 17.

33 *Id.* ¶¶ 18–21.

34 *Id.* ¶ 21.

35 *Id.* ¶ 22.

36 *Id.* ¶ 27.

37 *Id.* ¶ 23.

38 *Id.* ¶ 24.

39 *Id.* ¶ 25.

40 *Id.* ¶¶ 3, 27, 37.

41 PX 3900 (Hernandez Direct) ¶¶ 23–27.

42 PX 1101 (Moodie Memo).

43 PX 2167 (LAPs' Draft *Alegato*).

44 The excerpts contained the word strings or phrases that overlapped with the Judgment.

45 PX 3900 (Hernandez Direct) ¶¶ 12–22. For the Moodie Memo and draft *alegato,* Hernandez and his team compared the documents and excerpts of them to (1) all documents in the Lago Agrio record filed by the LAPs or any third party after the date upon which the Moodie Memo and draft *alegato* was created, and (2) all documents in the Lago Agrio record filed by Chevron after the date on

which Chevron first received documents from the LAPs in U.S. discovery proceedings. *Id.* ¶¶ 16–22.

46 *Id.* ¶¶ 23–24.

47 *Id.* ¶ 25.

48 *Id.* ¶ 26.

49 Tr. (summation) 2880:7–13.

50 *Id.*

51 PX 400 (Lago Agrio Judgment), at 51.

52 *See supra Facts* § VII.A.

53 The Judgment stated:

> "The contamination in the area of the concession extends to 7,392,000 cubic meters (m3), a figure that is arrived at considering that we have 880 pits (proven through aerial photographs certified by the Geographic Military Institute which appear throughout the record, analyzed together with the official documents of Petroecuador submitted by the parties and especially by the expert Gerardo Barros, and aggravated by the fact that the defendant has not submitted the historical archives that record the number of pits, the criteria for their construction, use or abandonment) of an area of 60 x 40 meters, and because of the possibility of leaks and spills, it should be remediated in an area of at least 5 meters around the pits, and the pits have a depth of 2.40 meters (which is a reasonable estimate, considering that the pits have different dimensions, and as we noted above, the defendant has not presented an archive or historical record that details the number or the dimensions specified for the construction of the pits)." PX 400 (Lago Agrio Judgment), at 125.

54 DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 77.

55 PX 400 (Lago Agrio Judgment), at 125.

56 PX 2502 (Chevron motion for expansion and clarification, filed Feb. 17, 2011), twenty-seventh request for expansion of the judgment, at 17 (emphasis in original).

57 PX 429 (Lago Agrio Judgment Clarification Order), at 15.

58 The same 916 pit figure appeared also in a spreadsheet produced by Stratus, upon which Anexo H–1 likely was based. PX 4100 (Lynch Direct) ¶ 98 & Figure 34.

59 *Id.*

60 *Id.*

61 PX 4000 (Ebert Direct) ¶ 4.

62 *Id.* ¶ 13.

63 *Id.* ¶ 15.

64 *Id.*

65 *Id.* ¶ 3; *see also id.* ¶ 18.
Dr. Ebert then went on to illustrate "why it [wa]s not possible that the author of the Ecuadorian judgment and the author of the Cabrera report reached the same result by interpreting the photos independently." *Id.* ¶ 19. He provided two examples of aerial photographs from the Military Geographic Institute that appeared in annexes to the Cabrera Report and that were interpreted by its author as identifying pits. Higher quality scans of the same photographs revealed that some of these pits actually were trees, above-ground tanks, and other objects. *Id.* ¶¶ 21, 22 & Figures 1, 2. For example, Appendix IV compares an aerial photograph of the Sacha Sur Station well site from Anexo E of the Cabrera Report (top), to a higher quality image taken from the same source at the same site (bottom). It reveals that a portion of the image characterized by the Cabrera Report as a waste pit actually is a man made structure.

66 DX 1482 (LAPs' Dec. 17, 2011 Alegato), at 60 & n. 252.

67 PX 400 (Lago Agrio Judgment), at 182–83.

68 PX 310A (Cabrera Report), at 6.

69 PX 400 (Lago Agrio Judgment), at 182.

70 PX 3306 (Barros Report Excerpt), at 3. The full Barros Report was not offered. Thus, the only evidence of what Barros said on this subject was his repetition and rounding off of what Cabrera said.

71 PX 400 (Lago Agrio Judgment), at 182–83.

72 *Id.* at 182–83.

73 *See id.*

74 *Id.* at 182.

75 *Id.* at 57.

76 *Id.* at 179, 181.

77 Allen Dep. Tr. at 171:18–172:3.

78 PX 400 (Lago Agrio Judgment), at 179.

79 DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 78.

80 PX 400 (Lago Agrio Judgment), at 125, 181.

81 *Id.* at 147.

82 *Id.* at 152.

83 *Id.* at 173–74.

84 *Id.* at 185–86.

85 *Id.* at 183.

86 *Id.*

87 *Id.* at 184.

88 DI 1847 (Chevron Corp. Post-trial Mem. of Law), at 78–79.

89 *Id.* at 79.

90 PX 310A (Cabrera Report), at 51. The Cabrera Report stated that "Annex T provides details on the calculation of unjust enrichment." *Id.* However, Chevron did not offer an English translation of Annex T into evidence and therefore the Court declines to consider the Spanish.

91 PX 400 (Lago Agrio Judgment), at 185.
* * *

92 Tr. (Guerra) 914:10–931:13; *see supra Facts* § X.C.

93 PX 1689, 1704, 1705, 1708, 1710 (Guerra Bank Statements).

94 Several copies of the deposit slips for those two dates appear in the record. PX 1713 (Guerra Deposit Slips), at 1, 7, 8; PX 1719 (Dec. 23, 2009 Guerra deposit slip obtained by Chevron investigator from the bank); PX 1718 (Feb. 5, 2009 Guerra deposit slip obtained by Chevron investigator from the bank).

95 PX 1713 (Guerra Deposit Slips), at 10.

96 *Id.* at 5, 11.

97 *Id.* at 15.

98 *Id.* at 5, 10, 11, 15.

99 PX 1740, 1741 (Centeno Nat'l Identity Cards).

100 A *cedula* number is an identification number that in Ecuador is assigned "to each individual, specifically, of Ecuadorian nationality, and which is used to identify the person throughout his or her life." Tr. (Guerra) 958:6–9.
The parties stipulated that the *cedula* number that appears on the two deposit slips belongs to Ximena Centeno. Tr. (Guerra) 953:1–4 ("MS. LITTLEPAGE: Yes. There is a woman who worked for Selva Viva, whose name is Ximena Centeno, whose number this is. We believe this is hearsay because we do not believe there is any evidence that that woman deposited this money at this bank.").

101 PX 1689, 1704, 1705, 1708, 1710 (Guerra Bank Statements).

102 Defendants' other objections merit only brief attention.
Defendants' relevance objection clearly is baseless. The bank statements Chevron offered show that money was deposited into Guerra's bank account (a) two days after Fajardo sent an email to Donziger and Yanza stating "[t]he puppeteer won't move his puppet unless the audience pays him something," PX 1751 (Oct. 27, 2009 Email from P. Fajardo to S. Donziger and L. Yanza re: "NEWS"), and (b) in amounts that corresponded to near-simultaneous withdrawals from the Selva Viva account, PX 583 (Banco Pichincha Account Summary for Selva Viva), at 52–53. All of this is highly relevant to Chevron's claim that Donziger and the LAPs paid Guerra as Guerra claimed. *See supra Facts* § X.C.

Defendants object to the admission of the redacted copy of Guerra's bank statement for February 2010, PX 1689, under the rule of completeness. The exhibit includes an unredacted Spanish-language version of the bank statement. Even if it did not, defendants have not shown that the redacted portions of this bank statement, which contain personal information and transactions unrelated to this case, must be admitted under Rule 106.
Finally, defendants raised what became a common litany of objections, including authenticity and best evidence. Substantially for the reasons discussed below in relation to the deposit slips, these objections have no merit and do not warrant further discussion.

103 Fed.R.Evid. 803(6).

104 *Id.* 807.

105 *Id.* 803(6).

106 *United States v. Pelullo,* 964 F.2d 193, 201 (3d Cir.1992) (quotations omitted).

107 *Fed. Deposit Ins. Corp. v. Staudinger,* 797 F.2d 908, 910 (10th Cir.1986) (quotations omitted); *see also* 5–803 Weinstein's Evidence § 803.08 (2d ed. 1997–present).

108 Tr. (Guerra) 1040:3–16 ("Q. Mr. Guerra, I want to refer you to your what's been marked as Plaintiff's Exhibit 1689, 1704, 1705, and 1708. If you could please look at each of those. Mr. Guerra, are each of those documents a monthly bank statement that you received from your bank, Banco Pichincha, concerning your bank account? A. Yes, sir, they are. Q. Do you recognize them to be true and correct copies of your bank statements that you received directly from your bank, your monthly statements? A. Yes. Q. Are these documents that you turned over to Chevron in connection with this litigation? A. Yes.").

109 673 F.2d 1062 (9th Cir.1982).

110 *Id.* at 1064–65; Fed.R.Evid. 807.

111 Tr. (Guerra) 1040:3–16.

112 *Karme,* 673 F.2d at 1065.

113 DI 746 (Guerra Decl.), Ex. C, Att. K, G, M.

114 DI 1492 (Chevron proposed pretrial order) (filed August 30, 2013; docketed October 4, 2013); *see, e.g., Robinson v. Shapiro,* 646 F.2d 734, 741–42 (2d Cir.1981) (notice served six weeks before trial was conceded to be sufficient); *United States v. Lino,* No. 00 CR. 632(WHP), 2001 WL 8356, at *22 n. 7 (S.D.N.Y. Jan. 2, 2001) (requiring that the government give defendant 30–days notice if it intended to avail itself of Rule 807).

115 Fed.R.Evid. 1003.

116 PX 1740, 1741 (Centeno Nat'l Identity Cards).

117 Tr. 942:14–943:5.

118 Fed.R.Evid. 901(b)(4).

119 *E.g., Jian Rong Xiao v. Bd. of Immigration Appeals,* 213 Fed.Appx. 38, 41–42 (2d Cir.2007) (party's testimony as to "issuance and chain of custody with respect to" personal documents can be sufficient to show authenticity); 5–901 Weinstein's Federal Evidence § 901.03 (2d ed. 1997–present).

120 Fed.R.Evid. 1003.

121 *See id.* 401.

122 The deposit slips—at least to the extent of the dates, amounts, and identity of the account to which the deposits were made—would have been admissible over hearsay objection under the business records exception even if that objection had not been waived and even assuming that the deposit slips were offered to prove the truth of those data.
There is adequate documentary evidence to provide a foundation for the deposit slips' admissibility under Rule 803(6) by virtue of *United States v. Pelullo,* 964 F.2d 193, 201 (3d Cir.1992) ("[T]he testimony of the custodian or other qualified witness is not a sine qua non of admissibility in the occasional case where the requirements for qualification as a business record can be met by documentary evidence, affidavits, or admissions of the parties, i.e., by circumstantial evidence, or by a combination of direct and circumstantial evidence." (citation and quotations omitted)). Guerra's bank statements are circumstantial evidence of the deposit slips' reliability as to those points, and that is as true of the two bearing the purported signature of Centeno as it is of the others. The statements corroborate the dates, amounts, and account numbers listed on the deposit slips. In addition, Guerra testified that he retrieved the entire group of deposit slips (PX 1713) directly from Banco Pichincha. Tr. (Guerra) 934:2–7. The Chevron investigator independently obtained directly from the bank copies of the two deposit slips purportedly signed by Centeno and that bore her *cedula* number, PX 1718 and PX 1719. The testimony of Guerra and the investigator, in addition to establishing authenticity through the chains of custody, support an inference that the bank maintained those records in the normal course of its business and that it was its regular course of business to do so.

123 There is an additional basis for admitting the two deposit slips that purport to contain Centeno's signature, assuming that those slips in fact do bear her signature. By signing, Centeno verified the accuracy of the date, time, amount, account, and recipient contained on the deposit slip. Her signature thus was an adoptive admission of all of the other statements contained on each slip under Rule 801(d)(2). Rule 801(d)(2) and Centeno's conceded role as defendants' agent or employee are discussed in greater detail below.

124 *See United States v. Kalymon,* 541 F.3d 624, 632 (6th Cir.2008) ("Rule 901(b)(3) in turn provides that the trier of fact can authenticate a signature by identifying and comparing it with a signature already authenticated." (citation omitted)); *United States v. Spano,* 421 F.3d 599, 605 (7th Cir.2005) ("no rule of evidence makes a [factfinder] incompetent to determine the genuineness of a signature by comparing it to a signature known to be genuine").

125 Tr. (Donziger) 2596:1–4 ("Q. Ximena Centeno is an employee of Selva Viva [in December 2009], correct, sir? A. My understanding was that she worked for Selva Viva at that time, yes."); PX 1739 (public record showing Ximena Centeno's employment at Selva Viva from September 2009 to May 2010).

126 *See supra Facts* § II.C.2.

127 *See Pappas v. Middle Earth Condo. Ass'n,* 963 F.2d 534, 537 (2d Cir.1992).

128 The written direct is at PX 4800 (Guerra Direct) ¶¶ 41–44. The testimony and objections are included in the passage at Tr. (Guerra) 990:9–1002:1.

129 Tr. (Guerra) 991:1–5.

130 Tr. (Guerra) 999:14–16, 999:24–1001:24.

131 Fed.R.Evid. 801(d)(2)(E).

132 *United States v. Gigante,* 166 F.3d 75, 82 (2d Cir.1999).
Although not expressly required, there is abundant independent evidence of the existence of the conspiracy.

133 Fed.R.Evid. 1101(b).

134 *United States v. Stanchich,* 550 F.2d 1294, 1299 n. 4 (2d Cir.1977).
The Court notes that there can be no conspiracy to bribe because the crime of bribery is one which necessarily requires the

concerted action of the briber and the bribee. *United States v. Sager,* 49 F.2d 725, 727–28 (2d Cir.1931) ("[w]here concert is necessary to an offense, conspiracy does not lie"). Defendants therefore conceivably might have argued that Donziger and Fajardo could not have been co-conspirators, and the statements in conversations (a) and (b) therefore are inadmissible hearsay, because Donziger and Fajardo could not have been convicted of conspiring with Zambrano to commit bribery. But that argument would be of no avail for three reasons.

First, defendants did not make the argument. It therefore was waived. Even if they had made the argument, however, it would have failed for each of two independent reasons.

Second, admission of a statement under Rule 801(d)(2)(E) does not require that the technical elements necessary to obtain a conspiracy conviction all have been satisfied—only that the statements were made "in furtherance of some joint purpose." *United States v. Trowery,* 542 F.2d 623, 626 (3d Cir.1976) ("The absence of a conspiracy count ... is without legal significance in determining whether [one's] statements were admissible against [another]. The Government need only prove a conspiracy in fact between [the two] to make the words of one, spoken in furtherance of some joint purpose, the words of the other as well."); *United States v. El–Mezain,* 664 F.3d 467, 502 (5th Cir.2011). Rule 801(d)(2)(E), if otherwise satisfied, therefore would have warranted receipt of the statements even if the participants in the two conversations could not have been convicted of conspiracy to commit bribery in addition to bribery.

Third, all of the participants in the conversations would have been subject to conviction for conspiracy notwithstanding the rule noted in the *Sager* case. The Court of Appeals has limited the rule set forth in *Sager*—that there can be no criminal conviction of the payer and taker of a bribe for the crime of conspiracy to bribe—to apply only to situations in which the conspiracy "involved [no] more participants than were necessary for the commission of the" crime of bribery. *United States v. Benter,* 457 F.2d 1174, 1178 (2d Cir.1972). A conspiracy may be charged where the bribe payer and bribe recipient use a "go between"—a person whose participation is not necessary to the offense of bribery, which requires only offer and acceptance in exchange for (usually) official conduct—to facilitate the bribe. *See id.* That is exactly the situation here. The bribe givers (Fajardo, Donziger, and perhaps Yanza) and the bribe taker (Zambrano) used Guerra as their go between. Although he facilitated the bribe, Guerra's participation was not essential to the crime of bribery, which required Fajardo and/or Donziger on one side and Zambrano on the other. All of the participants in the bribe scheme therefore could have been convicted of conspiracy. *Cf. United States v. Wong,* No. 99 CR. 842(RPP), 2000 WL 297163, at *3 (S.D.N.Y. Mar. 22, 2000).

135 PX 4800 (Guerra Direct) ¶ 44.

136 *Id.* ¶ 47

137 *Id.* ¶ 49

138 *Id.*

139 *Id.* ¶ 52.

140 *Id.* ¶ 42.

141 PX 5208 (Beltman Decl.); PX 5210 (Maest Decl.).

142 The Court previously had ruled that "all defendants were 'present or represented' at the 1782 Depositions, thus satisfying Rule 32(a)(1)(A) and (a)(8) and making them usable 'to the same extent as if taken in [this] action.' " DI 939 (Mar. 26, 2013 Order).

143 Fed.R.Evid. 106.

144 *United States v. Johnson,* 507 F.3d 793, 796 (2d Cir.2007) (citation omitted).

145 781 F.2d 329 (2d Cir.1986).

146 *Id.* at 332 n. 2.

147 *Id.*

148 *Id.*

149 *Johnson,* 507 F.3d at 796.

150 60 F.3d 95 (2d Cir.1995).

151 842 F.2d 1335 (2d Cir.1988).

152 *Phoenix Assocs.,* 60 F.3d at 103 (quoting *United States Football League,* 842 F.2d at 1375–76).

153 Fed.R.Evid. 806.

154 *See D'Cunha v. Genovese/Eckerd Corp.,* 415 Fed.Appx. 275, 278 (2d Cir.2011); *Vaughn v. Willis,* 853 F.2d 1372, 1379 (7th Cir.1988).

155 Fed.R.Evid. 806.

156 *United States v. Preldakaj,* 456 Fed.Appx. 56, 58 (2d Cir.2012) (citation omitted).

157 It so argues also with respect to the failure to call Centeno, Tarco and Calva. While much ink could be spilled concerning whether such inferences would be appropriate, the Court in the exercise of discretion declines to draw them. Accordingly, these absentees need not be discussed further.

158 *United States v. Rabbani,* 382 Fed.Appx. 39, 41 (2d Cir.2010).

159 *See Adelson v. Hananel,* 652 F.3d 75, 87 (1st Cir.2011).

160 *Gray v. Great Am. Recreation Ass'n, Inc.,* 970 F.2d 1081, 1082 (2d Cir.1992) ("The nonappearance of a litigant at the trial or his failure to testify as to facts material to his case and as to which he has especially full knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention." (quoting *United States v. Fields,* 102 F.2d 535, 537–38 (8th Cir.1939))).

161 Although the prototypical missing witness case involves government informants or employer/employee relationships, *Deler v. Commodore Cruise Line,* 92 CIV. 4473(SHS), 1995 WL 733655, at *5 (S.D.N.Y. Dec. 12, 1995) (citing *United States v. Mittelstaedt,* 31 F.3d 1208, 1215–16 (2d Cir.1994)); *see also United States v. Carter,* 07–5756–CR, 2009 WL 765004, at *3 (2d Cir. Mar. 25, 2009), other types of close relationships also afford a basis for determining that a witness is peculiarly within one party's power. *E.g., Fey v. Walston & Co., Inc.,* 493 F.2d 1036, 1053 (7th Cir.1974) (failure to call party's son); *Gaw v. C.I.R.,* 70 T.C.M. (CCH) 1196 (T.C.1995), *aff'd,* 111 F.3d 962 (D.C.Cir.1997) (failure to call mother-in-law).

162 *United States v. Nichols,* 912 F.2d 598, 601 (2d Cir.1990) (citations and emphasis omitted).

163 *E.g., Deler,* 1995 WL 733655, at *5.

164 *See United States v. Torres,* 845 F.2d 1165, 1169 (2d Cir.1988).

165 *See Nichols,* 912 F.2d at 602.

166 *See id.*

167 *Id.* (citation omitted).

168 *See* PX 4900R (Dahlberg Direct) ¶ 75; *see supra Facts* § II.C.1; PX 2396R (Donziger RFA Responses), at 21–28.

169 *See, e.g.,* Tr. (H. Piaguaje) 2704:6–8 ("Q. Did Mr. Fajardo tell you that you had to come to New York to testify? A. Yes."), 2685:11–14 ("Q. Did Mr. Fajardo assist you in selecting which of the asamblea minutes to produce? A. The most important ones which we believed that we had to produce, yes."); Tr. (Moncayo) 2075:22–23 ("Q. And Mr. Fajardo helped you draft [your witness statement], correct? A. To write it, yes."), 2081:13–22 (testifying that Fajardo contacted Calva's father to discuss her testifying in New York), 2099:11–13 ("Q. Did Pablo Fajardo ask you to speak to or send you to speak to any other people who were coming up to New York to testify? A. Just with Ms. Calva."); Tr. (J. Piaguaje) 2404:2–10 (testifying that he discussed with Fajardo his coming to New York to testify).

170 DI 152–155 (Sáenz Decls.).

171 *See* PX 5600 (Kohn Direct) ¶¶ 18, 51, 66; PX 1406 (Aug. 9, 2010 Ltr. from J. Kohn to P. Fajardo and others), at 3.

172 "[W]here an employee who could give important testimony relative to issues in litigation is not present and his absence is unaccounted for by his employer, who is a party to the action, the presumption arises that the testimony of such employee would be unfavorable to his employer." *Chicago Coll. of Osteopathic Med. v. George A. Fuller Co.,* 719 F.2d 1335, 1353 (7th Cir.1983) (citation omitted). Other types of close relationships render a witness "peculiarly within one party's power" also. For example, the Tax Court in *Gaw v. C.I.R.,* 70 T.C.M. (CCH) 1196 (T.C.1995), *aff'd,* 111 F.3d 962 (D.C.Cir.1997), drew an adverse inference against defendant for his failure to offer the testimony of his mother-in-law, who possessed material information and was beyond the court's subpoena power because the defendant and the mother-in-law shared "close and amicable business and family relationships prior to and during the years at issue." *Id.* at *24 & n. 45. The Seventh Circuit similarly held that an adverse inference instruction was appropriate where the defendant "testified in effect that her son [who possessed material information] was available to her as a witness; yet he was beyond the subpoena power of the defendants." *Fey v. Walston & Co., Inc.,* 493 F.2d 1036, 1053 (7th Cir.1974).

173 *See, e.g.,* DI 934–1 (Settlement and Mutual Release).

174 DI 1007–1 (Stavers Decl. Apr. 12, 2013), at Exs. 3652–3653.

175 *See Mittelstaedt,* 31 F.3d at 1215–16.

176 *See United States v. Carter,* No. 07–5756–CR, 2009 WL 765004, at *3 (2d Cir. Mar. 25, 2009).

177 DI 1871 (Feb. 20, 2014 Order), Ex. 1.

178 DI 1872 (Feb. 24, 2014 Order); DI 1873 (Feb. 25, 2014 Order).

179 DI 1872 (Feb. 24, 2014 Order), Ex. 2.

180 DI 1742 (Nov. 18, 2013 Order), DI 1713 (Nov. 12, 2013 Order).

181 DI 1771 (Dec. 2, 2013 Order).

182 DI 1828 (Defs. Br.), at 2.

183 DI 1830 (Dec. 13, 2013 Order), at 3.

184 DI 1864 (Stipulation), at 2.

185 DI 1865 (Notice re: Defs. Exhibits).

186 *See* DI 1377 (Defs. Proposed Pretrial Order), Exs. 1 & 2.

187 DI 1431 (Donziger Defs. Mot.).

188 DI 1539 (Oct. 11, 2013 Order).

189 *See* DI 1872 (Court Exhibit D), Ex. 2 at 171–172, 181.
The exhibits in question are DX 1094, DX 1096, DX 1099–1101, DX 1102A through DX 1102–T and DX 1106.

190 DX 1094; DX 1096.

191 DX 1099–1101; DX 1102A through DX 1102–T and DX 1106.

LEGAL AUTHORITY AA-75

§ 2G2.2(b)(3)(C) enhancement.[3]

VACATED AND REMANDED.

CHRISTIAN COALITION OF FLORIDA, INC., Plaintiff–Appellant,

v.

UNITED STATES of America, Defendant–Appellee.

No. 10–14630.

United States Court of Appeals, Eleventh Circuit.

Nov. 15, 2011.

Background: Taxpayer, which claimed to be tax-exempt social welfare organization, brought action against United States, seeking refund of income taxes paid as well as declaratory and injunctive relief. After Internal Revenue Service (IRS) refunded the disputed taxes in full, based on three-year statutory period for assessing and collecting those taxes having run, the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., No. 5:09-cv-00144-WTH-GRJ, 2010 WL 3061800, dismissed action for mootness. Organization appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

(1) action was moot notwithstanding that taxpayer was seeking declaratory and injunctive relief in order to obtain determination that it was tax-exempt;

(2) any collateral consequences did not prevent action from being moot;

(3) capable-of-repetition exception to mootness doctrine did not apply; and

(4) action was not prevented from being rendered moot by exception to mootness doctrine that is based on party ceasing wrongful activity.

Affirmed.

1. Internal Revenue ⚿4045, 4069

An organization cannot obtain tax exempt status merely by conducting itself in accordance with the relevant provisions of the Internal Revenue Code; rather, in order to establish its exemption, it is necessary that every such organization claiming exemption file an application with the IRS. 26 C.F.R. § 1.501(a)–1(a)(2).

2. Federal Courts ⚿776

Whether a case is moot is a question of law reviewed de novo.

3. United States ⚿125(3)

The United States, as a sovereign entity, is immune from suit unless it consents to be sued.

4. United States ⚿125(6)

The terms of the United States' consent to be sued in any court, as expressed by statute, define that court's jurisdiction to entertain the suit.

5. United States ⚿125(6)

The terms of the statute or statutes waiving the United States' immunity are construed strictly, and courts may only entertain suits that are in full accord with such statutes.

3. Because we are vacating and remanding the case on this ground, we do not reach Fulford's argument that his sentence is otherwise unreasonable.

6. Declaratory Judgment ⚿217

The Declaratory Judgment Act (DJA), which generally authorizes courts to issue declaratory judgments as a remedy, excludes federal tax matters from its remedial scheme. 28 U.S.C.A. § 2201.

7. Declaratory Judgment ⚿217
Internal Revenue ⚿4940, 4980
United States ⚿125(34)

Under statutes governing judicial review of federal tax decisions, the Declaratory Judgment Act (DJA), and the Anti–Injunction Act (AIA), judicial review of IRS determinations is, with certain exceptions, largely circumscribed to entertaining suits for the refund of already-paid taxes, and, against the backdrop of sovereign immunity, these statutes prescribe the terms of the United States' limited consent to be sued regarding federal tax matters, and accordingly define the court's jurisdiction to entertain the suit. 26 U.S.C.A. §§ 6532(a)(1), 7421(a), 7422; 28 U.S.C.A. §§ 1346(a), 2201.

8. Federal Courts ⚿12.1

There are three strands of justiciability doctrine, namely standing, ripeness, and mootness, that go to the heart of the Article III case or controversy requirement. U.S.C.A. Const. Art. 3, § 1 et seq.

9. Federal Courts ⚿723.1

The Court of Appeals does not determine questions of justiciability simply by looking to the state of affairs at the time the suit was filed; rather, the controversy must be extant at all stages of review, not merely at the time the complaint is filed.

10. Declaratory Judgment ⚿217
Federal Courts ⚿13
Internal Revenue ⚿4940, 5015

Taxpayer's action seeking refund of income taxes paid was rendered moot when IRS refunded the disputed taxes, based on three-year statutory period for assessing and collecting those taxes having run, notwithstanding that taxpayer was also seeking declaratory and injunctive relief in order to obtain determination that it was tax-exempt, inasmuch as taxpayer's remaining claims were forward-looking and thus were barred by Anti–Injunction Act (AIA) and tax exception to Declaratory Judgment Act (DJA). 26 U.S.C.A. §§ 6501(a), (g)(2), 7421(a); 28 U.S.C.A. § 2201.

11. Statutes ⚿195

Where Congress has provided a comprehensive statutory scheme of remedies, the interpretive canon of expressio unius est exclusio alterius applies.

12. Statutes ⚿195

The principle of "expressio unius" simply says that when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list.

See publication Words and Phrases for other judicial constructions and definitions.

13. Declaratory Judgment ⚿217
Federal Courts ⚿13
Internal Revenue ⚿4940, 5015

Even if taxpayer would be deprived of advance public recognition of its exempt status for future tax years, if donors were less likely to contribute to organization treated as for-profit corporation by IRS, and if taxpayer would have to pay state taxes because Florida state tax liability was controlled by its federal tax status, such collateral consequences did not prevent taxpayer's action seeking refund of income taxes paid as well as declaratory and injunctive relief, in which action taxpayer claimed to be tax-exempt, from being rendered moot by IRS's refund of the disputed taxes, which was based on three-

year statutory period for assessing and collecting those taxes having run. 26 U.S.C.A. § 6501(a), (g)(2); Fla.Admin.Code Ann. r. 12–12C–1.022(1)(e).

14. Federal Courts ⇐12.1

The capable-of-repetition exception to the mootness doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.

15. Federal Courts ⇐12.1

The capable-of-repetition exception to the mootness doctrine applies only where: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

16. Declaratory Judgment ⇐217
Federal Courts ⇐13
Internal Revenue ⇐4940, 5015

IRS's actions in connection with its failure to refund income taxes to taxpayer were not too short in duration to be fully litigated, and, thus, capable-of-repetition exception to mootness doctrine did not prevent taxpayer's action seeking refund of income taxes paid, as well as declaratory and injunctive relief, from being rendered moot by IRS's refund of the disputed taxes, which was based on three-year statutory period for assessing and collecting those taxes having run; every year in which taxpayer paid taxes, it could claim refund, and, should IRS fail to provide refund within six-month statutory period, taxpayer could file refund suit and obtain full judicial review of the dispute. 26 U.S.C.A. §§ 6501(a), (g)(2), 6532(a)(1).

17. Declaratory Judgment ⇐217
Federal Courts ⇐13
Internal Revenue ⇐4940, 5015

No reasonable expectation existed that taxpayer would be subject to same action in future, and, thus, capable-of-repetition exception to mootness doctrine did not prevent taxpayer's action seeking refund of income taxes paid, as well as declaratory and injunctive relief, from being rendered moot by IRS's refund of the disputed taxes, which was based on three-year statutory period for assessing and collecting those taxes having run; although question of whether taxpayer was tax-exempt could reoccur, the issue, properly framed, was whether it was entitled to refund for certain past tax years, and that issue was not capable of repetition. 26 U.S.C.A. § 6501(a), (g)(2).

18. Internal Revenue ⇐4565, 4870

Income taxes are levied on an annual basis, and each year is the origin of a new liability and of a separate cause of action.

19. Federal Courts ⇐12.1

For the capable-of-repetition exception to the mootness doctrine to apply there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party.

20. Declaratory Judgment ⇐217
Federal Courts ⇐13
Internal Revenue ⇐4940, 5015

Taxpayer's action seeking refund of income taxes paid, as well as declaratory and injunctive relief, was not prevented from being rendered moot by IRS's refund of the disputed taxes, under exception to mootness doctrine that is based on party ceasing wrongful activity, where IRS did not cease its activity in response to litigation concerning taxpayer's tax-exempt status, but instead was required by statute to

credit or refund the taxes because three-year statutory period for assessing and collecting those taxes had run. 26 U.S.C.A. §§ 6401(a), 6402(a), 6501(a), (g)(2).

21. Federal Courts ⚿12.1

When a party abandons a challenged practice voluntarily, the party alleging mootness bears the burden of demonstrating that the wrongful activity is not likely to recur, and the burden requires a showing that: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

22. Federal Courts ⚿12.1

A party alleging mootness based on the cessation of wrongful activity has a heavy burden.

James Bopp, Jr., Anita Yvonne Woudenberg, Bopp, Coleson & Bostrom, Terre Haute, IN, Horatio G. Mihet, Liberty Counsel, Orlando, FL, Mathew Duane Staver, Liberty Counsel, Maitland, FL, for Plaintiff–Appellant.

Patrick J. Urda, U.S. Dept. of Justice, Tax Div., Kenneth L. Greene, U.S. Dept. of Justice, Tax. Div., App. Section, Washington, DC, Robert E. O'Neill, David Paul Rhodes, Tampa, FL, for Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before MARCUS, WILSON and COX, Circuit Judges.

MARCUS, Circuit Judge:

Christian Coalition of Fla. ("CC–FL") appeals the district court's dismissal of its tax refund suit for mootness. Shortly after the litigation began, the Internal Revenue Service ("IRS") refunded the disputed taxes in full. CC–FL claims, however, that a live controversy still exists because it is also seeking declaratory and injunctive relief in order to obtain a favorable determination of its tax-exempt status. CC–FL claims that the failure of the IRS to recognize CC–FL as a tax-exempt organization has collateral consequences that prevent the tax refund from rendering this case moot.

After thorough review, we AFFIRM the judgment of the district court. Filing a claim for a tax refund suit is not simply a procedural hurdle that, once leapt over, allows a party to seek other forward-looking relief against the IRS after the refund has been granted. Without a live refund claim, there is no way to distinguish this case from the kind of pre-enforcement suits that Congress, through the Anti–Injunction Act and the federal tax exemption to the Declaratory Judgment Act, has expressly forbidden taxpayers from bringing.

I.

CC–FL is a Florida non-profit corporation, founded in 1990. According to its complaint, CC–FL is an "advocacy organization" that "teaches concern for the sanctity of life, traditional family values, an economic system which fosters individual self-reliance, and faith in God." CC–FL engages in a substantial amount of lobbying and "regularly publishes voter guides and legislative scorecards."

[1] Because of its lobbying activity, CC–FL could not seek tax exemption as a public charity under 26 U.S.C. § 501(c)(3). Instead, on July 19, 1993, CC–FL applied

to the IRS for recognition of tax exempt status as a social welfare organization under 26 U.S.C. § 501(c)(4) and 26 C.F.R. § 1.501(a)–1.[1] Section 501(c)(4) (together with section 501(a)) exempts from taxation non-profit organizations "operated exclusively for the promotion of social welfare." Unlike public charities, social welfare organizations may engage in lobbying and other forms of advocacy. They are not permitted, however, to engage in "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii).

On July 25, 2000, the IRS issued a proposed determination letter denying CC–FL's application. On October 5, 2000, CC–FL filed a letter with the IRS protesting and appealing the proposed determination. Although the IRS and CC–FL held a conference on May 30, 2002 to discuss the proposed determination letter, the matter was put on hold while the IRS and The Christian Coalition International, an affiliated but separate legal entity, resolved a similar dispute in litigation then pending in the United States District Court for the Eastern District of Virginia.

After that litigation concluded, the IRS issued, via a letter dated July 31, 2008, its final determination that CC–FL did not qualify for tax exempt status under section 501(c)(4). The IRS stated: "We made this determination for the following reasons: You were not primarily engaged in activities that promote social welfare. Your activities primarily constituted direct and indirect participation in political campaigns on behalf of, or in opposition to, candidates for public office." The final determination letter also incorporated in full the earlier proposed determination letter, which discussed at greater length what the IRS viewed as CC–FL's political activities, including publishing voter guides, releasing legislative scorecards right before elections, and conducting grassroots political activism seminars. The proposed determination letter concluded: "The emphasis throughout your materials is on electing to office 'family friendly' people in order to impact legislation and policy as insiders. The overwhelming majority of the evidence in the administrative record, and thus the facts and circumstances in this case, denotes an organization that is intent upon intervening in political campaigns."

During the lengthy pendency of its application, CC–FL had filed non-profit information returns, not corporate tax returns, with the IRS. In light of the adverse determination, the IRS instructed CC–FL to file corporate tax returns for all of the tax years in question within 30 days of the final determination letter. CC–FL did so, filing tax returns and making full payments for tax years 1991, 1994–2000, and 2005–2006 on August 27, 2008. CC–FL's tax liability for these years was quite small, ranging from $16 (in 1994) to $48 (in 1997).[2]

1. An organization cannot obtain tax exempt status merely by conducting itself in accordance with the relevant provisions of the Internal Revenue Code; rather, "[i]n order to establish its exemption, it is necessary that every such organization claiming exemption file an application" with the IRS. 26 C.F.R. § 1.501(a)–1(a)(2).

2. In its briefing, CC–FL explains why its tax liability was so small:

> Most of CC–FL's operating budget is acquired in the form of non-taxable gifts excluded from its gross income pursuant to [I.R.C.] section 102. Consequently, CC–FL often has very little, if any, tax liability. For example, for the suit years, CC–FL reported gross receipts in excess of $2,009,700. Of that amount, approximately $1,700 dollars could properly be classified as taxable income, resulting in a tax liability of $261.

On September 25, 2008, CC–FL then filed amended tax returns requesting a full refund for these tax years on the ground that it is a tax exempt social welfare organization under section 501(c)(4). By statute, a taxpayer must wait six months before bringing a tax refund suit. 26 U.S.C. § 6532(a)(1). Within this statutory window, on December 1, 2008, the IRS refunded CC–FL its tax amounts, plus statutory interest, for tax years 2005 and 2006, totaling $68.68. The IRS did not state its reasons for granting the refund.

The IRS did not issue a refund or make a determination within the six month statutory period as to CC–FL's claim for the remaining tax years 1991 and 1994–2000. Accordingly, on April 3, 2009, CC–FL filed the refund suit at issue in the United States District Court for the Middle District of Florida, seeking a full refund of $261 for those years. CC–FL also sought a declaration that it qualifies as a tax exempt organization under section 501(c)(4), an injunction prohibiting the IRS from revoking CC–FL's tax exempt status, and a declaration that 26 U.S.C. § 501(c)(4) and the accompanying regulations 26 C.F.R. §§ 1.504(c)(3)–1 and 1.504(c)(4)–1 are unconstitutional, both facially and as-applied to CC–FL, for overbreadth and vagueness.

Shortly after the litigation was filed, the IRS began refunding CC–FL its claimed tax amounts.[3] The IRS determined that, under 26 U.S.C. §§ 6501(a) and 6501(g)(2),[4] the three year statute of limitations on assessing and collecting taxes had run for all of the tax years. Accordingly, the IRS treated CC–FL's tax payments for those years as overpayments under 26 U.S.C. § 6401(a).[5] Pursuant to 26 U.S.C. § 6402(a),[6] the IRS first credited CC–FL's payments towards an existing employment tax liability for 2006, and then refunded the rest, sending the final refund check to CC–FL on August 11, 2009.

On August 17, 2009, the IRS moved to dismiss the refund suit for lack of subject

3. There is some dispute about the timing of these refunds. The IRS asserts that almost all of the claimed taxes (with the exception of tax year 1995) were refunded or credited to CC–FL before CC–FL filed suit on April 3, 2009. CC–FL says that it did not receive notice of any of these refunds until after it commenced suit. Ultimately, this dispute is of little relevance here. It is undisputed that at least some refunds had not yet been granted at the time CC–FL filed suit, and it is similarly undisputed, therefore, that CC–FL had a live refund claim at the time the suit was filed. And the IRS does not contend that the case was never a live one; rather, it argues only that the case was later rendered moot by its full refund of the claimed taxes.

4. Section 6501(a) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed." Section 6501(g)(2) provides that if a taxpayer has a good faith basis for believing it is a tax exempt organization and "files a return as such," then this earlier return is the applicable one for purposes of section 6501(a), notwithstanding a later adverse IRS determination. In other words, for purposes of this case, CC–FL's non-profit information returns that it filed for each of the years 1991 and 1994–2000—not its later 2008 corporate tax return—triggered the three year statute of limitations. The taxes were assessed and collected in 2008, well outside the statute of limitations for all of the tax years at issue.

5. Section 6401(a) provides: "The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."

6. Section 6402(a) provides: "In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall . . . refund any balance to such person."

matter jurisdiction under Fed.R.Civ.P. 12(b)(1). The IRS claimed that the refund suit was rendered moot because the refunds sought by CC–FL had been granted in full. The district court agreed, entering an order granting the government's motion and dismissing the complaint with prejudice on August 3, 2010, and entering a separate judgment the following day.

II.

[2] "A district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is a question of law we review *de novo*." *Sinaltrainal v. Coca–Cola Co.*, 578 F.3d 1252, 1260 (11th Cir.2009). Similarly, "[w]hether a case is moot is a question of law that we review *de novo*." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir.2007).

A.

[3–5] We begin with a brief discussion of the relevant jurisdictional statutes. The United States, as a sovereign entity, is immune from suit unless it consents to be sued. *United States v. Dalm*, 494 U.S. 596, 608, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990); *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). "[T]he terms of its consent to be sued in any court," as expressed by statute, "define that court's jurisdiction to entertain the suit." *Sherwood*, 312 U.S. at 586, 61 S.Ct. 767. Accordingly, the terms of the statute or statutes waiving immunity are construed strictly, and courts may only entertain suits that are in full accord with such statutes. *See Soriano v. United States*, 352 U.S. 270, 276, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." (citing *Sherwood*, 312 U.S. at 590–91, 61 S.Ct. 767)); *accord McMaster v. United States*, 177 F.3d 936, 939 (11th Cir.1999).

The primary jurisdictional statute governing judicial review of federal tax decisions is 28 U.S.C. § 1346(a). It provides, in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]

28 U.S.C. § 1346(a). Title 26 U.S.C. § 7422, which governs civil actions for tax refunds, requires a taxpayer to first file a claim for a refund or credit with the IRS before he may commence a tax refund suit. *See* 26 U.S.C. § 7422(a). And 26 U.S.C. § 6532(a)(1) provides that a taxpayer may not bring a suit "under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum . . . before the expiration of 6 months from the date of filing the claim required under such section."

[6] Aside from the statutes describing the affirmative requirements for bringing a tax refund suit, Congress has also expressly excluded from judicial review other types of federal tax disputes. The Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, which generally authorizes courts to issue declaratory judgments as a remedy, excludes federal tax matters from its

remedial scheme.[7] *See Raulerson v. United States*, 786 F.2d 1090, 1093 n. 7 (11th Cir.1986) ("Th[e DJA] proscribes judicial declaration of the rights and legal relations of any interested parties in disputes involving federal taxes." (internal quotation marks omitted)). And the Anti–Injunction Act ("AIA"), 26 U.S.C. § 7421, provides that, except for suits brought under a handful of enumerated statutory exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).

[7] Taking these provisions together, it is clear that, with certain exceptions not applicable here, judicial review of IRS determinations is largely circumscribed to entertaining suits for the refund of already-paid taxes. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 731–32 & n. 7, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974) (noting the "congressional antipathy for premature interference with the assessment or collection of any federal tax" and that the "pressures operating on organizations ... to seek injunctive relief against the Service ... conflict directly with a congressional prohibition of pre-enforcement tax suits"). Against the backdrop of sovereign immunity, these statutes prescribe the terms of the United States' limited consent to be sued regarding federal tax matters, and accordingly "define th[e] court's jurisdiction to entertain the suit." *Sherwood*, 312 U.S. at 586, 61 S.Ct. 767.

B.

[8, 9] "Article III of the Constitution limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir.1998). As we have explained, there are "three strands of justiciability doctrine—standing, ripeness, and mootness—that go to the heart of the Article III case or controversy requirement." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1247 (11th Cir.2010) (internal quotation marks and alterations omitted). With regard to the third strand, the Supreme Court has made clear that "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)); *see Harrell*, 608 F.3d at 1265. As a panel of this Court has put it, "[a]n issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir.2009) (internal quotation marks omitted). Moreover, we do not determine questions of justiciability simply by looking to the state of affairs at the time the suit

7. The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986,* a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added).

was filed. Rather, the Supreme Court has made clear that the controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)).

1.

CC–FL contends that the district court erred in concluding that CC–FL could not seek declaratory and injunctive relief after being granted a full refund because of the Anti–Injunction Act and the tax exception to the Declaratory Judgment Act. CC–FL claims those statutes do not apply in post-enforcement refund suits (even when there is no longer a live refund component to the suit), as opposed to pre-enforcement suits filed before the assessment or collection of any tax. CC–FL's theory is that, having jumped through all of the congressionally-mandated hoops by properly filing a refund claim for $261 to unlock the courthouse doors, it may now seek the relief it wanted all along—declaratory and injunctive relief—even when the $261 is no longer at issue.

The government responds that this case has become moot, noting that the tax refund relief CC–FL seeks has been granted, and that there is no longer any amount at issue for the suit years. The government points out that it was required by statute to credit or refund the taxes at issue because the three-year collection and assessment period had run. The government also notes that, as a general matter, a refund suit for particular tax years decides only the tax liability for those years, and not for future years. The government contends that CC–FL cannot maintain this action simply as a vehicle to preemptively obtain favorable tax status for future years. Forward-looking claims of this kind, the government argues, are barred by the Anti–Injunction Act and the tax exception to the Declaratory Judgment Act.

The government has the better of the argument. Although neither the Supreme Court nor this Circuit has squarely addressed whether declaratory and injunctive relief are available in the context of a tax refund suit, the leading case on the application of the Anti–Injunction Act is *Bob Jones Univ. v. Simon*, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974). In *Bob Jones*, the Supreme Court made clear that the AIA prohibits courts from entertaining pre-enforcement suits challenging the IRS's assessment or collection of federal taxes.[8] The Court held that filing these forward-looking suits, as opposed to paying the taxes arising from the dispute, then claiming a refund, was contrary to the clear terms of the AIA preventing courts from entertaining any "suit for the purpose of restraining the assessment or collection of any tax." *Id.* at 736, 94 S.Ct. 2038 (quoting 26 U.S.C. § 7421(a)). The Court noted that although the AIA "apparently has no recorded legislative history," *id.*, its "principal purpose" is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Id.* at 736–37, 94 S.Ct. 2038 (quoting *Enochs v. Williams Packing and Navigation Co.*,

8. While the Supreme Court did not directly apply the DJA, it observed: "There is no dispute, however, that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti–Injunction Act. Because we hold that the instant case is barred by the latter provision, there is no occasion to resolve whether the former is even more preclusive." *Bob Jones*, 416 U.S. at 732 n. 7, 94 S.Ct. 2038.

370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962)).

The facts and procedural posture of *Bob Jones* are instructive. Bob Jones University, located in Greenville, South Carolina, is a private Christian university. *See id.* at 734–35, 94 S.Ct. 2038. At the time of the Supreme Court's decision, the University refused to admit African–Americans as students and prohibited its students from interracial dating. *Id.* at 735, 94 S.Ct. 2038. Although the University had been granted tax-exempt status back in 1942 under a predecessor of what is now 26 U.S.C. § 501(c)(3), in 1970 the IRS announced that it would no longer allow tax-exempt status for schools maintaining racially discriminatory admissions policies.[9] *Id.* Before the IRS could take official action, Bob Jones University filed suit seeking declaratory and injunctive relief to prevent the IRS from revoking the University's tax-exempt status.

The Supreme Court recognized the substantial consequences revocation of tax-exempt status can have on a 501(c)(3) organization and the powerful incentives such organizations have to bring suits seeking declaratory and injunctive relief. *Id.* at 731, 94 S.Ct. 2038. Nonetheless, the Supreme Court recognized that these "pressures operating on organizations facing revocation of § 501(c)(3) status to seek injunctive relief against the Service pending judicial review of the proposed action conflict directly with a congressional prohibition of such pre-enforcement tax suits." *Id.* The Supreme Court went on to observe that the University could obtain review by paying income or employment taxes in full, and then bringing a suit for a refund. *Id.* at 746–47, 94 S.Ct. 2038. The Court conceded that the government's interest in protecting the administration of the federal tax system from judicial interference can often lead to imperfect and harsh results for an organization that has a dispute with the IRS:

> We do not say that these avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. But, as the Service notes, some delay may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation. And although the congressional restriction to postenforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, and of the opportunities for review that are available.

Id. at 747–48, 94 S.Ct. 2038 (citations omitted).

9. Title 26 U.S.C. § 501(c)(3) is the provision of the Internal Revenue Code that grants tax-exempt status to public charities. Notably, donations to 501(c)(3) organizations are tax-deductible, unlike donations to 501(c)(4) organizations (the section at issue in this case). Accordingly, revocation of 501(c)(3) status for a charity "is likely to result in serious damage to a charitable organization," because "[m]any contributors simply will not make donations to an organization that does not appear on the Cumulative List [the IRS' official list of approved 501(c)(3) organizations]." *Bob Jones,* 416 U.S. at 730, 94 S.Ct. 2038. Unless they have a strong attachment to the organization in question, individuals seeking to make tax-deductible charitable donations will simply divert their largesse elsewhere in the event an organization loses its 501(c)(3) status.

Finally, in a footnote on which CC–FL heavily relies, the Supreme Court emphasized that the University did not bring its case as a refund action. The Court stated that "we have no occasion to decide whether the Service is correct in asserting that a district court may not issue an injunction in such a suit, but is restricted in any tax case to the issuance of money judgments against the United States." *Id.* at 748 n. 22, 94 S.Ct. 2038. The Court also noted that "there would be serious question about the reasonableness of a system that forced a § 501(c)(3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress." *Id.*

CC–FL attempts to distinguish *Bob Jones* by claiming that the AIA and DJA only apply to suits seeking purely declaratory and injunctive relief, filed before any tax was assessed or collected. CC–FL argues that this case is different, because it met all of the jurisdictional and statutory requirements for a refund suit, and that this case falls into the scenario expressly left unresolved by the Supreme Court in *Bob Jones:* a tax refund suit in which the claimant also seeks declaratory and injunctive relief.

[10] Absent a live refund claim, however, CC–FL's attempt to distinguish this case from *Bob Jones* is unavailing. While CC–FL wanted to obtain its refund on the most favorable grounds possible, a refund is a refund, and the IRS returned all of the disputed taxes shortly after this litigation began. We need not decide today the still-unresolved issue of whether, in a live refund suit, a court may also award declaratory and injunctive relief. It is enough to say that, regardless of this case's origins as a tax refund suit, absent any live refund component, the district correctly concluded that it was without jurisdiction to entertain a suit containing solely forward-looking claims seeking declaratory and injunctive relief from the IRS. These types of suits are expressly proscribed by the DJA and AIA.

The congressional response to *Bob Jones* is also instructive, and favors the government's position here. Congress recognized the potential harshness of the Supreme Court's holding for 501(c)(3) charities that might lose virtually all of their donations, and responded to the "serious question" raised by forcing 501(c)(3) charities to repeatedly file backward-looking refund suits. Accordingly, in 1976, Congress enacted 26 U.S.C. § 7428, which, in relevant part, *permits* the United States Tax Court, the United States Court of Federal Claims, or the United States District Court for the District of Columbia to entertain declaratory judgment actions "with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3)." 26 U.S.C. § 7428(a); *see* Tax Reform Act of 1976, Pub.L. No. 94–455, § 1306, 90 Stat. 1520 (1976).[10]

[11, 12] Notably, however, Congress did *not* enact any exception to the Declaratory Judgment Act or Anti–Injunction Act for organizations seeking tax-exempt status under other provisions of section 501(c), including for organizations like CC–FL seeking tax-exempt status as a social welfare organization under section 501(c)(4). We find this distinction meaningful, and decline to read additional remedies into the legislative scheme chosen by

10. In this vein, Congress also amended the DJA, 28 U.S.C. § 2201, to carve out an exception (to the broader federal tax exception) for suits brought under 26 U.S.C. § 7428.

Congress. "Where Congress has provided a comprehensive statutory scheme of remedies, as it did here, the interpretive canon of *expressio unius est exclusio alterius* applies." *Christ v. Beneficial Corp.,* 547 F.3d 1292, 1298 (11th Cir.2008); *accord Shotz v. City of Plantation, Fla.,* 344 F.3d 1161, 1171 n. 15 (11th Cir.2003). The principle of *expressio unius* simply says that when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list. *See United States v. Castro,* 837 F.2d 441, 442 (11th Cir.1988) ("A general guide to statutory construction states that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.*") (internal quotation marks omitted). Thus, it is clear that Congress has granted organizations claiming 501(c)(4) tax-exempt status fewer avenues for judicial relief than those organizations seeking 501(c)(3) status.

2.

[13] CC–FL also contends that the case is not moot because it seeks more than the mere refund of $261 in federal taxes, and that collateral consequences result from the failure of the IRS to issue a favorable determination letter. CC–FL lists three primary consequences that, it claims, warrant further relief: (1) "CC–FL is deprived of the advance public recognition of its exempt status for future tax years," and must instead continue to file federal corporate tax returns; (2) "donors are less likely to contribute to an organization treated as a for-profit corporation by the [IRS] rather than one recognized as exempt from federal income taxes"; and (3) CC–FL will have to pay state taxes because "Florida state tax liability is controlled by its federal tax status." *See* Fla. Admin. Code r. 12–12C–1.022(1)(e).[11]

We are not persuaded. These consequences do not allow us to carve out an exception to the unambiguous prohibitions found in the Anti–Injunction Act and Declaratory Judgment Act. In the first place, we have no power to rewrite the language of these statutes. *United States v. Blue Cross and Blue Shield of Ala., Inc.,* 156 F.3d 1098, 1111 (11th Cir.1998) ("When the language of a statute is unambiguous, we are bound to give it its plain meaning . . . ."); *see also Bob Jones,* 416 U.S. at 750, 94 S.Ct. 2038 ("*Congress* . . . is the appropriate body to weigh the relevant, policy-laden considerations" of permitting not-for-profit organizations to obtain preventative injunctive relief against the IRS) (emphasis added).

Moreover, CC–FL's arguments prove far too much. As for CC–FL's future federal and state tax liabilities, if those were sufficient to permit the district court to retain jurisdiction over the suit, then the limitations found in the Anti–Injunction Act and Declaratory Judgment Act would be rendered meaningless. *Any* taxpayer denied tax-exempt status will have to pay federal and state taxes going forward. If we were to adopt the rule urged by CC–FL, then all adverse IRS determi-

11. Fla. Admin. Code r. 12–12C–1.022(1)(e) provides, in relevant part:

> Any nonprofit or other tax-exempt organization, including a private foundation, which is exempt from federal income tax under Section 501(a), I.R.C., and is described in Section 501(c), I.R.C., is required to file a Form F–1120 [Florida corporate income tax return] *only* when such organization has "unrelated trade or business taxable income," as determined under Section 512, I.R.C., or is filing a Form 990T with the Internal Revenue Service.

(emphasis added). In other words, as a general matter, organizations recognized by the IRS as tax-exempt do not have to file state corporate tax returns in Florida.

nations regarding an organization's claim to tax-exempt status would be susceptible to challenge in federal district court.

The Supreme Court's discussion in *Bob Jones* also highlights the weakness of CC–FL's claim that it would suffer reduced donations if denied declaratory or injunctive relief. Donations to 501(c)(3) charities—unlike those to 501(c)(4) organizations that engage in lobbying activity—are generally tax deductible, *see* 26 U.S.C. § 170, meaning that revocation of an organization's 501(c)(3) status will likely result in a massive drop in donations to that organization, as donors seeking favorable tax treatment make contributions elsewhere. Presumably recognizing this distinction, CC–FL instead says that donors will have more "peace of mind" in donating to a 501(c)(4) organization because those potential donors can rest assured that the organization will not use those donations for the "private inurement" of its members. *See* 26 U.S.C. § 501(c)(4)(B). But if the severe consequences of losing tax exempt status for a 501(c)(3) organization, even the potential "ruination of the taxpayer's enterprise," were deemed by the Supreme Court insufficient reason to carve out an exception to the AIA, *see Bob Jones,* 416 U.S. at 745, 747, 94 S.Ct. 2038, then CC–FL's far more modest claim would seem to be plainly insufficient to avoid the clear terms of the AIA and DJA.

CC–FL's collateral consequences argument is, at best, an incomplete attempt to satisfy the narrow judicially-created exception to the Anti–Injunction Act. In *Enochs v. Williams Packing,* the Supreme Court held that a taxpayer may seek preventative injunctive relief against the IRS only upon satisfying two independent prongs: first, that he will suffer "irreparable injury" if not awarded injunctive relief, and second, "that under no circumstances could the Government ultimately prevail." 370 U.S. at 6–7, 82 S.Ct. 1125. CC–FL's claim of collateral consequences bears *solely* on the first prong of the *Williams Packing* test. The Supreme Court has made clear, however, that a taxpayer must establish *both* prongs of the judicial exception to the Anti–Injunction Act before a court may entertain his claim for injunctive relief against the IRS. *See Alexander v. "Americans United" Inc.,* 416 U.S. 752, 762, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974) ("[A]llowing injunctive relief on the basis of this showing [of irreparable injury] alone would render [the Anti–Injunction Act] quite meaningless."); *accord Bob Jones,* 416 U.S. at 745, 94 S.Ct. 2038 ("*Williams Packing* switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement that it be established that the Service's action is plainly without a legal basis."). And CC–FL has not shown, or even argued, that the IRS's adverse determination is plainly without a legal basis or that under no circumstances could the IRS prevail. In short, the collateral consequences advanced by CC–FL do nothing to undermine the conclusion that this suit was rendered moot upon the full refund of taxes by the IRS.

C.

[14, 15] CC–FL's final claims are drawn from the judicially-created exceptions to the mootness doctrine. CC–FL first contends that even if the full refund of taxes would ordinarily render a refund suit moot, this case falls under the exception to the mootness doctrine governing cases or controversies "capable of repetition yet evading review." "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be sub-

jected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974)). As the Supreme Court has made clear, the exception applies only where " '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.' " *Davis v. FEC*, 554 U.S. 724, 735, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir.2004).

[16] The first prong of the exception—that the challenged action is too short to be fully litigated—is not met here. Nothing about the IRS's adverse determination or assessment and collection of taxes is "too short to be fully litigated." Every year in which CC–FL pays taxes, it may claim a refund, and, should the IRS fail to provide the refund within the six month statutory period, CC–FL may file a refund suit and obtain full judicial review of the dispute. As the Supreme Court has noted, "[t]hese review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility." *Bob Jones*, 416 U.S. at 746, 94 S.Ct. 2038. CC–FL says that it is too easy for the IRS to simply refund the taxes, either within the six month statutory period or shortly after litigation begins, but that complaint does not fit within the narrow exception to mootness for cases "evading review." Rather, it is a complaint that the congressional scheme for challenging adverse determinations by the IRS is too limited. However inequitable or frustrating CC–FL may find this statutory scheme, the Supreme Court has made clear that "the problems presented do not rise to the level of constitutional infirmities." *Id.* at 747, 94 S.Ct. 2038. Accordingly, we decline to use this exception to the mootness doctrine to create an end-run around the AIA and DJA.

[17–19] Nor is the second prong of the exception—a reasonable expectation that the complaining party will be subject to the same action in the future—met here. It is true, if stated broadly enough, that this case involves an issue (CC–FL's tax exempt status) that is likely to arise in future years yet may never be fully considered by a federal court (because in a given year, CC–FL may incur no tax liability, or the IRS may choose to refund the inevitably small amount of CC–FL's claim within the six month statutory window rather than litigate, as it did with respect to the 2005 and 2006 tax years). But a proper framing of the issue raised in this litigation is a narrower one.[12] The issue is not whether CC–FL is a tax-exempt organization, now and in the future, but rather whether it was entitled to a refund for the past tax years 1991 and 1994–2000. "Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action." *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 92 L.Ed. 898 (1948). And as the Supreme Court has said, "there must be a reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining par-

12. Moreover, even if we frame the issue broadly, CC–FL still cannot meet the first prong of the mootness exception for cases capable of repetition yet evading review, because the IRS's adverse determination and demand for taxes in any given tax year are not too short in duration to be fully litigated.

ty." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (emphasis added) (internal quotation marks omitted). The same controversy—CC–FL's tax liabilities for the years 1991 and 1994–2000—is not an issue capable of repetition. Rather, the hypothetical future controversy advanced by CC–FL would be at most a *similar* one. The tax amounts in dispute and the nature of the claim for a refund are specific to each individual tax year. *Sunnen*, 333 U.S. at 598, 68 S.Ct. 715. Similarly, the proper resolution of CC–FL's claim to tax-exempt status in a given tax year will depend on CC–FL's conduct in that year. Thus, for example, the IRS or the district court would have to determine whether, in the specific tax year at issue, CC–FL has engaged in "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii).

[20, 21] CC–FL's second claim is that the IRS has voluntarily ceased its unlawful conduct by refunding the taxes at issue, and that its voluntary cessation in response to this litigation does not render the case moot. We recently discussed the "voluntary cessation" exception to mootness in *Harrell v. The Fla. Bar*, noting that "it has long been the rule that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." 608 F.3d at 1265 (internal quotation marks and alteration omitted). When a party abandons a challenged practice voluntarily, the party alleging mootness—here, the IRS—bears the burden of demonstrating that the wrongful activity is not likely to recur. *Id.* The burden requires a showing that: "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (quoting *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979)).

[22] While CC–FL rightly calls this a "heavy burden," *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), it fails to recognize that the predicate condition has not been satisfied here. In refunding the amounts at issue in this case, the IRS did not abandon its practice or position—voluntarily or otherwise—that CC–FL is not a tax-exempt organization and that CC–FL should have paid corporate income taxes for the years at issue in the suit. Rather, the IRS was required by statute to credit or refund the taxes at issue because the three year statutory period for assessing and collecting those taxes had run. *See* 26 U.S.C. §§ 6401(a), 6402(a), 6501(a), 6501(g)(2). As the IRS points out, CC–FL's refund was not granted in response to pending litigation, "but rather was compelled by the operation of the Internal Revenue Code."[13]

The order and judgment of the district court dismissing this case as moot are

AFFIRMED.

13. This point also highlights the possibility that, should a similar dispute over CC–FL's tax exempt status arise in a future tax refund suit, the "voluntary cessation" exception to mootness may have a role to play if the IRS fails to refund the disputed taxes within the six month statutory period, and then later refunds the taxes after litigation begins, solely to deprive the court of jurisdiction and without any independent basis for granting the refund. We offer no opinion on the merits of a voluntary cessation claim presented under such circumstances, as those circumstances do not describe the case currently before us.

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unlawful. This interest is weighed against the hardships to SDI and the threat of harm to the public. Here the hardship to SDI—the cost of defending the lawsuits even in the face of favorable Board determinations—implicates the public interest. If these costs force SDI to reassign the Carpenters' work to Local 200, it is likely to engender a disruption of industrial peace, causing "obstructions to the free flow of commerce," *Miller,* 19 F.3d at 455 n. 3, and "threaten[ing a] danger of harm to the public," *Retail Clerks Union, Local 137 v. Food Employers Council, Inc.,* 351 F.2d 525, 531 (9th Cir.1965) ("Section 10(*l*) reflects a congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public. . . .").

B. Modification of the Preliminary Injunction

[11, 12] We review de novo whether the district court had subject matter jurisdiction to modify the injunction once an appeal was taken. *Burlington N. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174,* 203 F.3d 703, 707 (9th Cir.2000). Because "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal," we conclude that the district court lacked jurisdiction to modify the injunction. *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam).

Though the court is allowed to "modify . . . an injunction on . . . terms that secure the opposing party's rights," Fed.R.Civ.P. 62(c), the court only "retains jurisdiction during the pendency of an appeal to act to preserve the status quo," *Natural Res. Def. Council, Inc. v. Sw. Marine, Inc.,* 242 F.3d 1163, 1166 (9th Cir.2001). The district court deleted paragraph 1(c), which proscribed Local 200 from "in any manner or by any means, threatening, coercing, or restraining [SDI], where an object thereof is to force or require [SDI] to assign plastering work to Local 200." This modification altered the status quo by removing the prohibition on Local 200's use of other coercive measures designed to undermine the Board's section 10(k) determination pending final adjudication. We therefore vacate the modification order deleting paragraph 1(c) and reinstate the injunction as originally granted.

IV. Conclusion

Because we conclude that the district court did not abuse its discretion in granting injunctive relief, we affirm the order appealed in Case No. 08–56668. However, because the district court lacked subject matter jurisdiction to modify the injunction once the appeal was taken, we vacate the order appealed in Case No. 08–56942, reinstating the full scope of the injunction as originally granted.

Affirmed in part; Vacated in part.

COALITION FOR ICANN TRANSPARENCY, INC., a Delaware corporation, Plaintiff–Appellant,

v.

VERISIGN, INC., a Delaware corporation, Defendant–Appellee.

No. 07–16151.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 8, 2008.

Filed June 5, 2009.

Amended July 9, 2010.

Background: Organization composed of participants in Internet domain name sys-

tem (DNS), including website owners, brought action under Sherman Act and under California's Cartwright Act against operator of ".com" and ".net" domain name registries alleging conspiracy in restraint of trade in connection with terms of .com and .net contracts' pricing and renewal provisions, and monopolization or attempted monopolization of .com and .net registration markets. The United States District Court for the Northern District of California, Ronald M. Whyte, J., dismissed complaint, and plaintiff appealed.

Holdings: The Court of Appeals, Schroeder, Circuit Judge, held that:

(1) allegation that provision in .com agreement permitting competitive re-bidding was illusory was sufficient to allege violation of § 1 of Sherman Act;

(2) allegation that provision in .net agreement permitting competitive re-bidding was illusory was not sufficient to allege violation;

(3) allegation that operator and DNS's technical coordination body undertook concerted action to restrain trade adequately alleged claim for unlawful restraint of trade;

(4) *Noerr–Pennington* immunity doctrine did not bar claim attempted monopolization claim; and

(5) fact issues remained as to whether separate market existed for expiring internet domain names.

Reversed and remanded.

Opinion, 567 F.3d 1084, amended and superseded on denial of rehearing en banc.

1. Antitrust and Trade Regulation ⚿972(3)

Federal Civil Procedure ⚿1772

On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is plausible in light of basic economic principles; plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Fed.Rules Civ. Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Antitrust and Trade Regulation ⚿537

To state claim under § 1 of Sherman Act, plaintiff must allege facts that, if true, will prove: (1) existence of conspiracy, (2) intention on co-conspirators' part to restrain trade, and (3) actual injury to competition. Sherman Act, § 1, 15 U.S.C.A. § 1.

3. Antitrust and Trade Regulation ⚿577

Allegation by organization composed of participants in Internet domain name system (DNS) that provision of agreement between DNS's technical coordination body and operator of ".com" domain name registry permitting competitive re-bidding was illusory was sufficient to allege restraint of trade claim under the Sherman Act; agreement was entered into without any competitive bidding, and granted operator automatic renewal unless court or arbitrator issued final order finding operator to be in breach of agreement and operator failed to cure breach. Sherman Act, § 1, 15 U.S.C.A. § 1.

4. Antitrust and Trade Regulation ⚿577

Allegation by organization composed of participants in Internet domain name system (DNS) that provision of agreement between DNS's technical coordination body and operator of ".net" domain name registry permitting competitive re-bidding was illusory was not sufficient to allege restraint of trade claim under the Sherman Act; even though agreement granted operator automatic renewal unless court or arbitrator issued final order finding operator to be in breach of agreement and operator failed to cure breach, agreement was

entered into after competitive bidding. Sherman Act, § 1, 15 U.S.C.A. § 1.

5. Antitrust and Trade Regulation ⚷535

Competitive bidding is not required before entering into an exclusive licensing agreement, but its presence or absence is a factor to be considered in determining the applicability of the antitrust laws; so long as the agreement is the result of independent business judgment, is not the result of an intention to restrain trade, or does not actually injure competition, it is immaterial whether it was secured through a competitive bidding process. Sherman Act, § 1, 15 U.S.C.A. § 1.

6. Antitrust and Trade Regulation ⚷811

Entity cannot be held liable for antitrust violations if it simply unilaterally increases its prices, absent showing that it either conspired with another entity in order to restrain trade, or acted in market in which it holds or is attempting to hold monopoly. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Antitrust and Trade Regulation ⚷867

Allegation by organization composed of participants in Internet domain name system (DNS) that operator of ".com" domain name registry and DNS's technical coordination body undertook concerted action to restrain trade by imposing prices higher than market rate and under conditions hostile to competition adequately alleged that pricing provision in their .com agreement unlawfully restrained trade, in violation of the Sherman Act, where agreement was entered into without any competitive bidding. Sherman Act, § 1, 15 U.S.C.A. § 1.

8. Antitrust and Trade Regulation ⚷867

Allegation by organization composed of participants in Internet domain name system (DNS) that operator of ".net" domain name registry and DNS's technical coordination body undertook concerted action to restrain trade by imposing prices higher than market rate and under conditions hostile to competition did not adequately allege that pricing provision in their .net agreement unlawfully restrained trade, in violation of the Sherman Act, where contract was reached as result of competitive bidding, not conspiratorial action. Sherman Act, § 1, 15 U.S.C.A. § 1.

9. Antitrust and Trade Regulation ⚷905(1)

Noerr–Pennington immunity doctrine immunizes only litigation activity, not other forms of threats or harassment. Sherman Act, § 2, 15 U.S.C.A. § 2.

10. Antitrust and Trade Regulation ⚷620

Claim for monopolization under the Sherman Act has two elements: possession of monopoly power in relevant market, and acquisition or perpetuation of this power by illegitimate predatory practices. Sherman Act, § 2, 15 U.S.C.A. § 2.

11. Antitrust and Trade Regulation ⚷713, 714, 715

To state claim for attempted monopolization under the Sherman Act, plaintiff must allege facts that, if true, will prove: (1) that defendant has engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and (3) dangerous probability of achieving monopoly power. Sherman Act, § 2, 15 U.S.C.A. § 2.

12. Antitrust and Trade Regulation ⚿905(1, 3)

Noerr–Pennington immunity doctrine did not bar claim that operator of ".com" domain name registry engaged in attempted monopolization, in violation of the Sherman Act, as result of its predatory litigation activity aimed at coercing Internet domain name system's (DNS) technical coordination body to perpetuate operator's role as exclusive regulator of .com domain name market by awarding it .com agreement without any competitive bidding, and by agreeing to terms that favored operator, where claim did not pertain solely to operator's litigation activities, but encompassed operator's predatory and harassing activities that accompanied that litigation. Sherman Act, § 2, 15 U.S.C.A. § 2.

13. Antitrust and Trade Regulation ⚿554, 557

Relevant "market," for antitrust purposes, can be broadly characterized in terms of cross-elasticity of demand for or reasonable interchangeability of given set of products or services.

See publication Words and Phrases for other judicial constructions and definitions.

14. Antitrust and Trade Regulation ⚿557

In determining relevant market for antitrust purposes, court should consider whether product and its substitutes are reasonably interchangeable by consumers for same purpose, as well as industry or public recognition of submarket as separate economic entity, product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

15. Federal Civil Procedure ⚿1831

Issue of whether separate market existed for expiring internet domain names involved fact questions that could not be resolved on motion to dismiss action alleging that operator of ".com" domain name registry attempted to monopolize that market, in violation of the Sherman Act. Sherman Act, § 2, 15 U.S.C.A. § 2.

Bret A. Fausett, Los Angeles, CA, for the plaintiff-appellant.

Ronald L. Johnston, Los Angeles, CA, for defendant-appellee.

Dennis M. Hart, Washington, DC, for amicus curiae Internet Commerce Association.

Appeal from the United States District Court for the Northern District of California, Ronald M. Whyte, District Judge, Presiding. D.C. No. CV–05–04826–RMW.

Before MARY M. SCHROEDER, A. WALLACE TASHIMA and WILLIAM A. FLETCHER, Circuit Judges.

ORDER

The opinion filed on June 5, 2009 is hereby amended.

The petitions for rehearing and rehearing en banc are otherwise DENIED, and no further petitions for rehearing will be accepted.

OPINION

SCHROEDER, Circuit Judge:

This appeal is about whether the plaintiff, Coalition for ICANN Transparency, Inc., using antitrust statutes drafted in the late 19th century, has successfully stated claims in connection with the administration of the Internet domain name system, so essential to the operation of our sophisticated 21st century communications net-

work. The district court ruled that the plaintiff failed. With the benefit of extensive briefing, collegial discussions and amicus participation on appeal from other players in the domain name system, we hold that the plaintiff has stated claims under both Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1–2. We reverse and remand for further proceedings.

I. Overview

Plaintiff Coalition for ICANN Transparency ("CFIT") is an organization composed of participants in the Internet domain name system ("DNS"), including website owners. The heart of the IT industry is located in the Silicon Valley, which lies within the Northern District of California. CFIT filed its complaint in 2005 in the Northern District against defendant VeriSign, the corporation that acts as the sole operator of the ".com" and ".net" domain name registries.

VeriSign operates each registry pursuant to a contract with the Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit oversight body that coordinates the DNS on behalf of the United States Department of Commerce. Pursuant to these contracts, VeriSign receives a certain price for registering each domain name. It is not disputed that there can only be one operator for each domain name registry at any one time. Therefore, the only viable competition can take place in connection with obtaining a new contract after expiration of the old one. The .com agreement entered into by ICANN and VeriSign in 2006, after no competitive bidding, provides that the price of domain names can increase by seven percent over four of the six succeeding years. The .net agreement, which was entered into as a result of competitive bidding, contained price caps that were set to expire on December 31, 2006, leaving no limitation on the price that could be charged for .net names. Each contract has a presumptive renewal provision.

CFIT's complaint endeavored to state claims against VeriSign under Section 1 of the Sherman Act and under California's counterpart, the Cartwright Act, for conspiracy in restraint of trade in connection with the terms of the .com and .net contracts' pricing and renewal provisions. In essence, CFIT sought to show that the prices were artificially high and that the renewal provisions wrongfully restrained competition for successor contracts.

The complaint also endeavored to state claims under Section 2 of the Sherman Act, alleging that VeriSign's conduct in obtaining the anti-competitive provisions constituted monopolization or attempted monopolization of the .com and .net registration markets. In addition, the complaint sought an injunction against VeriSign's proposed service for registration of expiring domain names, on the ground it constituted an attempted monopolization of that allegedly separate market.

The district court, after some discovery and several opportunities for CFIT to amend the complaint, dismissed the action with prejudice for failure to state claims under state or federal law in connection with either the .com or the .net contract. It held that CFIT had not sufficiently alleged that either the terms of the contracts or VeriSign's conduct in obtaining the contracts amounted to antitrust violations. The court also held that CFIT failed sufficiently to allege that a market for expiring domain names existed separate and apart from the market for newly registered domain names.

In this appeal, CFIT contends that the district court failed to appreciate the seriousness of the allegations of anti-competitive conduct and that, in rejecting the existence of a separate market for expiring

domain names, the district court improperly relied on already outdated authority from earlier in this young century. We now agree with CFIT, at least with respect to the claims challenging the terms and award of the .com contract and asserting the existence of a separate market for expiring domain names. We therefore reverse.

II. The Players

Plaintiff CFIT is a non-profit corporation composed of DNS stakeholders, including domain name registrars and owners of domain names (registrants). CFIT alleges that its members, including both registrars and registrants, have an interest in ensuring that conditions in the domain name registration market remain fair and competitive.

ICANN is a nonprofit corporation that was created in 1998, in response to a policy directive of the Department of Commerce, to administer the domain name system on the Department's behalf. ICANN is charged by the Department of Commerce with selecting and entering into agreements with registry operators such as VeriSign. ICANN was named as a defendant in CFIT's original complaint and in its First Amended Complaint, but CFIT dropped ICANN as a defendant in the Second Amended Complaint, from which this appeal arises. It seeks to maintain claims only against VeriSign.

Defendant VeriSign is a corporation that, through its contractual relationship with ICANN, acts as the sole operator of the .com and .net domain name registries. This means that VeriSign manages the definitive databases of registered .com and .net domain names. VeriSign has held this position since 2001, prior to which its predecessor-in-interest, Network Solutions, Inc. ("NSI"), managed the databases.

III. Nature and Terms of the Agreements

VeriSign has been the sole operator of the .com and .net registries since 2001, when it entered into two separate agreements with ICANN (the "2001 .com Agreement" and the "2001 .net Agreement," respectively). Those agreements supercede ICANN's previous agreements with NSI. The 2001 Agreements imposed on VeriSign a price cap of $6 per year for registration, renewal, or extension of any domain name. Each of the 2001 Agreements contained a renewal provision that allowed ICANN to place the contract up for competitive bidding upon its expiration.

When the 2001 .net Agreement expired in 2005, there was a competitive bidding process that resulted in the selection of VeriSign's bid. VeriSign entered into a new agreement with ICANN (the "2005 .net Agreement"). Before the 2001 .com Agreement was due to expire in 2007, however, VeriSign and ICANN agreed to extend it with a new contract (the "2006 .com Agreement"). Both the 2006 .com Agreement and the 2005 .net Agreement provide for automatic renewal upon expiration unless a court or arbitrator issues a final order finding VeriSign to be in breach of the Agreement, and VeriSign fails to cure the breach. The 2006 .com Agreement also increases the maximum price VeriSign can charge for domain name registrations. The previous contract's $6 cap was maintained until December 31, 2006, but the new contract provides that cap may be increased seven percent per year in four of the following six years. The 2005 .net Agreement does not contain an express price increase provision. Its price cap of $4.25 per domain name expired on December 31, 2006, leaving no cap in its place.

IV. CFIT's Claims

CFIT's complaint included claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. CFIT sought to state a Section 1 claim, for conspiracy in restraint of trade, in connection with the pricing and renewal provisions of both the 2005 .net Agreement and the 2006 .com Agreement. CFIT claimed that VeriSign and ICANN conspired to restrain trade by setting prices for VeriSign's registry services that were substantially above the prices that would result from a competitive market. Moreover, CFIT alleged that VeriSign and ICANN violated Section 1 by imposing a presumptive renewal provision in both the 2006 .com and 2005 .net Agreements, all but ensuring VeriSign's continued market dominance by reducing or eliminating competition for successor contracts.

CFIT's first claim under Section 2 was for monopolization and attempted monopolization of the .com and .net markets. CFIT alleged that VeriSign engaged in improper and predatory conduct, including financial pressure, vexatious litigation, and negative press coverage, in order to induce ICANN to enter into agreements with terms that unlawfully favored VeriSign. CFIT claimed that VeriSign eventually settled its allegedly vexatious suit against ICANN by offering to pay ICANN a multi-million dollar fee in exchange for favorable terms in the 2006 .com and 2005 .net Agreements, thus doing away with any competition for the next contract.

CFIT's second claim under Section 2 concerned the existence of a separate market for expiring domain names. Expiring domain names are names that have fallen back, or are about to fall back into the registry database as a result of nonrenewal by their current owners. CFIT alleged that expiring domain names are sufficiently distinct from other types of domain names as to constitute a separate market for antitrust purposes.

CFIT further alleged that VeriSign planned to "leverage" its monopoly in the .com and .net markets into the market for expiring names. According to CFIT's complaint, pursuant to a term in the 2006 .com Agreement permitting VeriSign to launch new registry-related services, VeriSign planned to launch a Central Listing Service ("CLS") to replace the current system for registration of expiring domain names. CFIT alleged that VeriSign's proposed CLS system will allow it to leverage its existing monopoly in the .com and .net registration markets to achieve a monopoly of the market for expiring domain names.

V. Legal Analysis

[1] We review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *William O. Gilley Enters., Inc. v. Atl. Richfield Co.,* 588 F.3d 659, 662 (9th Cir.2009) (per curiam). All allegations of material fact are taken as true and are construed in the light most favorable to CFIT. *Id.* "On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *Id.* (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). CFIT must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955.

A. CFIT's Claims Under Section 1 of the Sherman Act

[2] Section 1 of the Sherman Act prohibits "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade or commerce." 15 U.S.C. § 1. To state a claim under Section 1, a plaintiff must allege

facts that, if true, will prove: (1) the existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3) actual injury to competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir.2008) (citing *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507(9th Cir.1989)).

CFIT sought to state a Section 1 claim in connection with the pricing and renewal provisions of the 2006 .com Agreement and the 2005 .net Agreement. CFIT alleged that ICANN and VeriSign conspired to set artificially high prices for VeriSign's services and to ensure that VeriSign would receive successor contracts with ICANN without having to go through a competitive bidding process. We conclude that CFIT adequately alleged a Section 1 violation with respect to the 2006 .com Agreement.

1. Renewal

CFIT challenged the renewal term in both the .com and .net contracts providing that VeriSign will receive automatic renewal upon expiration of each contract unless a court or arbitrator issues a final order finding VeriSign to be in breach of the Agreement, and VeriSign fails to cure the breach. CFIT alleged the renewal term unlawfully restrains competition because the provision that would trigger a competitive re-bid for the contract is "illusory," and that "at the time they executed the Agreement[s], both ICANN and VeriSign understood that [the provision] never would be triggered." CFIT alleged that the threat of losing each contract in a competitive re-bid is essential to protect competition in that it "benefits consumers by keeping prices in check, . . . by maintaining solid and reliable performance of the registry, and by preventing the registry from undertaking abusive practices that would financially benefit the registry at the expense of the end-user's experience." The district court found that CFIT's complaint was insufficient to state a challenge to the renewal provision, concluding that CFIT's allegation regarding the illusory nature of the re-bid provision was "conclusory and speculative," and insufficient to allege a violation of antitrust law.

We have expressly held, however, that concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm to competition. *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 487 (9th Cir. 1988). In *Harkins*, the defendants were distributors and exhibitors of films who "rigged" a bidding process in order to ensure that the exhibitors would obtain licenses to display films released by the distributors, thus excluding from competition the plaintiff, a rival film exhibitor. *Id.* at 487–88. We found a Section 1 violation for injury to competition even though the only entity harmed, in the particular circumstances of that case, was the plaintiff. *Id.* at 488. The allegation in this case regarding the elimination of competitive bidding at the expiration of each successive registry agreement means that any other potential registry operator is excluded from competition, making the alleged harm to competition in this case even more severe than that at issue in *Harkins*.

[3] CFIT's complaint is not limited to alleging that the renewal provision harms individual competitors in the DNS. Rather, CFIT alleged that competition itself has been eliminated as a result of VeriSign and ICANN's conspiratorial conduct. This is precisely the type of allegation required to state an injury to competition. *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992) (to state injury to competition, plaintiff must allege conduct that "actually causes injury to competition, beyond the impact on the claimant"). CFIT has also

alleged that consumers are harmed by this anti-competitive restraint, in the form of higher prices for registration of domain names, and potentially lower-quality services. In combination with the allegations regarding the existence of the conspiracy between VeriSign and ICANN as well as the intent to restrain competition, these allegations of harm to competition are sufficient to state a claim under Section 1. *Kendall,* 518 F.3d at 1047.

[4] Because restraint of trade claims under Section 1 do require the showing of a conspiracy whose members intended to restrain trade, *see id.,* we conclude that CFIT's allegations regarding the renewal provision in the contracts is made out only with respect to the .com contract. CFIT has adequately pled the existence of a conspiracy between VeriSign and ICANN, and that VeriSign had the intent to restrain trade when it entered into the .com contract. Beyond ICANN's decision not to use competitive bidding to reach the .com agreement, CFIT has also alleged that ICANN was economically motivated to conspire with VeriSign because VeriSign agreed to share its monopoly profits with ICANN and to cease its predatory behavior, which had put ICANN in financial jeopardy. However, the .net contract was reached after a competitive bidding process. CFIT has not adequately alleged that conspiratorial conduct to restrain trade was involved in the making of the .net agreement. CFIT has not alleged, with sufficient specificity, that the bidding process used to reach the 2005 .net Agreement was in any way rigged. *Harkins,* 850 F.2d at 484. CFIT's allegations concerning ICANN and VeriSign's adoption of the presumptive renewal provision are therefore sufficient to make out a Section 1 claim for restraint of trade with respect to the 2006 .com Agreement alone.

[5] In so holding, we observe that competitive bidding is not required before entering into an exclusive licensing agreement, but its presence or absence is a factor to be considered in determining the applicability of the antitrust laws. *See Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 692–96, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Harkins,* 850 F.2d at 487. So long as the agreement is the result of independent business judgment, is not the result of an intention to restrain trade, or does not actually injure competition, it is immaterial whether it was secured through a competitive bidding process. *See Kendall,* 518 F.3d at 1047.

2. Pricing

CFIT further alleged in its complaint that the seven-percent-per-year increase in the allowable fee under the 2006 .com Agreement exceeds the rate competitive market conditions would produce. CFIT's complaint stated that if the .com Agreement had been put out for competitive bidding, "the costs of domain name registrations would have fallen to at least as low as $3.00 per domain name, with at least the same level and quality of services provided by VeriSign." Counsel for CFIT stated at oral argument before the district court that potential competitors of VeriSign had stated publicly that, if awarded the .com contract, they could and would offer registry services at or below $3 per domain name.

The district court held that CFIT had not stated a cognizable claim regarding the pricing provisions in the 2006 .com Agreement, finding that an increase in the price of services, standing alone, did not give rise to antitrust liability. The district court relied primarily on *Alaska Airlines, Inc. v. United Airlines, Inc.,* 948 F.2d 536 (9th Cir.1991), in which this court held that a high price alone is not an antitrust viola-

tion. We stated in *Alaska Airlines* that while "setting a high price may be a use of monopoly power, . . . it is not in itself anti-competitive." *Id.* at 549(quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir.1979)).

[6] The district court's reliance on *Alaska Airlines* was misplaced, however, because the pricing claims at issue in that case were monopolization claims arising solely under Section 2 of the Sherman Act. *See id.* at 541 n. 8. In this case, by contrast, CFIT's allegation is that the pricing provision in VeriSign and ICANN's 2006 .com Agreement unlawfully restrains trade, in violation of Section 1. *Alaska Airlines* itself distinguishes between the proper inquiries the court should undertake in the Section 1 and Section 2 contexts: "While concerted conduct is subject to sanction [under Section 1] if it merely restrains trade, unilateral conduct is subject to sanction [under Section 2] only if it either actually monopolizes or threatens monopolization." *Id.* at 541(citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767–69, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). In other words, an entity cannot be held liable for antitrust violations if it simply unilaterally increases its prices, absent a showing that it either conspired with another entity in order to restrain trade, or acted in a market in which it holds or is attempting to hold a monopoly. *See Copperweld*, 467 U.S. at 768–69, 104 S.Ct. 2731 ("Congress treated concerted behavior more strictly than unilateral behavior .... [because][c]oncerted activity inherently is fraught with anticompetitive risk.").

[7] In this case, CFIT's allegation is not that VeriSign took unilateral action to increase the price of its services, but that VeriSign and ICANN undertook concerted action to restrain trade by imposing prices higher than market rate and under conditions hostile to competition. Applying the correct inquiry for Section 1 violations, we conclude that CFIT has adequately alleged that the pricing provision in VeriSign and ICANN's 2006 .com Agreement unlawfully restrains trade. CFIT has alleged the existence of a conspiracy, and that VeriSign and ICANN had the intent to impose terms for pricing and price increases that restrained trade. CFIT's allegations concerning the prices alternative registry operators would offer, were they able to compete with VeriSign for successor contracts, are adequate to state a claim of actual injury to competition, in that potential competitors are allegedly unable to bid for operation of the .com registry, and that consumers are allegedly unable to benefit from the positive effects of that competition. Harm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition in the Section 1 context, *see Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir.1996) ("[I]t is difficult to image a more typical example of anti-competitive effect than higher prices. . . ."), and CFIT's complaint adequately alleges that such injury has occurred and is still occurring. CFIT's complaint is therefore sufficient to state a claim under Section 1 in connection with the pricing provisions of the 2006 .com Agreement.

[8] CFIT also attempted to allege a Section 1 violation in connection with the pricing terms in the 2005 .net Agreement. The .net contract imposed an initial price cap of $4.25 per domain name registration, but provided that this cap would expire on December 31, 2006, leaving no price limitation in place. Although this claim involved terms comparable to those in the .com contract, CFIT has not made out a Section 1 violation for the .net pricing agreement. The .net contract was reached as a result

of competitive bidding, not conspiratorial action. CFIT's assertion that some terms of the agreement changed after VeriSign's bid was accepted, without allegations of materiality, does not suffice to state a claim for existence of a conspiracy and the intent to restrain trade. *See id.*

B. CFIT's Claims Under Section 2 of the Sherman Act

CFIT also asserted claims under Section 2 of the Sherman Act, alleging first that VeriSign's predatory conduct in obtaining the anti-competitive provisions described above constituted monopolization or attempted monopolization of the .com and .net registration markets. CFIT's second Section 2 claim alleged the existence of a separate market for expiring domain names, and attempted monopolization of that market. With respect to the latter claim, the district court held that CFIT failed to state a claim because it failed to allege that expiring names are sufficiently distinct from other types of names. With respect to the former, the district court held that CFIT also failed to state a claim for predatory conduct. The district court, apparently construing CFIT's claim as pertaining solely to VeriSign's initiation of litigation against ICANN, held that CFIT failed to state a claim because it alleged only that VeriSign's allegedly vexatious litigation against ICANN was "oppressive and costly," not that it was "baseless." In making this determination, the court relied on the doctrine that litigation activity is immune from antitrust liability unless it is "a mere sham." *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 56, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (quoting *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 144, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)); *see also United Mine Workers v. Pennington,* 381 U.S. 657, 670, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

1. Predatory Conduct

CFIT alleged that the 2006 .com Agreement and the 2005 .net Agreement were reached through improper conduct by VeriSign, including financial pressure and vexatious litigation against ICANN. CFIT alleged that in order to get ICANN to agree to the terms VeriSign desired, VeriSign paid lobbyists to support its position, "stacked" ICANN's public meetings with VeriSign supporters, hired purportedly independent organizations and individuals to advocate VeriSign's position, paid bloggers to attack ICANN's reputation, planted news stories critical of ICANN in mainstream media, threatened ICANN with litigation, arbitration, and government investigation, and indeed eventually brought suit against ICANN in federal and state court. VeriSign's suit against ICANN was settled, allegedly as a result of VeriSign's offer to pay ICANN a fee of between $6 and $12 million in exchange for the favorable terms in the agreements. VeriSign and ICANN's Settlement Agreement expressly provided that VeriSign "will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN's role [as 'the appropriate technical coordination body for the DNS'], and it will immediately cease any such ongoing activities." *Settlement Agreement between ICANN and VeriSign,* http://www.icann.org/en/tlds/agreements/verisign /ICANN–VRSN–settlement–agreement–2005.pdf, at 1.

[9] In concluding that CFIT failed to state a claim for predatory conduct, the district court erroneously construed the allegation in the complaint as pertaining solely to VeriSign's litigation against ICANN, rather than to the predatory and

harassing activities that accompanied that litigation. The district court's reliance on the *Noerr–Pennington* immunity doctrine therefore was misplaced, because Noerr–Pennington immunizes only litigation activity, not other forms of threats or harassment.

[10, 11] We have long held that Section 2 claims may be premised upon predatory conduct that is aimed at achieving or maintaining a monopoly in a given market. We have explained that a claim for monopolization of trade has two elements: "the possession of monopoly power in the relevant market and .... the acquisition or perpetuation of this power by illegitimate 'predatory' practices." *Alaska Airlines,* 948 F.2d at 541–42(citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 596 n. 19, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *Catlin v. Wash. Energy Co.,* 791 F.2d 1343, 1348 (9th Cir.1986)). Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 893 (9th Cir.2008) (quoting *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993)).

[12] CFIT has alleged that VeriSign's predatory litigation activity was aimed at coercing ICANN to perpetuate VeriSign's role as exclusive regulator of the .com domain name market by awarding VeriSign the 2006 .com Agreement without any competitive bidding, and by agreeing to the terms that favored VeriSign. These allegations meet the requirements articulated in *Cascade Health Solutions* for stating an attempted monopolization claim. 515 F.3d at 893.

Moreover, the Supreme Court has held that an entity may be prosecuted for an antitrust violation on the basis of improper coercion of a standards-setting body. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 495–97, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), the Court imposed antitrust liability on the defendant, a manufacturer of steel electrical conduits. This liability was for predatory actions undertaken to coerce the National Fire Protection Association ("NFPA"), a body that published product standards and building codes, to publish standards barring the use of plastic conduits, a rival product which the plaintiff manufactured. The activities undertaken by the defendant in *Allied Tube* included such conduct as packing NFPA meetings with paid supporters of the defendant who would advocate for the banning of plastic pipes. *Id.* at 496, 108 S.Ct. 1931. The Court noted that even such "unethical and deceptive practices" are protected from antitrust liability where they are either directly aimed at or " 'incidental' to a valid effort to influence government action." *Id.* at 499, 108 S.Ct. 1931 (citing *Noerr,* 365 U.S. at 140–41, 81 S.Ct. 523). However, the Court explained that predatory activities aimed at private standards-setting bodies, like NFPA, do not enjoy such categorical protection from liability. The Court pointed to the "procompetitive advantages" of private standards-setting organizations whose decisions are insulated from "being biased by members with interests in stifling product competition." *Id.* at 501, 108 S.Ct. 1931. In concluding that the defendant's predatory activities subjected it to liability, the Court emphasized the fact that the NFPA, the body the defendant sought to coerce, was a private organization without any accountability to the public. *Id.* at 502, 108 S.Ct. 1931.

CFIT has essentially alleged that ICANN is a private standards-setting body akin to the NFPA. ICANN administers the DNS and is responsible for entering into agreements with registry operators like VeriSign. According to the complaint, ICANN's mission includes a commitment to promoting competition for the contracts. CFIT's allegations further state that ICANN, like the NFPA, is a private body with no public accountability. These allegations are consistent with the view held by commentators on the subject, who have, indeed, identified *Allied Tube* as providing the strongest argument in favor of imposing antitrust liability on those who seek to coerce ICANN. *See* Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust,* 2003 U. Ill. L.Rev. 1, 72–73 (2003) (noting that "given ICANN's private status, VeriSign will face antitrust liability for persuading a private company in a position of power to grant it control over a market," and naming *Allied Tube* as the "closest analogue"). We hold, therefore, that pursuant to The Supreme Court's holding in *Allied Tube,* CFIT has adequately alleged that VeriSign's improper coercion of ICANN and attempts to control ICANN's operations in its own favor violated Section 2.

CFIT also attempted to state a claim of predatory conduct in the .net registration market. The complaint's allegations did not reflect any assertion that VeriSign's predatory activities had any bearing on the competitive bidding process that resulted in the 2005 .net Agreement. Accordingly, we hold that CFIT's claim of predatory conduct is made out with respect to the 2006 .com Agreement only.

2. Expiring Domain Names Market

The issue presented with respect to the claim of attempted monopolization of expiring domain names is whether the existence of a separate market was adequately pled. CFIT alleged that expiring domain names are more valuable than other names because, in all likelihood, they have already been advertised by the previous owner and already have web traffic. CFIT alleged that expiring domain names are in higher demand and command higher prices due to their unique features. In other words, expiring names differ from, and are more valuable than, names not previously used.

[13, 14] A relevant market, for antitrust purposes, "can be broadly characterized in terms of the 'cross-elasticity of demand' for or 'reasonable interchangeability' of a given set of products or services." *M.A.P. Oil Co., Inc. v. Texaco Inc.,* 691 F.2d 1303, 1306 (9th Cir.1982) (quoting *United States v. E.I. duPont de Nemours & Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)). We consider whether "the product and its substitutes are reasonably interchangeable by consumers for the same purpose," as well as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* (citations omitted).

The district court relied on two out-of-circuit, district court cases to conclude that the complaint failed adequately to allege that the market for expiring domain names is separate from the market for other types of domain names. *See Weber v. Nat'l Football League,* 112 F.Supp.2d 667(N.D.Ohio 2000); *Smith v. Network Solutions, Inc.,* 135 F.Supp.2d 1159 (N.D.Ala. 2001). In *Weber,* the plaintiff brought a Section 2 claim against two professional football teams, the New York Jets and the Miami Dolphins, who sought to prevent the plaintiff from registering the domain

names "jets.com" and "dolphins.com." 112 F.Supp.2d at 673. The plaintiff alleged that the market "should be defined by the demand for the domain names 'jets.com' and 'dolphins.com.' " *Id.* The court rejected the plaintiff's claim that the relevant market for antitrust purposes should be circumscribed to the market for a particular name, holding instead that the market should be "defined very broadly, in terms of domain names in general." *Id.* at 673–74.

Weber is similar to this case only insofar as it also involved antitrust claims defining a market for domain names. We agree with that court that a market should not be defined in terms of a single domain name. CFIT's complaint, however, does not define the relevant market so narrowly. Rather, it alleges that expiring domain names, as a group, are sufficiently distinguishable from other domain names so as to constitute a separate market. *Weber* did not deal with an alleged market for expiring domain names.

The second case, *Smith v. Network Solutions,* did address the question of whether a separate market for expiring domain names was adequately alleged. In *Smith,* the court considered a claim that the defendant, VeriSign's predecessor-in-interest, maintained an unlawful monopoly by failing expeditiously to release newly expired domain names for re-registration. 135 F.Supp.2d at 1166–67. The plaintiff alleged that the particular expiring domain names it wished to acquire constituted a separate market for antitrust purposes. *Id.* at 1168. The court rejected this proposed market definition, finding no appreciable difference between those particular expiring names and other types of names.

The court broadly observed that "there is no inherent difference in character, for purposes of interchangeability and cross-elasticity of demand, between domain names that are 'expired' ... and those that are not." *Id.* at 1169. It did so, however, because it viewed the proposed market of some particular expiring domain names as too small. Thus, the decision in *Smith,* like *Weber,* was premised upon the court's reluctance to approve an overly narrow market definition consisting of one or a few domain names. *See Smith,* 135 F.Supp.2d at 1169("Taken to its logical conclusion, Plaintiff's argument implies that each individual domain name is a relevant market unto itself for antitrust purposes, subject the entity 'controlling' the name at a particular time ... to a charge of monopolization.").

CFIT's claims are not so narrowly drawn. Its complaint relates to all expiring domain names, not just those a particular plaintiff wishes to acquire. Moreover, to the extent that the *Smith* court may have viewed expiring domain names as interchangeable with other names, it may well be that expiring domain names did not have a significant enough presence in 2001 for the court to consider a possible claim that, in the aggregate, they amounted to a separate market. According to the complaint, that is no longer the case. Moreover, amicus in this case, the Internet Commerce Association ("ICA"), points out that when *Smith* and *Weber* were decided, "the present expired domain name market barely existed," and that today's conditions were "unanticipated only a few years ago."

[15] Here CFIT's complaint alleges that every word in the English language is already registered as a domain name, and that desirable domain names can be difficult to come by. On appeal, our understanding of the distinct role and value of expiring domain names has also been significantly aided by the explanation provided by the ICA. As cogently explained by

ICA, expiring domain names often carry with them a history of established web traffic and advertising support; when such names do expire, they "still maintain much of [their] prior inbound traffic," making them more valuable than domain names that have never before been registered. The district court, of course, did not have the benefit of briefing by amicus. With the benefit of this aid to our understanding, we are not prepared to affirm the district court's ruling that no separate market exists. We therefore reverse and remand for further proceedings.

C. Claims Concerning the .Net Market

Although we conclude that CFIT has adequately stated facts sufficient to nudge its Section 1 and 2 claims "across the line from conceivable to plausible" with regard to VeriSign's activities in the .com registration market, *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955, we cannot reach the same conclusion for the allegations about the .net market. All of the specific allegations of the complaint concerning predatory conduct leading to the pricing and renewal provisions of a contract relate to the 2006 .com Agreement. The complaint, in its present form, contains no allegation that predatory or conspiratorial conduct was involved in the process of reaching the 2005 .net Agreement. CFIT may have viable claims with respect to the .net market, but the district court will be in a better position to determine whether it does if CFIT is given an opportunity to amend its conclusory allegations to allege more specific conduct or anti-competitive effect. We therefore remand the .net claims so that CFIT may be afforded that opportunity. In considering any possible amendments, the district court is directed to take into account the pleading requirements of the Supreme Court decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Finally, we observe that our review in this appeal is limited to whether the facts alleged in the complaint state plausible causes of action for violations of the Sherman Act. Although the complaint alleges that the Department of Commerce approved the 2006 .com Agreement, the role of the Department in developing that agreement or overseeing its administration has not been developed. We therefore do not consider the effect that government supervision may have in displacing the utility of antitrust supervision. *See, e.g., Gordon v. N.Y. Stock Exch., Inc.,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975). We acknowledge, however, that while CFIT stated plausible Section 1 and 2 claims with respect to the .com market, proving actual injury to competition under Section 1 or dangerous probability of achieving monopoly power under Section 2 may be difficult in light of the amendments made by the Department of Commerce to its Cooperative Agreement with VeriSign and the Department's asserted commitment to "fulfill its stewardship responsibilities in connection with VeriSign's provision of .com registry services." *Amendment 30 to the Cooperative Agreement between the Department of Commerce and VeriSign* (Nov. 29, 2006), http://www.ntia.doc.gov/ntiahome/domainname/agreements/amend30_11292006.pdf, at 3.

VI. Conclusion

We REVERSE the district court's grant of VeriSign's motion to dismiss CFIT's complaint for failure to state a claim, and

REMAND to the district court for further proceedings consistent with this opinion.

John McCOMISH; Nancy McLain; Tony Bouie, Plaintiffs–Appellees,

Robert Burns, Plaintiff–Intervenor–Appellee,

Arizona Free Enterprise Club's Freedom Club Pac; Arizona Taxpayers Action Committee, agent of Taxpayers Action Committee; Dean Martin; Rick Murphy, Plaintiffs–Intervenors–Appellees,

v.

Ken BENNETT, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo; Royann J. Parker; Jeffrey L. Fairman; Donald Lindholm; Lori S. Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission, Defendants–Appellants,

and

Clean Elections Institute, Inc., Defendant–Intervenor.

John McComish; Nancy McLain; Tony Bouie, Plaintiffs–Appellees,

Dean Martin; Robert Burns; Rick Murphy; Arizona Free Enterprise Club's Freedom Club Pac; Arizona Taxpayers Action Committee, agent of Taxpayers Action Committee, Plaintiffs–Intervenors–Appellees,

Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo; Royann J. Parker; Jeffrey L. Fairman; Donald Lindholm; Lori S. Daniels, in their official capacities as members of the Arizona Citizens Clean Elections Commission, Defendants,

and

Clean Elections Institute, Inc., Defendant–Intervenor–Appellant.

Nos. 10–15165, 10–15166.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 12, 2010.

Filed May 21, 2010.

Amended June 23, 2010.

Background: Six past and future candidates for Arizona state political offices who ran or planned to run privately-financed campaigns and two political action committees who funded such candidates filed lawsuit seeking to enjoin enforcement of the matching funds provision of Arizona's Citizens Clean Elections Act, as violative of their rights under the First Amendment and the equal protection clause. The United States District Court for the District of Arizona, Roslyn O. Silver, J., granted summary judgment in favor of plaintiffs. State appealed.

Holdings: The Court of Appeals, Tashima, Circuit Judge, held that:

(1) matching funds provision would be analyzed as if it affected fully protected speech;

(2) intermediate scrutiny applied to matching funds provision; and

(3) matching funds provision did not violate First Amendment.

Reversed and remanded.

Kleinfeld, Circuit Judge, filed concurring opinion.

Opinion, 605 F.3d 720, amended, withdrawn and superseded.

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construed as a general federal tort law. "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971) (emphasis in original).

Gerritsen has not alleged in his complaint any class-based discrimination against him. As a result, he has not stated a claim under section 1985(3). *Scott v. Rosenberg*, 702 F.2d 1263, 1269–70 (9th Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984). Therefore, there is no jurisdiction under 28 U.S.C. § 1343(a)(1) or (2) for his claims.

Gerritsen argues on appeal, but did not allege in his complaint, that "he is one of those class of persons who are critical of the policies of the Mexican government," and that he "is a member of a class of persons who would distribute printed materials in public areas of the City of Los Angeles." Because this purported class formulation has been raised by Gerritsen in his briefs only and has not been alleged in his complaint, we need not decide now whether this class can give rise to a claim under section 1985(3). We do note, however, that we have previously held that to state a claim under section 1985(3) the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir.1985). *But see Keating v. Carey*, 706 F.2d 377, 386–87 (2d Cir.1983) (Republicans are a protected class under section 1985(3)); *Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir.) (anti-government protestors are a protected class under § 1985(3)), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975).

CONCLUSION

The district court had jurisdiction under 28 U.S.C. § 1351 over the claims against the two consuls general and the vice consul. The Vienna Convention on Consular Relations does not grant these defendants immunity with respect to the claims alleged. The district court also had jurisdiction under the Federal Sovereign Immunity Act over the claims against the defendant Mexican Consulate. Therefore, we reverse the order dismissing the claims against the two consuls general, the vice consul, and the Mexican Consulate. We remand the action for appropriate further proceedings consistent with the views herein expressed, including the filing of amended pleadings.

REVERSED and REMANDED.

CONTINENTAL AIRLINES, INC., Plaintiff-Appellant,

v.

GOODYEAR TIRE & RUBBER COMPANY, B.F. Goodrich Co., Cleveland Pneumatic, Inc. and Air Treads, Inc., Defendants-Appellees.

McDONNELL DOUGLAS CORPORATION, Plaintiff-Appellee

v.

CONTINENTAL AIRLINES, INC., Defendant-Appellant,

and

Goodyear Tire & Rubber Company, Cleveland Pneumatic, Inc., Sargent Industries, Inc., Defendants-Appellee

Nos. 85–6367, 85–6414, 86–6047 and 86–6195.

United States Court of Appeals, Ninth Circuit.

Argued Feb. 5, 1987.

Submitted April 14, 1987.

Decided June 23, 1987.

Actions were brought as result of aircraft accident to determine liability of air-

craft manufacturer and aircraft parts manufacturers to airline. The United States District Court for the Central District of California, Laughlin E. Waters, J., granted partial summary judgments in favor of aircraft manufacturer and parts manufacturers, finding that exculpatory clause in contract for sale of aircraft was effective against airline's negligence and strict liability claims as to loss of aircraft, and partial summary judgments were certified as final for appeal. The Court of Appeals, Sneed, Circuit Judge, held that: (1) exculpatory clause was enforceable under California law; (2) exculpatory clause barred negligence and strict liability claims against aircraft manufacturer; and (3) exculpatory clause barred claims against parts manufacturers only insofar as parts were within coverage of aircraft manufacturer's warranty.

Affirmed in part; reversed and remanded in part.

1. Federal Courts ⇐305

Diversity was lacking in aircraft manufacturer's federal declaratory judgment action concerning effect of exculpatory clause in contract for sale of aircraft on liability of manufacturer for accident involving aircraft, though there was complete diversity with parties as aligned in complaint; supplier of escape slides, which was citizen of same state as airline which purchased aircraft, was more properly aligned with manufacturer than airline, in that it had identical interest in proving validity and scope of exculpatory clause.

2. Federal Courts ⇐545

Supplier of escape slides for aircraft, as only nondiversed party in action arising from aircraft accident, would be dismissed on appeal in order to perfect retroactively district court's original jurisdiction; supplier was dispensable because only claims to which it was party had been settled. Fed. Rules Civ.Proc.Rule 21, 28 U.S.C.A.

3. Federal Courts ⇐51

District court was not required to abstain from considering aircraft manufacturer's declaratory judgment action in favor of state litigation commenced earlier, where declaratory judgment action was consolidated, on airline's motion, with airline's suits against suppliers of aircraft tires, and resolution of those suits necessarily involve adjudication of validity and scope of exculpatory clause in contract for sale of aircraft, which was subject of declaratory judgment action. 28 U.S.C.A. §§ 2201, 2202.

4. Federal Courts ⇐660.25

Partial summary judgments entered in favor of aircraft manufacturer and parts suppliers, holding that exculpatory clause in contract for sale of aircraft barred any action against manufacturer or suppliers for damage to airplane, could be certified as final for appeal, though airline's fraud and breach-of-warranty theories asserted against manufacturer and passenger indemnification claims asserted against manufacturer and suppliers were left open; although no parties were eliminated and full recovery by airline was possible, matters disposed of were sufficiently severable factually and legally from remaining matters, and they completely extinguished liability of some part manufacturers as to damage claim. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

5. Federal Courts ⇐660.25

Otherwise permissible certification of partial summary judgments as final for appeal, designed to produce res judicata effects elsewhere, was proper with respect to issue of whether exculpatory clause in contract of sale of aircraft barred certain claims by airline against aircraft manufacturer, as well as suppliers of certain parts, arising from accident involving aircraft. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

6. Contracts ⇐94(1)
Fraud ⇐31

Under California law, defrauded party to contract may rescind contract, seek consequential damages for fraud, or both.

7. Aviation ⇐13

Under California law, airline was not entitled to have exculpatory provision in contract for sale of aircraft rescinded, on

ground that aircraft manufacturer made certain fraudulent misrepresentations in negotiating contract, without voiding entire contract.

8. Contracts ⇐1

Under California law, party as sophisticated as airline could not invoke doctrine of unconscionability in reference to contract for sale of aircraft, laboriously negotiated with aircraft manufacturer.

9. Contracts ⇐114

Under California law, exculpatory clause in contract for sale of aircraft was not rendered unenforceable, on ground that it exempted aircraft manufacturer from responsibility for violation of law, to extent that it barred airline from showing that manufacturer violated federal aviation regulations, which violation allegedly caused accident, in that manufacturer was subject to other sanctions; nothing inhibited operation of regulations through passengers' suits or sanctions imposed by Federal Aviation Administration. West's Ann.Cal.Civ. Code § 1668.

10. Contracts ⇐114

Under California law, exculpatory clause in contract for sale of aircraft was not void as against public policy, in that adhesion contract was not involved.

11. Aviation ⇐13

Exculpatory clause in contract for sale of aircraft barred airline's claims against aircraft manufacturer for postdelivery negligence and strict liability, arising out of accident involving aircraft.

12. Aviation ⇐13

Exculpatory clause in contract for sale of aircraft barred airline's claims for property damage against aircraft parts manufacturers only insofar as parts were within coverage of aircraft manufacturer's warranty; warranty reached parts manufactured by others only if they were made to design and detailed specification originated by aircraft manufacturer.

Gregory A. Long, Los Angeles, Cal., for plaintiff-appellant.

Thomas C. Walsh, Joseph E. Gregorich, Robert W. King, Los Angeles, Cal., Darrell A. Forgey, San Diego, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before SNEED, FARRIS and NOONAN, Circuit Judges.

SNEED, Circuit Judge:

These cases arise in the aftermath of a serious accident involving a Continental Airlines DC–10 aircraft. We must decide, among other issues, whether an exculpatory clause in the contract of sale between Continental and the aircraft's manufacturer, McDonnell Douglas Corporation (MDC), bars certain of Continental's claims not only against MDC but also against various suppliers of the aircraft's component parts. The district court so held on summary judgment. We find, however, that material issues of fact pertaining to the component part companies' liability remain unresolved. We therefore affirm in part and reverse in part.

I.

FACTS

In 1970, Continental agreed to buy a number of DC–10 airplanes from MDC. Their contract included a limited warranty in which MDC undertook certain servicing obligations and an exculpatory clause in which Continental waived "all other remedies" against MDC. The exact text of these provisions is discussed below.

On March 1, 1978, one of these DC–10s was nearing takeoff at Los Angeles International Airport when the two front tires of its left-side landing gear blew out. The pilot aborted the takeoff, but the uncushioned landing gear tore through the tarmac and broke away from the plane. In doing so it ruptured the left wing's fuel tank, which burst into flame. The emergency escape slides failed, apparently due to the heat of the ensuing fire. Some passengers evacuated through the copilot's window;

others jumped from the exits. Four died, and over seventy suffered injuries. The plane was destroyed.

II.

PROCEEDINGS

In December of 1979, Continental filed two suits, one state and one federal. In state court, Continental sued MDC and Sargent Industries, supplier of the escape slides. In federal court, Continental sued Goodyear and B.F. Goodrich, each of which had supplied one of the two blown-out tires. Continental later filed a second federal action against Air Treads, which had retreaded the Goodyear tire. In each suit, Continental sought damages for the lost airplane and indemnity against liability to passengers.

MDC sought a federal forum. It tried initially to remove the state case, but the district judge, after finding no federal question and no diversity because Sargent and Continental were both California citizens, remanded the case to the state court. MDC then instituted a federal declaratory judgment action. It named Continental, Sargent, Goodyear and Goodrich as defendants, basing jurisdiction on diversity. At Continental's request, all three federal actions were consolidated. Proceedings in Continental's remanded case continued independently in state court.

In early 1985, MDC sought summary judgment in its federal action. At the same time, Continental moved to dismiss or stay MDC's federal action in favor of the state litigation. The district court denied Continental's motion and granted partial summary judgment in favor of MDC. It held that MDC's exculpatory clause was enforceable under California law and effective against Continental's negligence and strict liability claims as to loss of the aircraft. The judgment did not reach Continental's fraud or breach-of-warranty theories of recovery, or its passenger indemnification claims. In September, 1985, the district court also granted partial summary judgment to the parts manufacturers on the basis of its holding that MDC's exculpatory clause also barred any action against them for damage to the airplane. Once again the issue of passenger indemnity was left open. On a motion by MDC and the parts manufacturers shortly before the state trial was to begin, the district court certified these partial summary judgments as final for appeal under Fed.R. Civ.P. 54(b).

The state court correctly held that these judgments, because certified as final, were res judicata for purposes of the state jury trial. Nevertheless, Continental pursued and prevailed on its fraud/breach-of-warranty claims for damage to the aircraft. That judgment is on appeal in the higher California courts. During the trial, moreover, the parties settled all the passenger indemnification claims. Only the loss of the airplane—worth some $30 million—remains at issue.

III.

ISSUES

Continental appeals the partial summary judgments on various jurisdictional and substantive grounds. Our discussion will proceed as follows. First we consider whether complete diversity existed below; whether the district court should have abstained; and whether the 54(b) certification was proper. Turning to the merits, we then address whether the exculpatory clause is enforceable in favor of MDC to the extent that the district court ruled, and finally whether it is enforceable to the same extent in favor of the tire companies.

IV.

DIVERSITY JURISDICTION OVER MDC'S DECLARATORY JUDGMENT ACTION

[1, 2] As noted above, when MDC attempted to remove Continental's state case, the district court correctly remanded for lack of diversity. Yet MDC then brought essentially the same action before the same district court in the form of a declaratory judgment suit, premising jurisdiction on diversity. The parties did not raise this ap-

parent jurisdictional defect, but we are obliged to consider it sua sponte.

MDC's federal complaint pleaded Continental, Sargent, Goodyear, and Goodrich as defendants. With the parties thus aligned, there was complete diversity. But as this circuit has stated:

> The courts, not the parties, are responsible for aligning the parties according to their interests in the litigation. If the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes.

Dolch v. United Cal. Bank, 702 F.2d 178, 181 (9th Cir.1983) (citations omitted) (realigning party and vacating for lack of jurisdiction). The critical question here is Sargent's proper alignment; as we have said, Continental and Sargent were both California citizens.[1] Sargent's alignment with MDC would destroy complete diversity.

Sargent, properly aligned, does belong with MDC. Sargent's strongest contention below was that MDC's exculpatory clause barred Continental's claims against the parts manufacturers. Indeed, the district court so held. MDC took the same position because if Continental had been able to recover against Sargent, Sargent could have sought indemnity against MDC. Thus both manufacturers had an identical interest in proving the validity and scope of MDC's exculpatory clause. Indeed Sargent filed papers below supporting MDC's winning summary judgment motion, and the two parties arranged to be represented by the same counsel on this appeal.

Thus, with respect to the primary matter in dispute, *see Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69, 62 S.Ct. 15, 16, 86 L.Ed. 47 (1941), Sargent was in reality MDC's co-party against Continental.[2] Diversity in MDC's action was therefore lacking. This does not, however, render MDC's judgment void. Despite earlier case law to the contrary, it is now settled in this circuit that practicality prevails over logic and that we may dismiss a dispensable, non-diverse party in order to perfect retroactively the district court's original jurisdiction.[3]

1. Continental is no longer a California citizen. Diversity jurisdiction, however, "depends upon the state of the parties at the commencement of the suit." *Connolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565, 7 L.Ed. 518 (1829) (Marshall, C.J.). Sargent's alignment, it should be noted, affects jurisdiction only in MDC's suit. In Continental's suits against the tire companies, diversity is unproblematic. Sargent was not a party to these suits, and the consolidation of cases below did not "make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry.*, 289 U.S. 479, 497, 53 S.Ct. 721, 728, 77 L.Ed. 1331 (1933).

2. Certainly MDC and Sargent would have disputed their respective liability to Continental, had any been found. But the inquiry goes to the "principal purpose of the suit," or the "primary and controlling matter in dispute." *Indianapolis*, 314 U.S. at 69, 62 S.Ct. at 16 (quoting prior cases). And the "principal purpose" of MDC's federal suit was, in that party's own words, to obtain a "declaration that the exculpatory clause precluded *all* of Continental's claims arising out of the accident, whether pursued directly against MDC or indirectly through other alleged joint tortfeasors." Brief of MDC, at 5 (original emphasis). Alternatively, because MDC's suit was declaratory, we can look to the underlying cause of action and see its principal purpose as Continental's claim against all the appellees. From both perspectives, the manufacturers' internal dispute over contribution was ancillary to the essential controversy. *See Eikel v. States Marine Lines*, 473 F.2d 959, 964–65 (5th Cir.1973).

   The Seventh Circuit has apparently rejected the "principal purpose" test. *See, e.g., Fidelity & Deposit Co. v. City of Sheboygan Falls*, 713 F.2d 1261, 1267–68 (7th Cir.1983) (alignment as pleaded will stand if there is any "substantial" dispute between parties). We, however, consider *Indianapolis* to require this test, *see* 314 U.S. at 69, 62 S.Ct. at 16, and in any event are bound by our opinion in *Dolch*, *see* 702 F.2d at 181 (looking to the "purpose of the lawsuit").

3. *E.g., Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1422 n. 1 (9th Cir.1986); *Ross v. International Bhd. of Elec. Workers*, 634 F.2d 453, 456 (9th Cir.1980); *Fidelity & Casualty Co. v. Reserve Ins. Co.*, 596 F.2d 914, 918 (9th Cir.1979); *see also Reed v. Robilio*, 376 F.2d 392, 394 (6th Cir.1967) (non-diverse but originally indispensable party may be dismissed if party becomes dispensable pending appeal). *Contra, e.g., Dollar S.S. Lines v. Merz*, 68 F.2d 594, 597 (9th Cir.1934). The *Dollar* line of cases has apparently been overruled sub silentio. Conferring jurisdiction retroactively is a curious idea. Knowledgeable judges have said it cannot be done. *E.g., Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1197 (7th Cir.1983) (Posner, J.), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1706, 80 L.Ed.2d

Sargent is dispensable because the only claims to which it was party involved passengers' injuries, and these claims have all been settled. Indeed in its brief Sargent explicitly disclaims any further interest in this litigation. We therefore dismiss it now under Fed.R.Civ.P. 21.

V.

DISMISSAL OR STAY OF FEDERAL PROCEEDINGS

[3] Continental insists that the district court abused its discretion by failing to dismiss or stay the federal proceedings in favor of the state litigation commenced earlier. We disagree.

If there were before us only MDC's declaratory judgment action, Continental would have a stronger claim. Federal courts are ordinarily said to have special jurisdictional discretion in such actions in order to prevent parties from using the Declaratory Judgment Act—as MDC has clearly done here—to circumvent the removal statute or to create a race to judgment. *See Transamerica Occidental Life Ins. Co. v. DiGregorio,* 811 F.2d 1249, 1253 (9th Cir.1987). MDC's action, however, is not the only one before us. Continental's two federal actions are also before us, and they are not declaratory in nature.

With MDC's declaratory suit, the district court consolidated—at Continental's own motion—the airline's suits against the tire companies. These were ordinary coercive suits, as to which Continental never requested abstention. *See* Excerpt of Record (E.R.) vol. 36, tab "288 of 1" (motion to stay or dismiss directed only to *MDC's* complaint). Because the district court's resolution of those suits necessarily involved an adjudication of the validity and scope of MDC's exculpatory clause—the very relief that MDC prayed for—it would have served no purpose to abstain in the declaratory action.

We would confront a different situation had Continental initially sought abstention instead of consolidation in response to the MDC's declaratory action. But in the actual circumstances, by 1985, the district court had no choice but to proceed with the claims against the tire companies, and no reason not to proceed with MDC's declaratory claims as well.

VI.

PROPRIETY OF THE RULE 54(b) CERTIFICATIONS

Continental next challenges appellate jurisdiction, on the ground that the Rule 54(b) certification of the judgments was an abuse of discretion. It contends the requirements of Rule 54(b) were not met and that the purpose of the certifications, to generate a res judicata effect, was improper. These arguments are not entirely without merit, but we hold that the district court remained within its discretion.

A. *Requirements of Rule 54(b).*

[4] In pertinent part, Rule 54 requires a certifiable judgment finally to resolve at least one claim in a multiple-claim action or finally to adjudicate the position of at least one party to a multiple-party action. *See* Fed.R.Civ.P. 54(b). That is, claims must be multiple and at least one must have been adjudicated finally. *See Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 743, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). Continental submits that the instant judgments fulfilled neither condition.

The partial summary judgments at issue here had the following effects: they held the exculpatory clause enforceable; they barred recovery by Continental for aircraft damage from all the parts manufacturers; and they also barred such recovery from MDC on any negligence or strict liability theory. These judgments did *not* affect Continental's potential recovery against any appellee for passenger indemnification, nor resolve Continental's fraud and breach-of-warranty theories against MDC for loss of the airplane.

While we confidently hold that multiple claims existed in this case, we cannot be equally certain that any one of them was

180 (1984). They underestimated, it appears, judicial—or at least appellate—resolve.

finally adjudicated below. Distinguishing "claims" from theories of recovery for purposes of Rule 54(b) has occasioned a good deal of subtle jurisprudence. A claim, it is true, is less than the central object of a lawsuit and surely more than merely one element of proof offered in support of a complaint seeking money damages. But the essence eludes the grasp like quicksilver. We agree with Judge Wisdom that the solution for Rule 54(b) purposes lies in a more pragmatic approach focusing on severability and efficient judicial administration. *See Local P–171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1070–71 (7th Cir.1981) (Wisdom, J., sitting by designation); *see also Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 1466, 64 L.Ed.2d 1 (1980) (emphasizing prevention of piecemeal appeals); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 54.33[2], at 54–194 (2d ed. 1987) (appellate decisions since *Curtiss-Wright* have adopted a more pragmatic approach). With these considerations in mind, we conclude that the requirements of Rule 54(b) were satisfied here.

It is true that the partial summary judgments below eliminated none of the parties and left open potentially full recovery in both of Continental's ultimate areas of loss (damage to the airplane and liability to passengers). For that reason, it is possible that Continental might never have needed to appeal the instant judgments if the case had been compelled to go forward. Rule 54(b) certification is ordinarily disfavored in such circumstances.

Nonetheless, given the size and complexity of this case, we cannot condemn the district court's effort to carve out threshold claims and thus streamline further litigation. In these partial summary judgments, the district court effectively narrowed the issues, shortened any subsequent trial by months, and efficiently separated the legal from the factual questions. The matters disposed of by the partial summary judgments were sufficiently severable factually and legally from the remaining matters, and they completely extinguished the liability of the tire companies as to the airplane damage claim. We hold that Rule 54(b) certification was proper under the circumstances of this case.

B. *The Res Judicata Purpose.*

[5] This case raises the question, which we believe is novel in this circuit, of whether a 54(b) certification may be awarded for the purpose of producing res judicata effects elsewhere. At least two circuits have suggested it may. *See Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 950 n. 7 (7th Cir.1980) (dictum) ("no just reason for delay" means not only delay of appeal but delay of res judicata); *Republic of China v. American Express Co.*, 190 F.2d 334, 339 (2d Cir.1951) (Frank, J.) (indicating that the district court *should* have made a 54(b) certification to assure res judicata). Continental would have us hold that a judgment's res judicata effect is an improper consideration in determining whether to certify it for appeal under Rule 54(b). This we decline to do. Because a 54(b) ruling in fact has res judicata ramifications, which are potentially very important, it would be unsound and ineffectual to hold that the district courts may not consider this factor in deciding for or against certification.

We do not wish to encourage the district courts to use their 54(b) powers to promote a race to judgment or to "snatch from the state courts" a dispute being properly litigated there. *Geni-Chlor Int'l. Inc. v. Multisonics Dev. Corp.*, 580 F.2d 981, 985 (9th Cir.1978). But we would be reluctant to adopt a rule that, in the circumstance of complex parallel state and federal litigation, the district court must either become inactive or incur the risk of wasting its efforts. We hold that an otherwise permissible 54(b) certification designed to produce res judicata effects in another forum was proper under these circumstances.

VII.

THE MERITS

A. *The Limited Warranty and Exculpatory Clause.*

Article 12 of the MDC/Continental contract sets forth MDC's limited warranty,

servicing obligations, and exculpatory clause. For two years after delivery, MDC warranted the quality of, and agreed to repair defects in, all:

> parts of the aircraft delivered hereunder which have been manufactured by [MDC] and by other manufacturers if made to detailed design and detailed specifications originated by [MDC].

E.R. vol. 35, tab "230 of 1," p. 24. In addition, MDC agreed to service fleetwide defects that might develop within ten years after delivery. *Id.* at 33–34. In block capital lettering, Part III of Article 12 provides as follows:

> The warranty and service life policy provided in this article and the obligations and liabilities of seller under said warranty and service life policy are exclusive and in lieu of, and buyer waives, all other remedies, warranties, guarantees or liabilities, express or implied, with respect to each aircraft, product and article delivered hereunder, arising by law or otherwise (including without limitation any obligation or liability of the seller arising from negligence or with respect to fitness, merchantability, loss of use, revenue or profit or consequential damages).

Id. at 39.

B. *Is the Exculpatory Clause Vitiated by Fraud in the Inducement?*

Continental claims that MDC made certain fraudulent misrepresentations in negotiating the contract. Indeed Continental appears to have prevailed on its fraud claim in the state jury trial. The airline contends that MDC's fraud should vitiate the exculpatory clause. The district court ruled to the contrary, and we affirm its reasoning.

[6, 7] A defrauded party to a contract may, in California, rescind his contract, seek consequential damages for fraud, or both. *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.*, 121 Cal.App.3d 447, 461, 176 Cal.Rptr. 546, 554 (1981); Cal.Civ.Code § 1692. Thus Continental, if the victim of fraud, could have demanded not only the consequential damages resulting from the fraud, but also full restitution of its original payment to MDC. To obtain the latter remedy, however, Continental would have had to restore to MDC all the consideration it had received under the contract, and to have treated the contract as void in its entirety.

In 1978, when the accident occurred, Continental still had valuable warranty rights under the original contract. Continental did not seek a restitutionary remedy, nor attempt to void the entire contract. Continental cannot *partially* rescind a nonseverable contract. "[I]t is axiomatic that ... the entitled party must rescind the entire contract and may not retain the rights under it which he deems desirable and repudiate the remainder." *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal.App.3d 315, 326, 122 Cal.Rptr. 816, 822 (1975). The district court viewed Continental's attempt to escape the exculpatory clause without voiding the entire contract as a form of partial rescission. This was a plausible characterization.

C. *Did Continental Waive Its Adhesion and Unconscionability Arguments?*

[8] In early 1985 the district court ruled that Continental could not argue that the exculpatory clause was unconscionable because the pre-trial order of December, 1984, did not include that issue. Continental contends that the pre-trial order did encompass the issue. We hold that the error, if error there be, is harmless.

A pre-trial order is controlling unless modified. Fed.R.Civ.P. 16(e). The order is, nonetheless, to be "liberally construed to permit any issues at trial that are 'embraced within its language.'" *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 368 (9th Cir.1985) (quoting *United States v. First Nat'l Bank*, 652 F.2d 882, 886 (9th Cir.1981)). The order here, liberally construed, very likely did frame the unconscionability argument.[4]

4. Review here of the 75-page pretrial order would be pointless. Suffice it to note that the order included the issue, "Whether the Exculpatory Clause is against public policy and the policy of the law and is void." E.R. vol. 31, tab "277 of 1," p. 56. Under California law, uncon-

Nevertheless, any error was harmless. The doctrine of unconscionability cannot be invoked by so sophisticated a party as Continental in reference to a contract so laboriously negotiated. *See Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 576 (8th Cir.1975) (unconscionability doctrine unavailable to sophisticated investor), *cited for this proposition in Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 927, 216 Cal. Rptr. 345, 355, 702 P.2d 503, 513 (1985), *appeal dismissed*, — U.S. —, 106 S.Ct. 1170, 89 L.Ed.2d 290 (1986); *AMF Inc. v. Computer Automation, Inc.*, 573 F.Supp. 924, 930 (S.D.Ohio 1983) (applying California law) (unconscionability doctrine held inapplicable on summary judgment to contract between "large, sophisticated merchants"). We affirm the district court's rejection of the unconscionability argument on the basis of doctrine. We do not rely on waiver.

D. *Does the Exculpatory Clause Exempt MDC from Liability for Violations of Law?*

[9] California law prohibits enforcement of contractual provisions that seek to "exempt" a party from "responsibility for his own ... violation of law." Cal.Civ. Code § 1668. Continental submits that the exculpatory clause is therefore unenforceable to the extent that it bars Continental from showing that MDC violated federal aviation regulations, which violations allegedly caused the accident. The district court correctly rejected this claim.

The exculpatory clause does not permit MDC to violate the federal regulations with impunity; it merely bars suit *by Continental* on this ground. Other sanctions remain in place. As we have said in a similar case, "nothing inhibits the operation of the regulation[s] in question through [passengers'] suits ... or sanctions imposed by the Federal Aviation Administration." *S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co.*, 641 F.2d 746, 753 (9th Cir. 1981); *see Airlift Int'l, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982) (rejecting the same claim here advanced by Continental).

E. *Is the Exculpatory Clause Void as Against Public Policy?*

[10] Several California cases have invalidated exculpatory clauses when they appear in adhesion contracts deemed to involve the "public interest." *See, e.g., Tunkl v. Regents of the Univ. of Cal.*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). But California appellate courts have specifically held that an aircraft purchase agreement is not such a contract. *Philippine Airlines, Inc. v. McDonnell Douglas Corp*, 189 Cal.App.3d 234, 240–41, 234 Cal.Rptr. 423, 426–27 (1987); *Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal.App.2d 95, 103–04, 47 Cal.Rptr. 518, 523–24 (1965). Moreover, *Tunkl's* approach essentially is rooted in the unconscionability doctrine. *See Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 821 & n. 20, 171 Cal.Rptr. 604, 612–13 & n. 20, 623 P.2d 165, 173–74 & n. 20 (1981). Thus, for the reasons mentioned earlier, it makes little sense in the context of two large, legally sophisticated companies to invoke the *Tunkl* application of the unconscionability doctrine. Nothing in the MDC–Continental contract impairs the rights of injured passengers to recover against either MDC or Continental.

F. *Does the Exculpatory Clause Bar Claims of Post-delivery Negligence or Strict Liability?*

[11] Continental argues that the exculpatory clause does not unambiguously reach claims of post-delivery negligence and strict liability. But we have already held that such clauses do bar strict liability claims, *see Airlift*, 685 F.2d at 269, and post-delivery negligence claims, *Empresa*, 641 F.2d at 750. Indeed in *Empresa*, we

scionability is a species of voidness for public policy. *See, e.g., Drennan v. Security Pac. Nat'l Bank*, 28 Cal.3d 764, 775 n. 14, 170 Cal.Rptr. 904, 910 n. 14, 621 P.2d 1318, 1324 n. 14 ("[E]ven a term clearly stated may be unenforceable if it is so unconscionable that its enforcement would be contrary to public policy."), *cert. denied*, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 112 (1981).

emphasized that a general exculpatory clause quite similar to MDC's was sufficiently unambiguous to permit summary judgment on these issues. *Id.* at 750–51.

G. *Does the Exculpatory Clause Bar Continental's Claims Against the Parts Manufacturers?*

[12] To this point we have concluded (1) that the district court correctly held MDC's exculpatory clause to be enforceable under California law and (2) that it precluded Continental's negligence and strict liability claims against MDC.[5] We now consider the district court's ruling that the exculpatory clause also completely barred any property damage recovery by Continental against the three tire companies. Here we hold the district judge erred.

The court below relied on *Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 773–74 (9th Cir.1982), which held that an MDC exculpatory clause barred an airline's suit against certain parts suppliers, and on *Airlift*, 685 F.2d at 270, which summarily held the same as to a Boeing exculpatory clause "on the authority of *Aeronaves*." The reasoning in *Aeronaves* proceeded in this fashion. The court pointed out that the airline already had received from MDC over $400,000 worth of free servicing under its warranty provisions. To permit recovery by the airline from the parts suppliers for consequential damages would enable the parts suppliers thereafter to sue MDC for indemnity. The consequence would be that the airline would in effect circumvent the exculpatory clause and reap a "windfall" of free repairs plus consequential damages. 677 F.2d at 773. The crux of the matter, as *Aeronaves* saw it, was that the airline (by way of the exculpatory clause) had waived its consequential damage remedies in return for MDC's promise to provide valuable servicing of the component parts that allegedly caused the accident. The airline should not be permitted 'to have its cake and eat it too.' The situation in *Airlift* appears to have been the same.

As Continental points out, however, the contractual provisions in this case differ in a significant respect. In *Aeronaves*, "the warranty provisions ... explicitly extend[ed] to components of the aircraft manufactured by entities other than MDC, regardless of who supplied the design specifications." 677 F.2d at 774. Here, however, the warranty provisions reach other manufacturers' parts only if they were "made to detailed design and detailed specifications originated by MDC." *See supra.* If the tire companies did not make their products according to MDC's design specifications, then presumably MDC was under no obligation to service them. If this is true, the potential for a "windfall" that was present in *Aeronaves* would not exist here. Continental would have surrendered no right to recover damages in exchange for rights to servicing. It would be entitled to at least a portion of its cake because it had not previously eaten it.

The tire companies strenuously argue that our precedents establish an inflexible rule according to which MDC's exculpatory clause bars Continental's claims against them regardless of whether MDC's warranty reached their products. We reject this interpretation. According to the tire companies' view of Continental's contract, the airline meant to give itself no protection whatever against defects in those parts that MDC had not either produced or designed. MDC would not guarantee or service these parts, but nonetheless Continental waived all claims against MDC *and the parts manufacturers* with respect to them. Neither *Aeronaves* nor *Airlift* discussed such a possibility, nor do we believe they require such a result.

Thus we hold the *Aeronaves* doctrine should not have been mechanically applied here. On remand, the district court must determine (1) whether the warranty in fact

5. Because we uphold MDC's summary judgment on these claims, we need not reach Continental's contention that the district court erroneously denied its motion for a trial by jury against MDC. Although some of Continental's claims against MDC are still pending, these claims are not part of the 54(b) certification. We by no means suggest that the denial of Continental's jury right as to the pending claims was correct.

reached these component parts or (2) whether this question raises issues of fact improper for summary judgment. If the warranty did not reach certain of the component parts here at issue, then Continental may sue the suppliers of those parts.

Nevertheless, Continental's potential recovery may only be partial. MDC's liability continues to be limited by the exculpatory clause. Thus, even should MDC be found jointly and severally liable with a parts manufacturer whose part is not covered by the exculpatory clause, that liability has been contracted away by Continental by means of the exculpatory clause. That clause excluded *all* remedies against MDC other than those provided by the "warranty and service life policy."

Whether MDC's immunity extends far enough to defeat a suit by a non-covered parts manufacturer for contribution or indemnity is not before us. We observe, however, that should it so extend, the non-covered parts manufacturer's liability to Continental in fairness should not exceed that portion of the damage attributable to its portion of the wrong. Reason suggests that MDC should be immune from such contribution or indemnity and that the non-covered tire company's liability to Continental be so limited.[6]

VIII.

CONCLUSION

Sargent is dismissed from MDC's declaratory action, and the partial summary judgment in that case is AFFIRMED. The partial summary judgments in favor of Goodrich, Goodyear, and Air Treads are REVERSED and REMANDED for further consideration of whether MDC's warranty provisions covered the parts each supplied.

Editor's Note: The opinion of the United States Court of Appeals, Tenth Circuit, in *United States v. Soundingsides*, published in the advance sheet at this citation, 819 F.2d 1529–1541, was withdrawn from bound volume and is published at 820 F.2d 1232.

6. This result would also comport with the California Supreme Court's repeated observation that "equity and fairness" demand liability for multiple tortfeasors "in proportion to their relative culpability, rather than the imposition of the entire loss upon one." *American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 595, 146 Cal.Rptr. 182, 193, 578 P.2d 899, 910 (1978), *quoted in Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal.3d 488, 495, 213 Cal.Rptr. 256, 260, 698 P.2d 159, 163 (1985). The fact that Continental has waived its claim for losses owing to MDC's negligence or strict liability should not increase a parts manufacturer's liability. To the contrary, a parts manufacturer could be seen as a third-party beneficiary of MDC's exculpatory clause insofar as it was relieved of joint and several liability for MDC's portion of the loss. Alternatively, MDC could be seen as having a right to indemnity *from Continental* for any indemnification MDC must make to the parts manufacturers. The result in either case should be the same.

It should be noted that the potential dispute that may arise between MDC and the parts manufacturers does not affect our earlier holding with respect to the alignment of parties below. This potential dispute is secondary to the principal cause of action between Continental on the one hand and all the appellees on the other, in which cause of action all the appellees had substantially identical interests. *See supra* note 2.

LEGAL AUTHORITY AA-78

Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For

An Antitrust Primer

This primer briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion.

Introduction[1]

American consumers have the right to expect the benefits of free and open competition — the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice.

In recent years, the Antitrust Division has successfully prosecuted regional, national, and international conspiracies affecting construction, agricultural products, manufacturing, service industries, consumer products, and many other sectors of our economy. Many of these prosecutions resulted from information uncovered by members of the general public who reported the information to the Antitrust Division. Working together, we can continue the effort to protect and promote free and open competition in the marketplaces of America.

Federal Antitrust Enforcement

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice.

Violation of the Sherman Act is a felony punishable by a fine of up to $10 million for corporations, and a fine of up to $350,000 or 3 years imprisonment (or both) for individuals, if the offense was committed before June 22, 2004. If the offense was committed on or after June 22, 2004, the maximum Sherman Act fine is $100 million for corporations and $1 million for individuals, and the maximum Sherman Act jail sentence is 10 years. Under some circumstances, the maximum potential fine may be increased above the Sherman Act maximums to twice the gain or loss involved. In addition, collusion among competitors may constitute violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes, all of which the Antitrust Division prosecutes.

In addition to receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

Forms of Collusion

Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes. Each of these forms of collusion may be prosecuted criminally if they occurred, at least in part, within the past five years. Proving such a crime does not require us to show that

A corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries.

Under the law, price-fixing and bid-rigging schemes are per se violations of the Sherman Act. This means that where such a collusive scheme has been established, it cannot be justified under the law by arguments or evidence that, for example, the agreed-upon prices were reasonable, the agreement was necessary to prevent or eliminate price cutting or ruinous competition, or the conspirators were merely trying to make sure that each got a fair share of the market.

Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to:

- Establish or adhere to price discounts.
- Hold prices firm.
- Eliminate or reduce discounts.
- Adopt a standard formula for computing prices.
- Maintain certain price differentials between different types, sizes, or quantities of products.
- Adhere to a minimum fee or price schedule.
- Fix credit terms.
- Not advertise prices.

In many cases, participants in a price-fixing conspiracy also establish some type of policing mechanism to make sure that everyone adheres to the agreement.

Bid Rigging

Bid rigging is the way that conspiring competetors effectively raise prices where purchasers — often federal, state, or local governments — acquire goods or services by soliciting competing bids.

Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy.

Bid rigging also takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding: Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

Bid Rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. A strict bid rotation pattern defies the law of chance and suggests collusion is taking place.

Subcontracting: Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Almost all forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.

Market Division

Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts let by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts let by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

Detecting Bid Rigging, Price Fixing, And Other Types Of Collusion

Bid rigging, price fixing, and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. However, suspicions may be aroused by unusual bidding or pricing patterns or something a vendor says or does.

Bid or Price Patterns

Certain patterns of bidding or pricing conduct seem at odds with a competitive market and suggest the possibility of collusion:

Bids

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.
- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.

Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories.

- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:
  - Prices stay identical for long periods of time.
  - Prices previously were different.
  - Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts historically were given.
- Vendors are charging higher prices to local customers than to distant customers. This may indicate local prices are fixed.

Suspicious Statements or Behavior

While vendors who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. In addition, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. Be alert for the following situations, each of which has triggered a successful criminal antitrust prosecution:

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendor's bid.
- Bid or price documents contain whiteouts or other physical alterations indicating last-minute price changes.
- A company requests a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract (likely a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding.
- A bidder or salesperson makes:
  - Any reference to industry-wide or association price schedules.
  - Any statement indicating advance (non-public) knowledge of competitors' pricing.
  - Statements to the effect that a particular customer or contract "belongs" to a certain vendor.
  - Statements that a bid was a "courtesy," "complementary," "token," or "cover" bid.
  - Any statement indicating that vendors have discussed prices among themselves or have reached an understanding about prices.

A Caution About Indicators of Collusion

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a company submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists

or whether there is an innocent explanation for the events in question.

Conditions Favorable To Collusion

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years.

These conspiracies are by their nature secret and difficult to detect.

The Antitrust Division needs your help in uncovering them and bringing them to our attention.

While collusion can occur in almost any industry, it is more likely to occur in some industries than in others. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion.

- Collusion is more likely to occur if there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.
- The probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured.
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service.
- Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.
- Bidders who congregate in the same building or town to submit their bids have an easy opportunity for last-minute communications.

What You Can Do

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years. These conspiracies are by their nature secret and difficult to detect. The Antitrust Division needs your help in uncovering them and bringing them to our attention.

If you think you have a possible violation or just want more information about what we do, contact the Citizen Complaint Center of the Antitrust Division:

E-mail:

antitrust.complaints@usdoj.gov

Phone:

1-888-647-3258 (toll-free in the U.S. and Canada) or 1-202-307-2040

Address:

Citizen Complaint Center
Antitrust Division, U.S. Dept. of Justice
950 Pennsylvania Ave. NW, Suite 3322
Washington, DC 20530

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[1] This Primer provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigation prerogatives of the Department of Justice.

LEGAL AUTHORITY AA-79

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

DOTCONNECTAFRICA TRUST; Plaintiff, vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.; Defendants.	Case No.: BC607494 Hearing Date: February 3, 2017 Time: 8:30 a.m. **ORDER RE:** PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is DENIED. The court has considered, very carefully, the excellent arguments of counsel. The tentative ruling will remain the ruling on the motion.

BACKGROUND

This action involves the award and delegation of the generic top-level domain name ("gTLD")[1] ".Africa." Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system. In 2012, ICANN launched the "New gTLD program," in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

In March 2012, Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing

information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC ("ZACR") also applied to be the operator of .Africa. ZACR is a South African non-profit company which was formed to promote open standards and systems in computer hardware and software.

The competition for the .Africa gTLD came down to DCA and ZACR. In 2013, ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application should not proceed due to issues with regional endorsements. ICANN rejected DCA's application based on the GAC advice, while ZACR's application continued. Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed past this phase.

In January 2016, after learning that ICANN would reject its application, DCA filed suit against ICANN. ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

Upon remand, DCA moved for the same preliminary injunction that the district court previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has been resolved. DCA initially sought this relief under its ninth cause of action for declaratory

relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at length. The Court denied the motion.

DCA now moves again for the same preliminary injunction. The instant motion is substantially the same as the motion which was denied on December 22, 2016. The only meaningful difference is that DCA now moves under alternative causes of action: its second and fifth causes of action for intentional misrepresentation and unfair business practices. The motion is opposed by Defendant ICAAN and by intervenor ZACR.

EVIDENCE

ICANN's evidentiary objections are overruled.

DCA's evidentiary objections are overruled.

LEGAL STANDARD

"As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528, 554.) "[A]n order granting or denying a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 890-91 (citations omitted).)

"In determining whether to issue a preliminary injunction, the trial court considers: (1) the likelihood that the moving party will prevail on the merits and (2) the interim harm to the respective parties if an injunction is granted or denied. The moving party must prevail on both factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other..." (Church of Christ in Hollywood v. Superior Court (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous

interim decision may cause." (White, supra, 30 Cal.4th at p. 554.) The burden is on the party seeking injunctive relief to show all elements necessary to support issuance of a preliminary injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

DISCUSSION

A. Interim Harm to the Parties

"To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (White, supra, 30 Cal.4th at p. 554.) "In evaluating interim harm, the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the defendant is likely to suffer if an injunction is issued." (Shoemaker, supra, 37 Cal.App.4th at 633.)

Notably, DCA has not provided any new evidence of harm that was not considered by the Court in the prior motion for preliminary injunction. DCA contends that, if .Africa is delegated to ZACR before this case is resolved, DCA's mission will be seriously frustrated, funders will likely pull their support, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶34-35.) This harm is highly speculative and fails to account for the possibility of re-delegation.

The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this litigation. This is not disputed by DCA. Instead, DCA argues, without supporting evidence, that the procedure for gTLD re-delegation is uncertain. But the evidence reflects that re-delegation is not uncommon and has occurred numerous times. (Atallah Decl. ¶13.) Indeed, ICANN has an established procedure for re-delegating a gTLD, which is set forth in a published manual. (Masilela Decl. I, Ex. I.) Accordingly, there is no potential for irreparable harm to DCA. Further, it appears that any interim harm to DCA can be remedied by monetary damages, as requested in DCA's Complaint. (See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 306 ("if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction cannot be granted").)

In contrast to the speculative nature of DCA's harm, ZACR presents evidence in the form of a detailed spreadsheet prepared by its finance section demonstrating that ZACR is incurring significant financial costs with no attendant benefits as a result of the delay in delegation of the .Africa gTLD. (Masilela Decl. ¶11-12, Ex. F.)

The public interest also weighs in favor of denying the injunction because the delay in the delegation of the .Africa gTLD is depriving the people of Africa of having their own unique gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider "the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause").) Although the public also has an interest in having the .Africa gTLD properly awarded through a fair and transparent application process, this concern does not apply to the interim harm analysis because, in the event that DCA ultimately prevails in this action, the gTLD can be re-delegated.

The Court finds that the balance of the interim harm weighs in favor of denying the preliminary injunction.

B. Likelihood of Success on the Merits

A preliminary injunction must not issue unless it is "reasonably probable that the moving party will prevail on the merits." (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller) (1985) 170 Cal.App 3d 438, 442.) The "likelihood of success on the merits and the balance-of-harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary injunction." (White, supra, 30 Cal.4th at 561.) "The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (Id.) However, this does not mean that a trial court may grant a preliminary injunction on the basis of the likelihood-of-success factor alone when the balance of hardships dramatically favors denial of a preliminary injunction. (Id.; see also Yu v. Univ. of La Verne (2011) 196 Cal.App.4th 779,

787 (a trial court's order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to satisfy either of the factors).)

Here, as discussed above, the balance of hardships clearly favors denial of the preliminary injunction. In any event, DCA has not made a sufficient evidentiary showing to establish that it is likely to prevail on the merits.

ICANN contends that DCA is unlikely to prevail on the merits because, among the terms and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD applications (the "Covenant"). The Covenant provides:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.

DCA contends that the Covenant is unenforceable because it violates Civil Code §1668, it is unconscionable, and it was procured by fraud. However, a federal district court recently rejected these same arguments and dismissed a gTLD applicant's lawsuit against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." (Ruby Glen, LLC v. Internet Corp. 2016 WL 6966329, at *4 (C.D. Cal. Nov. 28, 2016).) The court stated: "the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to

Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with prejudice." (Id. at *5.)

For the reasons set forth in the Ruby Glen order, it appears that the Covenant is enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair business practices are likely to be barred. As a result, DCA cannot establish that it is likely to succeed on the merits.

For the foregoing reasons, the Court finds that DCA has not met its burden of showing the elements necessary to support issuance of a preliminary injunction. DCA's motion for a preliminary injunction is denied.

ICANN is ordered to provide notice of this ruling.

DATED: February 3, 2017

Howard L. Halm
Judge of the Superior Court

LEGAL AUTHORITY AA-80

161 Cal.App.4th 906
Court of Appeal, Second District, Division 3, California.

EMPLOYERS REINSURANCE COMPANY et al., Petitioner,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Thorpe Insulation Company, Real Party in Interest.

No. B200959.
|
April 3, 2008.
|
As Modified April 22, 2008.

Synopsis
Background: Asbestos company brought suit against its liability insurers, seeking declaratory relief that some current and future asbestos suits against it should be considered "non-products" claims not subject to policy limits, and moved in limine to preclude insurers from introducing "course of performance" evidence to show meaning of policies. The Superior Court, Los Angeles County, No. JCCP4458, Carolyn B. Kuhl, J., granted motion. Insurers petitioned for writ of mandate.

Holdings: The Court of Appeal, Croskey, J., held that:

[1] course of performance evidence is relevant to insurance contract interpretation;

[2] evidence of performance under policy by people who did not draft or negotiate policy was relevant to show policy's meaning; but

[3] evidence of course of performance after subsequent settlement agreement was not relevant to show terms of original policy.

Petition granted in part and remanded with directions.

West Headnotes (28)

[1] **Insurance**🔑Premises and operations hazards

A manufacturer's or service provider's liability insurance policy claims for injuries arising while a work activity is in progress fall within "non-products coverage" or "operations coverage."

[2] **Insurance**🔑Products and completed operations hazards

A manufacturer's or service provider's liability insurance policy claims for injuries arising once the product has been completed and sent to market fall within "products coverage" or "completed operations coverage."

[3] **Insurance**🔑Premises and operations hazards
Insurance🔑Products and completed operations hazards

"Non-products" liability coverage or "operations coverage" is complementary and not overlapping to "products coverage" or "completed operations coverage"; products coverage takes over where operations coverage leaves off.

1 Cases that cite this headnote

[4] **Appeal and Error**🔑Admission or exclusion of evidence in general

The abuse of discretion standard of review applies to any ruling by a trial court on the

admissibility of evidence.

11 Cases that cite this headnote

[5] **Appeal and Error**🔑Abuse of discretion

Under the abuse of discretion standard of review, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercises its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.

20 Cases that cite this headnote

[6] **Appeal and Error**🔑Insurers and insurance
Appeal and Error🔑Admission or exclusion of evidence in general

The abuse of discretion standard of review, rather than de novo review, applied to trial court's exclusion of "course of dealing" evidence in interpretation of asbestos company's liability insurance contracts; trial court did not rule in favor of company on any of its causes of action or the insurers' affirmative defenses, and made no rulings regarding interpretation of the liability policies.

5 Cases that cite this headnote

[7] **Insurance**🔑Policies considered as contracts
Insurance🔑Application of rules of contract construction

Although insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.

2 Cases that cite this headnote

[8] **Insurance**🔑Intention

The mutual intention of the contracting parties at the time the contract is formed governs an insurance contract.

3 Cases that cite this headnote

[9] **Insurance**🔑Intention
Insurance🔑Language of policies

In interpreting an insurance contract, the Court of Appeal ascertains the intention of the parties solely from the written contract if possible, but also considers the circumstances under which the contract was made and the matter to which it relates.

2 Cases that cite this headnote

[10] **Insurance**🔑Construction as a whole

In interpreting an insurance contract, the Court of Appeal considers the contract as a whole and interprets the language in context, rather than interpreting a provision in isolation.

12 Cases that cite this headnote

[11] **Insurance**🔑Plain, ordinary or popular sense of language

In interpreting an insurance contract, the Court of Appeal interprets words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage.

6 Cases that cite this headnote

1 Cases that cite this headnote

[12] **Insurance**Ambiguity in general

An insurance policy provision is ambiguous if it is capable of two or more reasonable constructions.

4 Cases that cite this headnote

[13] **Evidence**Grounds for admission of extrinsic evidence
InsuranceAmbiguity in general

In determining if an insurance policy provision is ambiguous, the Court of Appeal considers not only the face of the contract but also any extrinsic evidence that supports a reasonable interpretation.

6 Cases that cite this headnote

[14] **Insurance**Ambiguity in general

Even apparently clear insurance policy language may be found to be ambiguous when read in the context of the policy and the circumstances of the case.

6 Cases that cite this headnote

[15] **Insurance**Reasonable expectations
InsuranceFavoring coverage or indemnity; disfavoring forfeiture

If insurance policy language is ambiguous, an interpretation in favor of coverage is reasonable only if the coverage that would result from such a construction is consistent with the insured's objectively reasonable expectations.

[16] **Evidence**Latent ambiguity

Extrinsic evidence can be offered not only where it is obvious that a contract term is ambiguous, but also to expose a latent ambiguity.

12 Cases that cite this headnote

[17] **Evidence**Grounds for admission of extrinsic evidence

Extrinsic evidence is admissible when relevant to prove a meaning to which the language of a contract is reasonably susceptible.

9 Cases that cite this headnote

[18] **Contracts**Construction by Parties

Course of performance evidence can be used not only to interpret an ambiguity, but also to reveal one in language otherwise thought to be clear. West's Ann.Cal.C.C.P. § 1856(c).

5 Cases that cite this headnote

[19] **Contracts**Construction by Parties

When a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. West's Ann.Cal.C.C.P. § 1856(c).

14 Cases that cite this headnote

[20] **Contracts**Intention of Parties
ContractsConstruction by Parties

In interpreting a contract, it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. West's Ann.Cal.C.C.P. § 1856(c).

6 Cases that cite this headnote

[21] **Contracts**Construction by Parties

The principle of "practical construction" applies only to acts performed under the contract before any dispute has arisen.

1 Cases that cite this headnote

[22] **Insurance**Construction by parties; course of conduct or prior dealings

The rules relating to course of performance as extrinsic evidence used for contract interpretation are equally applicable to insurance policy interpretation. West's Ann.Cal.C.C.P. § 1856(c).

3 Cases that cite this headnote

[23] **Insurance**Construction by parties; course of conduct or prior dealings

Course of performance evidence may be used to interpret insurance policies, even if the performing parties are not the same people who drafted or negotiated the policy contract. West's Ann.Cal.C.C.P. § 1856(c).

[24] **Insurance**Construction by parties; course of conduct or prior dealings
InsuranceAdmissibility

Evidence of course of performance of asbestos company and its excess liability insurers after insurers entered into interim agreement on costs of defense and indemnity for personal injury actions was not relevant to show that asbestos claims were "products" claims subject to policy limits under the original liability policies, even though asbestos company was not party to agreement, since after agreement parties handled claims pursuant to agreement rather than policies; insurers reserved their rights to subsequently contend that payments they made were not actually due under policies, and one expressly reserved right to argue that asbestos claims were not products claims. West's Ann.Cal.C.C.P. § 1856(c); West's Ann.Cal.Com.Code § 1303.

See 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 85; Annot., The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract (1971) 40 A.L.R.3d 1384; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) ¶ 8:3115.10 (CACIVEV Ch. 8E-G).

2 Cases that cite this headnote

[25] **Contracts**Construction by Parties

Course of performance evidence is admissible only to interpret the contract under which the parties were performing. West's Ann.Cal.C.C.P. § 1856(c).

11 Cases that cite this headnote

[26] **Insurance**Construction by parties; course of conduct or prior dealings
InsuranceAdmissibility

Evidence of course of performance of asbestos company and its primary liability insurers after parties entered into settlement on costs of defense and indemnity for personal injury actions was not relevant to show that asbestos claims were "products" claims subject to policy limits under the original liability policies, since after settlement asbestos company and insurers handled claims pursuant to the settlement rather than pursuant to the policies themselves; settlement expressly stated that it was not a policy interpretation and should not be used in any court to interpret policies. West's Ann.Cal.C.C.P. § 1856(c).

[27] **Insurance**Construction by parties; course of conduct or prior dealings
Pretrial Procedure Motions in limine; preclusion of evidence, argument, or reference

The Court of Appeal would not exclude evidence of course of performance between asbestos company and its liability insurers on the basis that insurers would be unable to prove that asbestos company understood it was accepting performance in a way that interpreted the policies to have no non-products coverage for asbestos suits, since that argument was not a basis for the asbestos company's motion in limine in the trial court; insurers were never required to establish a foundation for the admissibility of the disputed evidence. West's Ann.Cal.C.C.P. § 1856(c); West's Ann.Cal.Com.Code § 1303.

1 Cases that cite this headnote

[28] **Pretrial Procedure**Motions in limine; preclusion of evidence, argument, or reference

Trial court acted within its discretion in declining, on motion in limine, to reach issue of whether insurers' interpretation of liability policies to exclude "non-products" coverage of asbestos suits was unreasonable as a matter of law, preventing admission of course of performance evidence to support that interpretation; even though asbestos company's showing on motion in limine contained the relevant policy language, company never specifically identified any asbestos suits, or types of asbestos suits, that it believed fell within scope of non-products coverage. West's Ann.Cal.C.C.P. § 1856(c); West's Ann.Cal.Com.Code § 1303.

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Opinion

CROSKEY, J.

***911** In this case, we consider the use of "course of performance" evidence in the interpretation of contracts of insurance and conclude that such evidence is relevant and may be used for such purpose. However, such evidence is only admissible when the performance was pursuant to the contract to be interpreted, not a subsequent settlement agreement such as the one we have in this case.

[1] [2] [3] Thorpe Insulation Company ("Thorpe"), a distributer and installer of asbestos insulation products, was sued in numerous personal injury actions. Thorpe had many insurance policies, both primary and excess, issued by different insurance companies (the "insurers").[1] Thorpe tendered the asbestos claims to the insurers, and there followed some thirty years of negotiations, settlement agreements, claims handling agreements, reservations of rights, and payments of defense costs and indemnity, resulting in the exhaustion or near-exhaustion of Thorpe's $180 million in insurance coverage. Nearly all of Thorpe's insurance policies provided coverage for both "products" (or "completed operations") claims and "non-products" (or "operations") claims.[2] The individual policies' aggregate limits of liability apply to products claims but not ***912** non-products ****738** claims. In other words, non-products claims would not exhaust a policy. When the insurers' paid Thorpe's claims, they charged the payments against policy limits, treating all of the asbestos suits as products claims. When its policies were nearly exhausted, and asbestos suits continued to be filed against Thorpe, Thorpe brought the instant suit against its insurers, seeking declaratory relief that at least some of the current and future asbestos suits against it should be considered non-products claims.[3]

The insurers took the position that, over the past thirty years, the parties had all assumed that asbestos claims were products claims which exhausted aggregate limits, and that, in fact, Thorpe had obtained millions of dollars in payments from its excess insurers based on this very assumption. Thorpe sought and obtained summary adjudication of the insurers' affirmative defenses of waiver, estoppel, laches, and ratification. That ruling is not at issue in this writ proceeding. Thorpe also moved, in limine, to preclude the insurers from introducing the parties' thirty-year course of handling the asbestos claims as evidence of the *meaning* of the insurance policies. The trial court granted the motion, and the insurers sought writ review. We issued an order to show cause,[4] and now grant the petition in part.

FACTUAL AND PROCEDURAL BACKGROUND

According to the operative complaint, Thorpe "is a California company that installed, repaired, maintained, removed and displaced asbestos materials at industrial facilities. It has been subject to thousands of asbestos bodily injury lawsuits resulting from these historical operations." In the asbestos suits, the underlying plaintiffs "seek ... recovery of damages from Thorpe resulting from their alleged injurious exposure to asbestos at industrial facilities serviced by Thorpe. The [underlying] plaintiffs seek recovery against Thorpe on various theories of recovery, including premises liability, negligence, and failure to warn." In 1978, Thorpe began submitting asbestos claims to its primary insurers.

In 1984, Thorpe and ten of its primary insurers entered into a Claims Handling and Settlement Agreement (the "1984 Agreement"). The stated purpose of the 1984 Agreement was to "clarify among" the parties to the agreement the "apportionment of defense and indemnification of Thorpe ... under any of the carriers' policies arising out of numerous lawsuits charging Thorpe with liability for damages to individuals resulting from exposure to asbestos ***913** products." The 1984

Agreement states that it "is the result of a compromise accord and is a compromise settlement of disputed claims. It is the product of arms length negotiations, is not intended to nor shall it be construed as the admission of the existence of a policy or as a policy interpretation, and shall not be used in any Court or Arbitration to create, ****739** prove or interpret the obligations under general liability or other liability policies." It further stated that "[i]t is the purpose of this Agreement to achieve, between Thorpe and its insurers, the most efficient and economical defense of Thorpe in such asbestos cases without prejudice to later assertion by any of such parties of claims against each other, or against third persons, pursuant to the several reservations of rights ... contained in this Agreement." The agreement allocated the costs of defense and indemnification among the insurers. It then provided, "Upon payment of policy limits or aggregate limits by any insurer that is a party to this Agreement, ... Thorpe shall assume that particular insurer's obligation under this Agreement," with an express reservation of rights against any excess carrier or other primary carrier. The parties reserved all rights against each other, in the event it is ultimately determined by California case law or statute that the responsibility of insurers in asbestos cases shall be "determined on the manifestation, as distinguished from the exposure theory, or any other theory substantially different from the allocation theory of this Agreement."[5] It appears that the 1984 Agreement was intended to be final with respect to the parties to the agreement, except in the event of a change in law. Finally, the 1984 Agreement provided that, except as expressly modified, "all terms and conditions of all policies written by the insurers for Thorpe remain in effect without alter[ ]ation by this Agreement."

The parties operated under the 1984 Agreement, with the primary insurers charging the asbestos claim costs against their aggregate policy limits. In other words, all of the asbestos claims were treated as products claims that exhausted the policies. As the primary policies were exhausted, Thorpe turned to its first layer of excess insurers for coverage.

In 1998, seven of Thorpe's first level excess carriers entered into an Interim Excess Insurance Claims Handling Agreement (the "1998 Agreement"). The excess carriers' execution of the 1998 Agreement was intended "to adopt by way of compromise and accord without prejudice or waiver of their respective positions in this and other matters, an interim mechanism for allocating the responsibility for Defense Costs and Indemnity Payments." Under the 1998 Agreement, each signatory excess insurer "expressly reserve[d] any rights and defenses that it may have against any person or entity that is or is not a Party to this Agreement with respect to any asbestos-related ***914** litigation or the Asbestos–Related Cases [against Thorpe], including the right to assert the applicability of any policy interpretation, policy defense, or other defense with respect to asbestos-related litigation or Asbestos–Related Cases [against Thorpe] against such person or entity." A further reservation of rights paragraph again indicates that the excess carriers reserve all rights "to seek reallocation, reimbursement, declaratory relief, contribution, indemnity or any other relief" from any party or non-party to the agreement. The 1998 Agreement provides that nothing in the agreement "shall be construed to operate so as to alter, amend or waive any of the terms, conditions, exclusions, provisions, or obligations of any applicable policy of insurance." The 1998 Agreement specifically provides that, except as expressly stated, the Agreement does not modify the insurance policies. The 1998 Agreement sets forth a method ****740** by which defense costs and indemnity payments are to be shared among the parties to the agreement. Significantly, the 1998 Agreement considers an excess insurer's policy to be implicated when the underlying primary policy is "contend[ed to] have been exhausted." That is to say, the 1998 Agreement does not appear to require an actual determination that a primary policy has been exhausted in order to implicate the relevant excess policy, but only that the primary insurance "claims to be exhausted by the payment of claims." Under the 1998 Agreement, the obligations of any first level excess insurer that is a party to the agreement shall cease once that insurer's aggregate policy limits have been exhausted.

On November 4, 1998, Chicago Insurance Company ("Chicago"), an excess insurer who was a party to the 1998 Agreement, and is a party to this action, responded to Thorpe's request for defense and indemnity. Chicago sent Thorpe a letter advising Thorpe of its "general position concerning the claims and to provide Thorpe with an outline of Chicago's intended actions in responding to these claims." Chicago denied coverage, but nonetheless indicated it had entered into the 1998 Agreement to participate in the adjustment and settlement of the claims, with the full reservation of its rights. Specifically, Chicago indicated that it "reserve[d] its right to contend that some or all of the subject claims, including claims previously settled by Thorpe's primary insurers, do not arise out of the Completed Operations/Products exposures and therefore may still be covered under one or more of the underlying primary policies."

Thorpe was not a party to the 1998 Agreement, but was provided with a copy. On December 8, 1998, Thorpe

acknowledged receipt of the agreement and noted, "Of course, Thorpe reserves all of its rights under the policies."

In August 1999, Thorpe wrote to two of its primary carriers, which had been parties to the 1984 Agreement, but are not parties to the instant action, arguing that those carriers should be handling certain asbestos claims— ***915** specifically, those for negligent installation of asbestos insulation—as non-products claims that were not subject to aggregate policy limits. Thorpe specifically challenged those insurers' claims of policy exhaustion, on the basis that negligent installation claims are not subject to aggregate policy limits. Indeed, Thorpe demanded that those carriers "immediately reimburse the excess carriers for the sums that they have paid for the defense and indemnification of the underlying actions." On September 21, 1999, Thorpe filed suit against those insurers and sought a declaratory judgment that non-products coverage applied to negligent installation claims. The suit proceeded to arbitration, where, in 2002, an award was entered in favor of the insurers. In March 2005, in apparent response to an inquiry by its excess insurers, Thorpe allegedly represented that it would not seek non-products coverage against them.

On November 14, 2005, Thorpe filed its initial complaint in this matter. Thorpe alleged that the insurers' policies contained aggregate limits, if at all, only for products and/or completed operations claims. Thorpe alleged that some of the policies defined "completed operations" in a manner that was indecipherably ambiguous.[6] Thorpe sought a declaration that the insurers have the burden of establishing each underlying claim is a products or completed operations claim in order for ****741** that claim to be charged against the policy's aggregate limits.[7]

The trial court found it appropriate to hold several "phased" trials, each addressed to discrete matters. The first trial, scheduled for May 2008, is to be devoted to policy interpretation.

***916** In February 2007, Thorpe filed a first amended complaint, adding causes of action for damages for breach of contract and for bad faith, among others. Thorpe specifically alleged that the insurers' intentional mischaracterization of the asbestos claims as products claims rather than non-products claims constituted bad faith. However, Thorpe has indicated that its action is limited only to currently pending and future asbestos suits. That is, Thorpe is not seeking relief for any mischaracterization of *former* suits as products claims.[8]

In February 2007, Thorpe filed a motion for summary adjudication of the insurers' affirmative defenses of waiver, estoppel, ratification and laches. Thorpe also filed a motion in limine to exclude evidence of the parties' post-contract course of performance in the policy interpretation trial.[9] Thorpe's motion in limine was based on three arguments: (1) course of performance evidence is not relevant to the interpretation of standard form contracts, and, in fact, should have no place in the interpretation of insurance policies; (2) much of the course of performance evidence which the insurers were likely to introduce was the product of the 1984 and 1998 Agreements, which specifically state they are not to be used for policy interpretation; and (3) the insurers' interpretation of the contracts was unreasonable.

The insurers' opposition to the motion for summary adjudication stated that the insurers "have never argued that their policies ****742** do not provide for so-called 'operations' coverage for certain types of claims. Rather, the [i]nsurers' position, which we believe is supported by the policy language and the parties' nearly three decades of agreement, is that claims based on the inherently dangerous nature of asbestos products do not fall within such coverage." The insurers argued that Thorpe knew of the existence of the "operations" theory since at least 1984, but nonetheless treated all asbestos claims as products claims subject to aggregate policy limits. The insurers argued that Thorpe's handling of the claims, including the 1984 and 1998 Agreements, reflected an understanding that asbestos claims were products claims. The insurers further argued that Thorpe's treatment of the asbestos claims as products claims enabled Thorpe to receive $150 million in excess ***917** coverage to which it otherwise might not have been entitled. On the basis of Thorpe's history of handling the insurance claims as products claims, the insurers argued that triable issues of fact existed as to its affirmative defenses of laches, waiver, estoppel, and ratification. The insurers supported their opposition with three volumes of exhibits, reflecting Thorpe's history of handling the asbestos claims.

In opposition to the motion in limine, the insurers argued that: (1) course of performance evidence is admissible to aid in the interpretation of *all* contracts, including form insurance policies; (2) the 1984 and 1998 Agreements are no bar, because the parties' performance was based on the insurance policies, not the agreements, and, in any event, the excess carriers were not parties to the 1984 Agreement and Thorpe was not a party to the 1998 Agreement; (3) the policies are reasonably susceptible of the insurers' interpretation; and (4) the evidence is admissible to rebut Thorpe's allegation that the policy language is ambiguous. The insurers also argued that all extrinsic evidence should be provisionally admitted, and

ultimately allowed if it supports a reasonable interpretation of the contract.[10] The insurers incorporated into their opposition the exhibits and declarations accompanying their opposition to the motion for summary adjudication.[11]

After a hearing, the court granted both the motion for summary adjudication and the motion in limine. As to the motion in limine, the court granted it on two bases. First, the court noted that evidence of course of performance, while generally relevant, is only relevant if it *predates* any controversy. As the 1984 Agreement indicated ****743** the existence of a controversy in 1984, no course of performance evidence after that date would be relevant. Second, the court indicated that course of performance evidence is only relevant if it sheds light on the intention of the parties at the time of contracting. Reasoning that the individuals who negotiated the insurance contracts were not the same individuals who performed under them, the court concluded the ***918** course of performance evidence was not relevant. The court specifically declined to reach the issue of whether the insurers' interpretation of the policies was reasonable.

The insurers filed a timely petition for writ of mandate, challenging only the grant of the motion in limine, not the grant of summary adjudication. We issued an order to show cause.

ISSUES FOR RESOLUTION

It is important to recognize that the trial court's ruling on the motion for summary adjudication of the insurers' affirmative defenses is not before us. We are therefore not concerned with the issues of: whether Thorpe's failure for twenty years to assert non-products coverage against the insurers constitutes laches; whether Thorpe's acceptance of $150 million in excess coverage estops it from asserting the primary policies were not exhausted; whether Thorpe's assertion that it would not pursue the non-products theory against the excess insurers constitutes waiver of the right to assert that theory; and so forth. The *only* issue with which we are concerned in this proceeding is whether the court erred in concluding the claims handling history of the parties is not relevant to the issue of *policy interpretation.*

Preliminarily, we conclude that course of performance evidence is generally admissible in the context of interpretation of insurance policies, even standard form policies. We further conclude that the admissibility of course of performance evidence does not depend on the individual performing being the individual who had negotiated the contract. We therefore conclude the trial court erred in its alternative conclusion that course of performance evidence was inadmissible in this case for that reason.

However, course of performance evidence is relevant to the issue of contract interpretation only when the course of performance is attributable to the parties' understanding of the contract. In this case, the 1984 and 1998 Agreements, not the policies, governed the bulk of the parties' performance. Therefore, we conclude the trial court did not err in excluding evidence of performance following the 1984 Agreement. As it is not clear whether the insurers seek the admission of evidence of performance predating the 1984 Agreement, we direct the trial court to vacate its order granting the motion in limine in its entirety and to enter an order granting the motion in limine only to the extent of evidence of course of performance evidence following the 1984 and 1998 Agreements.

***919** *DISCUSSION*

1. *Standard of Review*

[4] [5] "The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, 40 Cal.Rptr.3d 118, 129 P.3d 321.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Ibid.*)

****744** [6] The insurers suggest that de novo review is the appropriate standard, on the basis that the trial court's exclusion of an entire category of evidence is akin to a ruling on a general demurrer or a motion for judgment on the pleadings. We disagree. The trial court did not rule on the motion on limine in favor of Thorpe on any of its causes of action or the insurers' affirmative defenses. The court made no rulings regarding the interpretation of the insurance policies. The court simply concluded that certain evidence that would be proffered by the insurers

on the issue of contract interpretation was inadmissible for that purpose. The abuse of discretion standard applies.

2. *General Rules of Insurance Policy Interpretation*

[7] [8] [9] [10] [11] [12] [13] [14] [15] "Although insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. [Citations.] Thus, the mutual intention of the contracting parties at the time the contract was formed governs. [Citations.] We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. [Citations.] We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. [Citations.] We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. [Citations.] [¶] A policy provision is ambiguous if it is capable of two or more reasonable constructions. [Citations.] In determining if a provision is ambiguous, we consider not only the face of the contract but also any extrinsic evidence that supports a reasonable interpretation. [Citation.] Even apparently clear language may be found to be ambiguous when read in the context of the policy and the circumstances of the case. [Citations.] [¶] If policy language is ambiguous, an interpretation in favor of coverage is reasonable only if it is consistent with the objectively reasonable expectations of the insured. [Citation.] Thus, the court must determine whether the coverage under the policy that would result from such a construction is ***920** consistent with the insured's objectively reasonable expectations. [Citation.]" (*London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 655–656, 53 Cal.Rptr.3d 154.)

3. *General Rules Governing Admissibility of Course of Performance Evidence*

[16] [17] Extrinsic evidence can be offered not only "where it is obvious that a contract term is ambiguous, but also to expose a latent ambiguity." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1241, 88 Cal.Rptr.2d 777.) Such evidence is admissible when " 'relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' " (*Ibid.*)

[18] The use of "course of performance" evidence as extrinsic evidence is acknowledged in case law and was ultimately codified in Code of Civil Procedure section 1856. (Cal. Law Revision Com. com., reprinted at 20A West's Ann.Code of Civ. Proc., (2007 ed.) foll. § 1856, p. 11.) As with all extrinsic evidence, course of performance evidence can be used not only to interpret an ambiguity, but also to reveal one in language otherwise thought to be clear. (*Ibid.*)

While the parol evidence rule provides that terms set forth in an integrated writing "may not be contradicted by evidence of any prior agreement or of a contemporaneous ****745** oral agreement," (Code Civ. Proc., § 1856, subd. (a)), the statute goes on to provide that the terms set forth in an integrated writing "may be explained or supplemented by course of dealing or usage of trade or by course of performance." (Code Civ. Proc., § 1856, subd. (c).) The Law Revision Commission comments note that "[i]t is expected that the courts will look to the definition[ ] in Commercial Code Section[ ] 1205 ... for guidance in interpreting the meaning of the term[ ] ... 'course of performance.' " (Cal. Law Revision Com. com., reprinted at 20A West's Ann.Code of Civ. Proc., (2007 ed.) foll. § 1856, p. 11.) The referenced California Uniform Commercial Code section was subsequently renumbered to section 1303. It defines a "course of performance" as "a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." (Cal.Com.Code, § 1303, subd. (a).)

Not only is a course of performance relevant "in ascertaining the meaning of the parties' agreement," it may "supplement or qualify the terms of the ***921** agreement," (Cal.Com.Code, § 1303, subd. (d)) or "show a waiver or modification of any term inconsistent with the course of performance." (Cal.Com.Code, § 1303, subd. (f); see *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1388, 265 Cal.Rptr. 412 [conduct antithetical to a term of a written contract which induces the other party to rely on the conduct can amount to a modification of the contract].)

[19] [20] [21] The rationale for the admission of course of performance evidence is a practical one. "[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when

reasonable, be adopted and enforced by the court. [Citation.] The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention." (*Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 761–762, 128 P.2d 665.) "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189, 242 Cal.Rptr. 403.) "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754, 8 Cal.Rptr. 427, 356 P.2d 171.) "The principle of 'practical construction' applies only to acts performed under the contract before any dispute has arisen." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 296, 85 Cal.Rptr. 444, 466 P.2d 996.)

4. *General Admissibility of Course of Performance Evidence to Interpret the Insurance Policies at Issue*

[22] Since insurance policies "are still contracts to which the ordinary rules of ****746** contractual interpretation apply," (*London Market Insurers v. Superior Court, supra,* 146 Cal.App.4th at p. 655, 53 Cal.Rptr.3d 154), it is apparent that the rules relating to course of performance as extrinsic evidence are equally applicable to insurance policy interpretation.[12] The trial court, however, concluded that course of performance evidence is not admissible to interpret the insurance policies in this case. The trial court reasoned that since the main goal of contract interpretation is to determine the intent of the parties at the time of ***922** contracting, course of performance evidence is not relevant unless it can be shown that the individuals who performed were also the individuals who had negotiated the contracts.[13]

[23] We conclude the trial court was mistaken. Preliminarily, we note that the parties have not cited, nor has independent research disclosed, any authority that expressly limits the admissibility of course of performance evidence in this fashion.[14] In any event, we find that this limitation is not required by the rationale that justifies the admission of course of performance evidence. The very purpose of the admission of course of performance is the commonsense belief that when the parties perform under a contract, without objection or dispute, they are fulfilling their understanding of the terms of the contract. This is true *regardless* of the actual language of the contract, as long as the parties' interpretation is reasonable. If the parties to a contract have, for years, harmoniously performed the contract in a way that reflects a particular, reasonable, understanding of the terms of the contract, that performance is relevant to determining the meaning of the contract. It should not matter whether the parties' agents who originally drafted the contract participated in the performance, or have long since left the scene. Indeed, if parties harmoniously performed for years under a particular understanding of the contract, there is no reason why that performance should be considered irrelevant to the meaning of the contract even if the contract was drafted by the parties' predecessors-in-interest or was a pre-printed standard form contract. Moreover, under California Uniform Commercial Code section 1303, course of performance evidence can supplement, qualify, or modify contrary terms in the contract. This would be largely undermined if course of performance evidence could only be considered when limited to the performance of the individual who drafted or negotiated the contract on behalf of the party.

In this case, the parties to the insurance contracts are the insurers and Thorpe, not the particular individuals who may have actually negotiated or ***923** signed the policies ****747** on behalf of those entities. Similarly, the parties whose performance is at issue are the insurers and Thorpe, not the individuals who handled the claims on their behalf. It is their performance which is relevant. The trial court abused its discretion to the extent it concluded that all course of performance evidence is inadmissible unless it was the performance of the very individuals who had actually negotiated or executed the contract on behalf of the parties.

5. *Course of Performance Evidence After the 1984 and 1998 Agreements*

With respect to the impact of the 1984 and 1998 Agreements, the trial court reasoned that the evidence was inadmissible because course of performance evidence is only relevant to the extent it occurred *prior* to the existence of a dispute, and the 1984 Agreement evidenced a dispute existent as of that time. We conclude that the trial court's conclusion was correct, although for a more

basic reason than the existence of a dispute. Specifically, after the 1984 and 1998 Agreements, the actions of the parties were taken in conformity with the 1984 and 1998 Agreements, not the insurance policies. As the point is more readily apparent with respect to the 1998 Agreement, we consider that agreement first.

[24] Thorpe's first-layer excess carriers entered into the 1998 Agreement, which was denominated an "interim" agreement whose express purpose was to adopt "an interim mechanism for allocating" the costs of defense and indemnity among the excess carriers without having any effect on their rights. Under the 1998 Agreement, excess carriers agreed to begin payment when the applicable primary policies "claim[ed]" to be exhausted by the payment of claims. The 1998 Agreement repeatedly reserved the rights of the excess insurers, specifically including the rights to "seek reallocation, reimbursement, declaratory relief, contribution, indemnity or any other relief" from any party or non-party to the 1998 Agreement. Indeed, at the same time that Chicago informed Thorpe that it had signed the 1998 Agreement and would be performing under it, Chicago expressly informed Thorpe that it "reserve[d] its right to contend that some or all of the subject claims, including claims previously settled by Thorpe's primary insurers, do not arise out of the Completed Operations/Products exposures and therefore may still be covered under one or more of the underlying primary policies."

[25] Thorpe was not a party to the 1998 Agreement, but was provided a copy.[15] Thereafter, Thorpe informed the excess carriers when the underlying primary ***924** policies claimed exhaustion, and the excess carriers performed their obligations. The insurers now contend that this performance was actually performance *under* the excess policies themselves, and is therefore course of performance evidence relevant to the interpretation of the policies.[16] They argue that Thorpe obtained ****748** tens of millions of dollars in excess coverage proceeds based on the shared understanding that all of the asbestos claims against Thorpe were products claims. But it is apparent that Thorpe obtained the excess coverage proceeds because the excess insurers had agreed among themselves to make those payments while reserving all of their rights to subsequently contend the payments were not, in fact, due under the policies. Indeed, Chicago *expressly reserved* to itself the right to argue that the asbestos claims *were not* products claims, while it nonetheless paid them. For Chicago to now contend that its payment of those claims reflected a shared understanding with Thorpe that the claims *were* products claims is disingenuous at best.

The 1998 Agreement appears to be an effort by Thorpe's insurers to promptly pay the asbestos claims with the understanding that the ultimate liability for those claims—whether held by the excess carriers, primary carriers, Thorpe itself, or a third party—would be resolved at a later date. Thorpe's acceptance of those payments cannot in any way be used to interpret the insurance policies, as, from that point on, the excess carriers were acting pursuant to the 1998 Agreement and *not* under the policies themselves.[17]

A similar conclusion follows with respect to the 1984 Agreement, between Thorpe and ten of its primary carriers. Unlike the 1998 Agreement, the 1984 was not an "interim" agreement, but an actual *settlement* between the insurers and Thorpe. The 1984 Agreement provided that it "is the result of a compromise accord and is a compromise settlement of disputed claims. It is the product of arms length negotiations, is not intended to nor shall it be construed as the admission of the existence of a policy or as a policy ***925** interpretation, and shall not be used in any Court or Arbitration to create, prove or interpret the obligations under general liability or other liability policies."

[26] It is apparent that the claims handling conduct between Thorpe and its primary carriers following the 1984 Agreement was taken pursuant to the 1984 Agreement, not the policies themselves. The parties had resolved their differences regarding the claims and reached an agreement under which the primary insurers would pay their policy limits and no more; their subsequent conduct was governed by that agreement. The insurers argue that, at the time of the 1984 Agreement, there was no dispute over whether asbestos claims were products or non-products claims, so the 1984 Agreement is actually *further* evidence of the parties' conduct, which simply reflects an unspoken understanding that asbestos claims were to be treated as products claims. We disagree. The 1984 Agreement expressly states that it is *not* a policy interpretation and shall *not* be used in any court to interpret the policies. It therefore cannot be considered to be evidence of the parties' interpretation of the policies. As the agreement cannot be considered for policy interpretation, we similarly conclude that conduct *pursuant to* the agreement cannot be considered for the purpose of policy interpretation.[18]

****749** We note that both the 1984 and the 1998 Agreements appear to have been entered into as part of a good faith effort to pay the claims of numerous injured third parties, without requiring litigation over the precise scope of each insurer's duty. This private resolution of the issues apparently resulted in the prompt payment of

nearly $180 million to injured individuals, for which the parties are to be commended. This conduct, however, was clearly accomplished by means of the 1984 and 1998 Agreements, and was not simply a product of Thorpe and its insurers harmoniously performing under a joint understanding of the underlying policies.[19] It therefore is inadmissible for policy interpretation.

6. *Course of Performance Prior to the 1984 Agreement*

It is unclear whether the insurers wish to rely on any course of performance evidence prior to the 1984 Agreement.[20] In the insurers' opposition to ***926** the motion for summary adjudication of their affirmative defenses, they argued that Thorpe knew of the existence of the "non-products" theory of coverage since "at least 1984," and appeared to rely largely on performance following that date. In their writ petition, however, the insurers argue that there were many years of "course of performance" evidence that predated the 1984 Agreement.

[27] Relying on the insurers' assertion that Thorpe knew of the existence of the "non-products" theory in 1984, Thorpe argues that any course of performance evidence prior to that date would be inadmissible, in that the insurers would be unable to prove that Thorpe *understood* that it was accepting performance in a way that interpreted the policies to have no non-products coverage for asbestos suits. (See Cal. Comm.Code § 1303, subd. (a) [course of performance evidence requires the party accepting performance to do so "with knowledge of the nature of the performance"].) We disagree. While it may ultimately be the case that the insurers could not establish this prerequisite for admissibility, Thorpe did not bring its motion in limine on this basis, so the insurers were never required to establish the foundation for the admissibility of pre–1984 course of performance evidence. Pre–1984 course of performance evidence therefore cannot be excluded on this basis.

[28] Thorpe also contends that no course of performance evidence is admissible on the issue of whether certain asbestos suits fall within the non-products coverage of the insurance policies, on the basis that the insurers' interpretation of their policies to exclude such coverage is not reasonable as a matter of law. The trial court expressly declined to reach this issue. We do not disagree. The entire first phase of the trial is to be occupied with this issue; it cannot be resolved in passing on a motion in limine. In any event, Thorpe's showing on the motion in limine was wholly inadequate to enable a court to make this determination. While ****750** Thorpe's motion for summary adjudication did contain the relevant policy language, Thorpe never identified with any specificity any asbestos suits, or types of asbestos suits, that it believed fell within the scope of the non-products coverage of its policies. Thorpe seems to take the position that since it is theoretically possible to conceive of an asbestos suit that falls within non-products coverage, the insurers' position is necessarily unreasonable. But without knowing anything about the nature of the underlying suits at issue, it is impossible to determine whether the insurers' position that the suits *against Thorpe* do not fall within non-products coverage is reasonable.[21] Thorpe has therefore failed in establishing this alternative basis for excluding course of performance evidence.

927 *DISPOSITION

The petition for writ of mandate is granted in part. The trial court is directed to vacate its order granting the motion in limine, and enter a new and different order consistent with the views expressed in this opinion. The parties are to bear their own costs in this writ proceeding.

We Concur: KLEIN, P.J., and KITCHING, J.

All Citations

161 Cal.App.4th 906, 74 Cal.Rptr.3d 733, 08 Cal. Daily Op. Serv. 3935, 2008 Daily Journal D.A.R. 4833

Footnotes

1 The insurance companies that are parties to this writ proceeding are: Employers Reinsurance Company; Westport Insurance Company; Transcontinental Insurance Company; Maine Bonding and Casualty Company; Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company; Argonaut Insurance Company; Middlesex Mutual Insurance Company; Associated International Insurance Company; Chicago Insurance Company; Central National Insurance Company of Omaha; Motor Vehicle Casualty Company; Granite State Insurance Company;

and National Union Fire Insurance Company of Pittsburgh, PA.

2 A manufacturer or service provider can incur liability both while work is in progress and after completion. Claims for injuries arising while an activity is in progress fall within "non-products" or "operations" coverage. Claims for injuries arising once the product has been completed and sent to market fall within "products" or "completed operations" coverage. The coverages are complementary and not overlapping. Products coverage takes over where operations coverage leaves off. (*Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 500–501, 20 Cal.Rptr.2d 376.)

3 Moreover, Thorpe sought a declaration that the insurers had the burden to prove that any underlying claim was a products claim that was subject to their policies' aggregate limits.

4 This proceeding was temporarily stayed following Thorpe's filing a petition in bankruptcy. The insurers have obtained an order from the bankruptcy court permitting this writ petition to proceed.

5 The "any other theory" language appears to relate only to theories of allocation. The parties do not suggest that the "any other theory" language could, or should, be read to include the "non-products" theory of coverage.

6 Thorpe cited to *United States Elevator Corp. v. Associated Internat. Ins. Co.* (1989) 215 Cal.App.3d 636, 263 Cal.Rptr. 760 as authority that purportedly found the definition in certain of the insurers' policies to be indecipherably ambiguous. In that case, the insured had been sued for negligent servicing of elevators, and the issue was whether those claims fell within the products/completed operations clause of the insurance policy. The policy language excluded from completed operations those operations " 'for which the classification stated in the policy or in the Company's manual specifies "including completed operations [.]" ' " (*Id.* at pp. 643–644, 263 Cal.Rptr. 760, italics omitted.) Evidence ultimately indicated that the referenced "Company's manual" was not a manual of either the insured or the insurer, but, in fact, a manual prepared by the Insurance Service Office, "a statistical gathering organization which prepares insurance rates and forms." (*Id.* at p. 644, 263 Cal.Rptr. 760.) The trial court expressly found that this provision to be indecipherable, and, on appeal, there was no argument that this finding was not supported by substantial evidence. (*Id.* at p. 648, 263 Cal.Rptr. 760.) We are not certain what relevance this opinion has to Thorpe's assertion that claims arising from asbestos installation activity fall outside the scope of products/completed operations coverage.

7 In this writ proceeding, the insurers argue that Thorpe previously took the position that asbestos suits constituted products claims and is now arguing that asbestos suits constitute non-products claims. As alleged in Thorpe's complaint, however, there is no clear dichotomy. Thorpe is currently contending that *some* asbestos suits constitute non-products claims. Thorpe does not clearly identify which suits it contends constitute non-products claims; it argues that this should be the insurers' burden.

8 Specifically, the record before us reflects that Thorpe indicated to the trial court that it had not yet decided whether to seek damages for the misallocation of suits that already had been resolved, and the proceedings giving rise to this writ petition proceeded on the basis that Thorpe was not seeking such damages. The record also demonstrates, however, that Thorpe believed that the damages causes of action added by its first amended complaint would encompass claims for damages arising from the mischaracterization of former suits, should Thorpe later choose to proceed on that basis.

9 As the insurers had not yet filed an answer to the first amended complaint, the parties stipulated that the motion for summary adjudication and motion in limine were nonetheless "procedurally ripe" and could proceed. As discussed below, the insurers argue in this writ proceeding that the motion in limine was premature, in that discovery had not been completed. Thorpe argues that the stipulation that the motion was "procedurally ripe" undermines this argument. It does not; the stipulation pertained only to the consideration of these motions prior to a responsive pleading having been filed to the operative complaint.

10 In the instant writ proceeding, the insurers argue that the motion in limine was premature, in that the motion was a "highly irregular attempt to exclude large swaths of unspecified evidence a year before trial." The insurers did not oppose the motion in limine on this basis. In their response in support of the writ petition, the insurers state that they had, in fact, argued "that 'Thorpe's motion should be denied as premature." The quoted argument stated, in full, "[i]n the alternative [to denying the motion on the merits], Thorpe's motion should be denied as premature so that the Court may provisionally admit and review all credible evidence of the parties' course of performance." While the insurers did note, *parenthetically,* that Thorpe's motion was made "without any discovery," and "before the parties even have an opportunity to fully discover just what th[e] evidence is," the insurers never made an argument, with any citation to authority, that the motion in limine should be denied as premature.

11 The insurers argue that the trial court's ruling on the motion in limine barred "three decades' worth of relevant evidence, sight unseen." As the insurers had incorporated by reference the exhibits in support of their opposition to the motion for summary adjudication, the trial court had before it three volumes of such evidence.

12 Thorpe does not pursue in this proceeding its earlier argument that course of performance evidence is simply inapplicable to the interpretation of insurance policies.

13 The trial court also found significant on this point the fact that the policies were standard form policies. The insurers argue that this is factually incorrect, and that some of the policies at issue were not standard form policies. We need not address the factual dispute as we conclude the trial court erred in its interpretation of the law.

14 Thorpe relies on a footnote in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253, which reads as follows: "[B]oth the insurers and [the insured] have requested that we take judicial notice of documents allegedly indicating the view the other has taken of the CGL policies in connection with litigation and activities unrelated to this case. Because our focus here is on the intent of the parties at the time the policies were formed, the evidence contained in these documents is immaterial to our decision." (*Id.* at pp. 823–824, fn. 9, 274 Cal.Rptr. 820, 799 P.2d 1253.) This footnote appears to be in response to the parties' efforts to use their opponents' statements in other cases as a basis for judicial estoppel, not a discussion of the admissibility of the parties' own course of performance under the insurance policies there at issue.

15 The fact that Thorpe was not a party to the 1998 Agreement is not relevant. We are here concerned with whether the history of claims handling after the 1998 Agreement constitute a "course of performance" under the insurance policies such that it can be used for policy interpretation. As the post–1998 claims handling constituted a course of performance under the 1998 Agreement, not the insurance policies, it cannot be used for policy interpretation, regardless of whether Thorpe was a party to the 1998 Agreement.

16 The insurers' argument considers Thorpe's thirty-year history of claims handling as an indivisible whole that the insurers contend should be used for policy interpretation as a whole. The insurers are, in this respect, overstating their case. Course of performance evidence is admissible only to interpret the contract under which the parties were performing. To the extent Thorpe's course of performance under the excess policies is relevant, it would be relevant only to the interpretation of the excess policies.

17 Again, we are concerned only with the insurers' attempt to use Thorpe's course of conduct as course of performance evidence to interpret the insurance policies. We do not consider whether Thorpe's acceptance of these excess payments estops it from asserting the payments were not owed.

18 We do not consider whether Thorpe's present assertion that some asbestos claims are non-products claims is, in any way, barred by, or a breach of, the 1984 Agreement.

19 Indeed, the insurers' position describes the lengthy claims history as decades of "negotiations, representations and agreements." This is not simple performance under a joint understanding of the policies.

20 It is also unclear whether the insurers seek to rely on any course of performance evidence *after* the 1984 Agreement, but not attributable to it or the 1998 Agreement—for example, claims practices with respect to insurers that were not parties to those agreements.

21 In any event, we note that the opinion in *Fibreboard Corp. v. Hartford Accident & Indemnity Co., supra,* 16 Cal.App.4th at pp. 500–502, 20 Cal.Rptr.2d 376, rejected an insured's claim that asbestos suits based on failure to warn and several other theories fell within non-products coverage. While this authority does not control the issue in this case, it suggests that the insurers' position is not so unreasonable as to be rejected outright in the course of a motion in limine.

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LEGAL AUTHORITY AA-81

ENTERGY SERVICES, INC., Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent

Arkansas Electric Cooperative Corporation, Intervenor.

No. 07–1343.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 7, 2008.

Decided June 12, 2009.

Background: Electricity services company, for public utility holding company that sold electricity through operating subsidiary, petitioned for review of orders of Federal Energy Regulatory Commission (FERC), 2006 WL 3030149 and 2007 WL 1814451, determining that contract between subsidiary and electric cooperative barred services company's practice of taking into account transmission system operating constraints in determining billing rate for electricity supplied to cooperative's customers.

Holding: The Court of Appeals, Garland, Circuit Judge, held that contract barred practice of billing at premium rate based on transmission system operating constraints.

Petition denied.

1. Public Utilities ⇐168

To satisfy the arbitrary and capricious standard, under the Administrative Procedure Act, the Federal Energy Regulatory Commission (FERC) must demonstrate that it has made a reasoned decision based upon substantial evidence in the record, and the path of its reasoning must be clear. 5 U.S.C.A. § 706(2)(A).

2. Public Utilities ⇐194

Court of Appeals reviews claims that the Federal Energy Regulatory Commission (FERC) acted arbitrarily and capriciously in interpreting contracts within its jurisdiction by employing the principles of *Chevron*, evaluating de novo FERC's determination that a contract is ambiguous, but giving *Chevron*-like deference to FERC's reasonable interpretation of ambiguous contract language. 5 U.S.C.A. § 706(2)(A).

3. Electricity ⇐11.2(2)

Federal Energy Regulatory Commission (FERC) reasonably interpreted contract between electricity services company's subsidiary and electric cooperative as barring company's practice of taking into account transmission system operating constraints to apply premium replacement energy billing rate, rather than cheaper substitute energy rate, for electricity supplied to cooperative's customers for any hour that cooperative's resources had capability of meeting customer requirements, under contract ambiguously authorizing premium rate only during period that cooperative lacked sufficient resources "available" and only if "capability" of resources was not sufficient, since cooperative necessarily had sufficient resources available for any period that it had capability of satisfying demand, and parties' course of conduct for over 23 years consistently allowed cooperative to pay cheaper billing rate when capable of meeting customer requirements. Electric Utility Companies Act, § 205, 16 U.S.C.A. § 824d.

On Petition for Review of an Order of the Federal Energy Regulatory Commission.

Floyd L. Norton IV argued the cause for petitioner. With him on the briefs was Erin M. Murphy.

Samuel Soopper, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were Cynthia A. Marlette, General Counsel, and Robert H. Solomon, Solicitor.

Sean T. Beeny argued the cause for intervenor. With him on the brief were Phyllis G. Kimmel and Milton J. Grossman.

Before: SENTELLE, Chief Judge, and RANDOLPH and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

This petition for review challenges the Federal Energy Regulatory Commission's (FERC's) resolution of a contract dispute between Entergy Arkansas, Inc., an operating subsidiary of petitioner Entergy Services, Inc. ("Entergy"), and Arkansas Electric Cooperative Corporation ("Arkansas Electric"). Entergy contends that the plain language of the contract permits it to take into account transmission system operating constraints in determining the billing rate for energy supplied to Arkansas Electric's customers. In the two rulings under review, FERC found that the relevant contract provisions are ambiguous, but that they are best interpreted to bar this billing practice. *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 F.E.R.C. ¶ 61,314 (2007) [hereinafter Order on Rehearing]; *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 117 F.E.R.C. ¶ 61,099 (2006) [hereinafter Order on Initial Decision]. FERC's orders are carefully reasoned, and we have little difficulty upholding them under our deferential standard of review.

I

Petitioner Entergy Services, Inc. is the services company for Entergy Corporation, a public utility holding company that sells electricity in Arkansas, Louisiana, Mississippi, and Texas through operating subsidiaries named after their respective jurisdictions—in this case, Entergy Arkansas, Inc. Arkansas Electric is an electric generation and transmission cooperative that provides wholesale electricity to its members in Arkansas. Entergy and Arkansas Electric share an ownership interest in several resources, including two coal-fired generation plants, each of which contains two generating units. Arkansas Electric also wholly owns two gas-fired plants. Pursuant to a 1977 Power Coordination, Interchange and Transmission Service Agreement ("Power Agreement") and several location-specific contracts ("Co–Owner Agreements"), Entergy and Arkansas Electric have integrated their generation resources, with Entergy given full control over their scheduling and dispatch. All of the energy produced by Arkansas Electric's resources within the Entergy control area flows through Entergy's multistate transmission system. The Power Agreement provides a billing mechanism known as after-the-fact or theoretical "redispatch," whereby Arkansas Electric compensates Entergy retrospectively for the energy that Entergy has delivered to Arkansas Electric's customers.

During certain periods, Entergy is able to supply Arkansas Electric's customers with energy derived solely from Arkansas Electric's own resources. For this service, the contract is clear that Arkansas Electric owes Entergy nothing. Power Agreement art. V, § 5(a)(i). During other periods, Arkansas Electric indisputably has sufficient resources available to satisfy its customer demand, yet Entergy elects to fulfill some of that demand with energy produced elsewhere. For this service, Entergy bills Arkansas Electric at the "Substitute Energy" rate, which approximates what it would have cost Arkansas Electric to produce the energy itself. *Id.* art. V,

§ (a)(ii); *id.* exhibit E, Redispatching Principle No. 6.[1]

During still other periods, Arkansas Electric's customers' demand for energy may exceed the physical "capability" of its units, as that term is defined in Article II, Section 17 of the Power Agreement,[2] and Entergy must make up the difference. This discrepancy is billed at a premium rate, known as the "Replacement Energy" rate, under the contract's provision for "energy used by [Arkansas Electric] on redispatch for which [Arkansas Electric] did not have sufficient [Arkansas Electric] Resources available." *Id.* art. V, § 5(c). The premium rate also applies in cases of "outages," when Arkansas Electric's resources are out of service because of emergency or planned maintenance and Entergy must replace the lost generation. *Id.* art. III, § 5.[3]

The instant dispute concerns whether the premium rate applies in yet another situation. During some periods, Arkansas Electric's resources are physically capable of producing energy sufficient to meet its customers' needs—they are not experiencing outages and their rated capacity is greater than or equal to real-time demand—yet on account of "transmission system operating constraints," Entergy cannot or will not use all of this capacity. Instead, Entergy satisfies some portion of Arkansas Electric's customers' needs by drawing on other sources. The system operating constraints that lead Entergy to take these actions are the product of many factors and can take many forms. Across its vast transmission system, Entergy's dispatchers may face unpredictable fluctuations in output, load, and third-party deliveries. To meet their obligations effectively in the face of such fluctuations, Entergy maintains, its dispatchers must sometimes turn down energy from Arkansas Electric's units to accommodate delivery from other resources.

The parties mostly agree on the causes and effects of these system operating constraints, but they vehemently disagree on their relevance to billing. Entergy argues that, whenever system operating constraints induce it to supply Arkansas Electric's customers with energy from other sources, that energy must be billed at the Replacement Energy rate because Arkansas Electric "did not have sufficient . . . resources available" to satisfy its custom-

1. The term ''Substitute Energy'' does not appear in the Power Agreement, but has long been used by the parties.

2. Pursuant to Article II, Section 17, the parties conduct regular tests to determine the net generating capability, or rated capacity, of Arkansas Electric's resources. This is the amount of energy that the resources are physically capable of producing in a given amount of time. The provision states as follows:

> Determination of Capability of Arkansas Electric Owned Resources. The capability of Arkansas Electric Owned Resources shall be net generating capability based on tests conducted in accordance with approved Entergy Corporation capability rating plant testing procedures. The determination of such capability shall be based on tests conducted jointly by Arkansas Electric and Entergy at mutually agreed times; provided, that either party shall have the right to require a new test at any time not sooner than twelve months after the last previous test.

J.A. 98 (acronyms replaced).

3. Article III, Section 5 states:

> Outage of Arkansas Electric Owned Resources. When any Arkansas Electric Owned Resource is out of service because of emergency or planned maintenance, Entergy will replace Arkansas Electric's generation so lost, to the extent possible, with power and energy from Arkansas Electric Resources. Subject to availability, Entergy will supply the remaining requirements as Replacement Energy which will be billed to Arkansas Electric and paid for at the following [premium] rate . . . .

J.A. 101–02 (acronyms replaced).

ers. Power Agreement art. V, § 5(c). Arkansas Electric counters that, so long as there are no outages and its units are capable of meeting its customers' requirements, billing must be calculated at the cheaper Substitute Energy rate.

Entergy did not always take its current position. For most of the life of the contract, Entergy applied the billing methodology that Arkansas Electric favors. Entergy began to reassess this approach in the early 2000s, as system operating constraints grew more acute and financial losses on Substitute Energy mounted. Entergy ultimately determined that its new view was the only permissible reading of the Power Agreement. Indeed, Entergy claimed that it had been unnecessarily "subsidiz[ing]" Arkansas Electric and other co-owners by "protect[ing] [them] from the impacts of system operating constraints." Affidavit of John P. Hurstell ¶¶ 44–45 (J.A. 295–96). Determined to forswear such countertextual corporate altruism, Entergy unilaterally changed its billing procedures in July of 2004. Following an unsuccessful attempt at reconciliation, Arkansas Electric filed a complaint with FERC alleging, inter alia, that Entergy's actions violated the Power Agreement.

An Administrative Law Judge initially sided with Entergy, *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.,* 114 F.E.R.C. ¶ 63,015 (2006), but the Commission reversed. The Commission found that the Power Agreement is ambiguous as to the billing methodology that applies in situations of transmission system operating constraints, but that it is best read to require Entergy to charge the Substitute Energy rate. Order on Initial Decision, 117 F.E.R.C. at 61,496–97. "The provisions of the billing mechanism," the Commission concluded, "confirm Arkansas Electric's view that they are designed to render it economically indifferent as to the actual amount of power that the Entergy dispatcher decides to dispatch from Arkansas Electric's units as long as the units are physically capable of generating the power needed to serve its own load." *Id.* at 61,500. The Commission therefore held that the premium Replacement Energy rate applies only if, and to the extent that, Entergy delivers power to Arkansas Electric's customers in excess of the rated capacity of Arkansas Electric's units or, in the case of outages, in excess of the actual dispatchability of the units. *Id.* at 61,496.

In essence, the Commission ratified the parties' pre–2004 understanding of the contract: no matter how difficult it may be for Entergy to utilize Arkansas Electric's resources, the Replacement Energy rate does not apply to periods in which Arkansas Electric's units are physically capable of satisfying its customers' demand. The Order on Initial Decision directed Entergy to cease and desist from its new billing method and to refund, with interest, all charges collected pursuant thereto. The Order on Rehearing reaffirmed and elaborated the same conclusions.

II

[1, 2] This court reviews the Commission's orders under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). To satisfy this standard, the Commission must "demonstrate that it has made a reasoned decision based upon substantial evidence in the record, and the path of its reasoning must be clear." *Sithe/Independence Power Partners v. FERC,* 165 F.3d 944, 948 (D.C.Cir.1999) (internal quotation marks and citation omitted). We review claims that the Commission acted arbitrarily and capriciously in interpreting contracts within its jurisdiction by employing the familiar principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*

467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We evaluate de novo the Commission's determination that a contract is ambiguous, but we give *Chevron*-like deference to its reasonable interpretation of ambiguous contract language. *See Old Dominion Elec. Coop., Inc. v. FERC,* 518 F.3d 43, 48–49 (D.C.Cir.2008); *Cajun Elec. Power Coop., Inc. v. FERC,* 924 F.2d 1132, 1135–36 (D.C.Cir.1991). To help resolve contractual ambiguity, we have indicated that the Commission may look to extrinsic evidence such as the background of negotiations, *Sw. Elec. Coop., Inc. v. FERC,* 347 F.3d 975, 983 (D.C.Cir.2003), and the parties' subsequent course of performance, *S.D. Pub. Utils. Comm'n v. FERC,* 934 F.2d 346, 351 (D.C.Cir.1991).

[3] Both sides agree that the key parts of the Power Agreement are the billing provisions of Article V, Section 5 and the redispatching principles set out in Exhibit E. Section 5 of Article V states:

> Energy. It is the intent of both parties that all resources of both parties will be dispatched by Entergy for maximum combined efficiency, and that Arkansas Electric's Resources will, on a retroactive basis, considering their *availability* on an hour-to-hour basis, be used to theoretically redispatch Arkansas Electric's load from Arkansas Electric's Resources.
>
> . . . .
>
> For billing purposes:
>
> . . . .
>
> (c) Excess Energy. For any energy used by Arkansas Electric on redispatch for which Arkansas Electric did not have sufficient Arkansas Electric resources *available,* Arkansas Electric will pay to Entergy an amount calculated as in Article III, section 5 [i.e., the Replacement Energy rate applicable to outages].
>
> (d) Redispatching Principles. All redispatching of Arkansas Electric's Resources will be in accordance with the principles outlined in Exhibit E.

J.A. 111–14 (emphases added and acronyms replaced). Exhibit E states:

> Redispatching Principles. For billing purposes, the following principles will be utilized:
>
> (1) The first cost will be the minimum operating level for *each unit.* The minimum operating level will be the lowest level of net generation at which the plant can be operated as designated by the owner and furnished to the Entergy dispatcher.
>
> (2) For redispatch purposes it will be assumed that *each unit* will not be loaded above 95% of rated capacity unless said unit actually operated at a greater value.
>
> (3) For redispatch purposes appropriate consideration will be given to *other* operating constraints which limit the availability of the plant to the Entergy dispatcher.
>
> . . . .
>
> (6) If the *capability* of Arkansas Electric Resources is sufficient to supply Arkansas Electric requirements and if Arkansas Electric requirements are greater than the energy supplied from Arkansas Electric Resources in an hour, Arkansas Electric will pay to Entergy Arkansas Electric's incremental cost per kWh of the energy deficiency.
>
> (7) If the *capability* of Arkansas Electric Resources is not sufficient to supply Arkansas Electric requirements in an hour, Arkansas Electric may purchase Replacement Energy in accordance with Article III, section 5, after giving consideration to the principles in 1, 2 and 3 above.

Id. at 157–59 (emphases added and acronyms replaced); *see also* Order on Initial

Decision, 117 F.E.R.C. at 61,501–02 (reproducing additional portions of the Power Agreement).

FERC was correct in finding these provisions ambiguous. Article V, Section 5(c) provides that the Replacement Energy rate will apply during any period in which Arkansas Electric does "not have sufficient resources . . . *available*." Power Agreement art. V, § 5(c) (emphasis added). The very next clause states that all redispatch billing must "be in accordance with the principles outlined in Exhibit E," *id.* art. V, § 5(d), and Principle 7 of that Exhibit indicates that the Replacement Energy rate applies only if the "*capability*" of Arkansas Electric's resources "is not sufficient to supply [its customers'] requirements," *id.* exhibit E, Redispatching Principle No. 7 (emphasis added). Hence, without explanation the key terms ("availability" and "available") in Article V, Section 5 are replaced by another term ("capability") in the corresponding provision of Exhibit E. As the Commission observed, "availability" could therefore be given at least two different meanings:

> (1) the capability of the unit to generate power irrespective of whether and in what amount power is actually dispatched, as Arkansas Electric interprets it, or (2) whether the power the unit is capable of generating is usable by the Entergy dispatcher based on operating conditions on the transmission system, as Entergy apparently interprets it.

Order on Initial Decision, 117 F.E.R.C. at 61,497.

Entergy draws on scattered provisions of the Power Agreement to argue for the latter interpretation. The company argues, for example, that the reference to "maximum combined efficiency" in the lead paragraph of Article V, Section 5 should be read to endorse a systemwide approach to redispatch, and that the Agreement's various references to "availability" should be read to refer to the actual accessibility of resources to Entergy at a given moment in time, rather than to their theoretical accessibility based on the rated capacity of Arkansas Electric's units. Entergy also argues that the reference to "other operating constraints" in Redispatching Principle 3 should be read to encompass more than just constraints on rated capacity.[4]

Although Entergy's textual argument is reasonable, the Commission's reading of the Power Agreement is more so. The Commission observes that in the three places where the contract provides for Replacement Rate billing—in Article III, Section 5 (regarding outages, *see supra* note 3); Article V, Section 5(c); and Exhibit E's Redispatching Principle 7—there is no mention of "transmission system operating constraints" or anything comparable. Order on Initial Decision, 117 F.E.R.C. at 61,496. The Commission further notes that, whereas the other billing provisions turn on undefined terms such as "availability," "efficiency," and "appropriate consideration," Redispatching Principles 6 and 7 offer clear guidance: For any hour in which Arkansas Electric's resources have the "capability" (i.e., the tested capacity, *see* art. II, § 17) to meet its customers' requirements, the Replacement Rate does not apply; but for any hour in

4. Entergy further contends that, in interpreting the Power Agreement, the Commission should have consulted certain language in the Co–Owner Agreements. We do not find the language Entergy cites particularly illuminating; more important, the Power Agreement was the rightful focus of FERC's analysis because the Co–Owner Agreements do not address questions of billing methodology. Nor are we persuaded by Entergy's insistence that the Commission should have attended more closely to considerations of "good utility practice." Because such considerations relate primarily to dispatch rather than redispatch (i.e., billing), they are inapposite here.

which Arkansas Electric's resources are incapable of meeting its customers' requirements, the Replacement Rate does apply.

In construing a contract that "is not well-written and scatters provisions [on billing] in three separate parts," Order on Rehearing, 119 F.E.R.C. at 62,806, the Commission has reasonably chosen to ground its analysis in these specific instructions. *See* Order on Initial Decision, 117 F.E.R.C. at 61,495 n. 47 ("In the interpretation of a contract, specific and exact terms have a greater weight than general language. Attention and understanding are likely to be in better focus when language is specific or exact . . . ." (citing *Sw. Elec. Coop.*, 347 F.3d at 982–83)). The Commission infers from Principles 6 and 7 that the term "availability" in Article V, Section 5 is best understood to be synonymous with the term "capability," as defined by Article II, Section 17, unless there are outage conditions that decrease a unit's ability to produce power. *See* Order on Rehearing, 119 F.E.R.C. at 62,806 (clarifying this point); *supra* note 2 (text of Section 17). The two terms are connected but not conflated. For any period in which Arkansas Electric's units have the capacity to satisfy demand *and* are in service, the Commission reasonably concludes, Arkansas Electric necessarily has sufficient resources "available" within the meaning of Article V, Section 5(c).

FERC's reading of the contract has the substantial virtue of harmonizing the Redispatching Principles of Exhibit E with the body of the Power Agreement. By equating "availability" with "capacity" except in cases of outages, FERC manages to adhere to the interpretive maxim of meaningful variation while honoring the specific commands of Redispatching Principles 6 and 7. Likewise, by construing the phrase "other operating constraints" in Redispatching Principle 3 to follow Principles 1 and 2 in referring to other physical, unit-based constraints (like rated capacity), rather than to systemwide constraints (i.e., transmission system operating constraints), FERC adheres to the canon of *ejusdem generis*, *see Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 221 (D.C.Cir.2007) ("[W]here general words follow specific words, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (internal quotation marks omitted)), while reconciling those Principles with Article V, Section 5. If there is any other way to make the contract hang together, Entergy has not told us how.

The reasonableness of FERC's interpretation is further confirmed by reference to the parties' course of conduct. *See S.D. Pub. Utils. Comm'n*, 934 F.2d at 351 (observing that course-of-performance evidence "of course is probative" in the context of a FERC contract interpretation dispute). As the Commission found, "[t]he record is replete with evidence that for over twenty-three years *both* parties regarded Arkansas Electric as entitled to pay the lower incremental fuel (coal) cost of its units when the units were capable of meeting Arkansas Electric's load, regardless of whether and to what extent Entergy actually dispatched power from those units." Order on Initial Decision, 117 F.E.R.C. at 61,500; *see also* Oral Arg. Recording at 10:30 (concession by counsel for Entergy that FERC's finding was accurate). That is, for over twenty-three years both parties applied the billing methodology that Entergy now disclaims. When Entergy "restated" the contract in 2001 and refiled it with FERC the following year, *see* Power Agreement pmbl., it did so against a background of more than two decades of consistent billing practice. If the contractual language were in fact as clear—and if Arkansas Electric's interpre-

tation thereof were in fact as untenable—as Entergy now alleges, then it is hard to fathom why Entergy would have applied Arkansas Electric's less favorable interpretation of the billing provisions for all those years prior to 2004. In short, we cannot agree that the only plausible way to interpret the contract is precisely opposite from the way that Entergy itself interpreted it for more than twenty years.

Finally, Entergy maintains that, as a matter of fairness, it deserves additional compensation for those occasions when factors beyond its control compel it to satisfy Arkansas Electric's customers with energy from third parties. The Commission's analysis, by contrast, appropriately focused on the contract the parties negotiated rather than on which side struck the better bargain. *See, e.g.,* Order on Rehearing, 119 F.E.R.C. at 62,808–09. Similarly, the question before us is not whether the *contract* was reasonable, a technical issue as to which courts have little expertise, but rather whether FERC's *construction* of that contract was reasonable—the kind of legal dispute that this court resolves every day. And as to the latter, we have no doubt.

III

For the foregoing reasons, the petition for review is

Denied.

WESTAR ENERGY, INC., et al., Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Nos. 08–1196, 08–1205.

United States Court of Appeals, District of Columbia Circuit.

Argued March 26, 2009.

Decided June 12, 2009.

Background: Electricity wholesalers petitioned for review of orders of Federal Energy Regulatory Commission (FERC), 2005 WL 503759 and 2005 WL 669752, requiring wholesalers to make refunds to customers for market-priced sales in areas where wholesalers had market power at point of sale.

Holdings: The Court of Appeals, Kavanaugh, Circuit Judge, held that:

(1) application of point-of-sale test, rather than sink-based test, for pricing electricity sales was reasonable;

(2) policy change from sink-based test to point-of-sale test was sufficiently explained;

(3) order requiring retroactive refunds was not arbitrary and capricious; and

(4) denial of refund waiver was reasonable.

Petitions denied.

1. Administrative Law and Procedure ⚿763

Review of an agency's decision, under the arbitrary and capricious standard of the Administrative Procedure Act (APA), is deferential. 5 U.S.C.A. § 551 et seq.

2. Electricity ⚿11.3(1)

For wholesalers that sold electricity in regions where they had market power but

LEGAL AUTHORITY AA-82

71 Cal.App.4th 646
Court of Appeal, Fourth District, Division 2, California.

Donald ERICKSON, Plaintiff and Respondent,
v.
AETNA HEALTH PLANS OF CALIFORNIA, INC., Defendant and Appellant.

No. E021505.
|
April 21, 1999.
|
Certified for Partial Publication.*

Synopsis
Health maintenance organization (HMO) brought motion to compel arbitration of plan member's claims of breach of contract, negligence, and fraud relating to HMO's alleged failure to provide timely cancer treatment under replacement Medicare coverage plan. The Superior Court, Riverside County, No. 282921, Victor Miceli, J., denied the motion. HMO appealed. The Court of Appeal, Richli, J., held that: (1) state statutory requirements for form and content of notice of arbitration clauses in health care plans were preempted by Federal Arbitration Act (FAA); (2) HMO's plan was not a contract of adhesion; and (3) arbitration was mandatory rather than optional under HMO's plan contract.

Reversed and remanded with directions.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Alternative Dispute Resolution**What law governs
InsuranceRequisites and validity

Statute providing disclosure requirements for binding arbitration clauses in health care service plans does not apply to plans or policies issued before its enactment. West's Ann.Cal.Health & Safety Code § 1363.1.

[2] **Alternative Dispute Resolution**
Constitutional and statutory provisions and rules of court

Health maintenance organization's (HMO) replacement Medicare coverage plan involved "commerce," within meaning of Federal Arbitration Act (FAA) provision making the Act applicable to any contract evidencing a transaction involving commerce; HMO performed its Medicare contract with federal government by entering into interstate contracts with vendors and service providers operating on a national basis. 9 U.S.C.A. § 2.

14 Cases that cite this headnote

[3] **Alternative Dispute Resolution**Preemption
StatesParticular cases, preemption or supersession

State statute was in conflict with Federal Arbitration Act (FAA) by imposing special requirements for form and content of notice of arbitration clauses in health care plans that were not applicable to contracts generally, and thus, statute was preempted by FAA. 9 U.S.C.A. § 2; West's Ann.Cal.Health & Safety Code § 1363.1.

11 Cases that cite this headnote

[4] **Contracts**Adhesion contracts; standardized contracts

Although normally a party to a contract is bound by its provisions whether or not he or she is aware of them, courts will not enforce provisions in adhesion contracts which favor the stronger party unless they are conspicuous, clear, and not inconsistent with the parties'

reasonable expectations.

3 Cases that cite this headnote

[5] **Appeal and Error**Grounds not considered or relied upon below

Although an appellate court can affirm a ruling on a ground not adopted by the trial court, it should not do so where the alternative ground presents fact issues which the opposing party and trial court did not have an opportunity to address.

1 Cases that cite this headnote

[6] **Alternative Dispute Resolution**Compulsory arbitration

Health maintenance organization's (HMO) replacement Medicare coverage plan containing arbitration clause was not a contract of adhesion, where plan was provided pursuant to negotiated agreement with federal agency that presumably had bargaining power comparable to HMO's bargaining power and where Medicare subscribers were not required to participate in the plan.

5 Cases that cite this headnote

[7] **Alternative Dispute Resolution**Arbitration favored; public policy

Where a transaction falls under the Federal Arbitration Act (FAA), even the threshold decision of whether there is an agreement to arbitrate must be made with a healthy regard for the federal policy favoring arbitration. 9 U.S.C.A. § 1 et seq.

4 Cases that cite this headnote

[8] **Alternative Dispute Resolution**Construction

Issues concerning the construction of the contract language itself are subject to the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

[9] **Alternative Dispute Resolution**Evidence

Under the Federal Arbitration Act (FAA), a court cannot apply a state law requirement that an arbitration clause be "express" or "unequivocal" if state law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence. 9 U.S.C.A. § 2.

7 Cases that cite this headnote

[10] **Alternative Dispute Resolution**Construction

Arbitration clause of health maintenance organization's (HMO) replacement Medicare coverage plan, which stated that plan member "may" request binding arbitration and that any differences between member and HMO were "subject to binding arbitration," required arbitration rather than merely permitting it; the permissive language simply meant member could accept grievance panel's proposed resolution.

1 Cases that cite this headnote

[11] **Alternative Dispute Resolution**Construction

"Subject to," in contractual arbitration clause providing that certain disputes were "subject to binding arbitration," meant "conditioned upon, limited by, or subordinate to," and thus, arbitration of such disputes was mandatory

rather than optional.

5 Cases that cite this headnote

[12] **Alternative Dispute Resolution**Liberal or strict construction
Alternative Dispute Resolution Construction in favor of arbitration

Principle of construing any uncertainty in a contract against its drafter is subordinate to the policy favoring arbitration when construing Federal Arbitration Act (FAA) agreements. 9 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[13] **Alternative Dispute Resolution**Construction

Principle of construing any uncertainty in a contract against its drafter does not apply where compulsory arbitration does not inherently favor the drafting party.

2 Cases that cite this headnote

Attorneys and Law Firms

****78 *648** Epstein, Becker & Green, William A. Helvestine, Michael T. Horan, San Francisco, and Kevin M. Corbett, San Leandro, for Defendant and Appellant.

Law Offices of Leibovic & Tysch and Gary L. Tysch, Sherman Oaks, for Plaintiff and Respondent.

***649 OPINION**

RICHLI, J.

Aetna Health Plans of California, Inc., appeals from the denial of its motion to compel arbitration of claims arising from its alleged failure to provide timely cancer treatment to Donald Erickson under Aetna's Medicare coverage plan. We conclude that: (1) although Aetna's arbitration provision failed to comply with Health and Safety Code section 1363.1, that statute is preempted by the Federal Arbitration Act; and (2) the arbitration provision is not otherwise invalid under general principles of law. Accordingly, we reverse.

I

FACTUAL AND PROCEDURAL BACKGROUND

Aetna is a federally qualified health maintenance organization. Pursuant to an agreement with the federal Health Care Financing Administration, Aetna offered replacement Medicare coverage to eligible individuals under a plan called Senior Choice. Mr. Erickson enrolled in Senior Choice in about April 1993.

Among other things, the Senior Choice handbook[1] set forth the options available to plan members in the event of a dispute. After explaining the procedure for filing a grievance, the handbook stated: "If you are not satisfied with the [grievance panel's] proposed resolution, you may request binding arbitration. [¶] **If You Want To Have Binding Arbitration** [¶] Any differences between you and the Health Plan (other than those subject to the Medicare Appeals Procedure) are subject to binding arbitration."

According to his complaint, Mr. Erickson was found to have prostate cancer in 1995. His physician recommended proton beam therapy, and Aetna represented the procedure would be covered. Later, however, Aetna took the position the therapy was not covered. Although Aetna eventually agreed to cover the therapy, the delay increased the risk Mr. Erickson's cancer would metastasize and threaten his life.

Mr. Erickson brought this action in June 1996, alleging that Aetna's conduct breached its agreement with Mr. Erickson and the covenant of good faith contained in that

agreement, and also constituted negligence, negligent misrepresentation, infliction of emotional distress, and fraud. Aetna moved to compel arbitration based on the provision in the Senior Choice handbook ***650** quoted above. The court denied the motion, ruling that (1) the arbitration clause was not sufficiently clear and unequivocal to be valid under California law, and (2) the clause failed to comply with the disclosure requirements of Health and Safety Code section 1363.1.

II

DISCUSSION

A. *FAA Preemption of Health and Safety Code Section 1363.1*

1. *Section 1363.1*

Health and Safety Code Section 1363.1 (section 1363.1) provides that a binding arbitration clause in a health care service plan must incorporate various disclosures, including a clear statement of "whether the subscriber or enrollee is waiving his or her right to a jury trial...." The waiver language must be substantially in the wording provided in ****79** Code of Civil Procedure section 1295, subdivision (a),[2] and must appear immediately before the signature line for the individual enrolling in the plan. (§ 1363.1, subd. (c), (d).)

[1] It is undisputed Aetna's arbitration clause did not comply with these requirements. Accordingly, if section 1363.1 applies, the clause is invalid.[3]

2. *The FAA*

The Federal Arbitration Act (FAA), Title 9 U.S.C. section 1 et seq., applies to any "contract evidencing a transaction involving commerce" which contains an arbitration clause. (9 U.S.C. § 2.) Section 2 of the FAA (section 2) provides that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) State courts may, without violating section 2, decline to enforce arbitration clauses on the basis of "generally applicable contract defenses, such as fraud, duress or ***651** unconscionability." However, they may not do so on the basis of "state laws applicable *only* to arbitration provisions." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 [116 S.Ct. 1652, 1656, 134 L.Ed.2d 902].)

3. *Preservation of Preemption Issue in Lower Court*[**]

4. *Interstate Commerce*

[2] "Commerce" for purposes of FAA coverage "is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause." (*Foster v. Turley* (10th Cir.1986) 808 F.2d 38, 40; accord, *Willis v. Dean Witter Reynolds, Inc.* (6th Cir.1991) 948 F.2d 305, 310.) In an analogous context, it has been held that a health care provider's treatment of Medicare patients, receipt of reimbursement from Medicare, and purchase of out-of-state medicines and supplies constitutes being engaged in interstate commerce for purposes of the Sherman Act. (See, e.g., *Summit Health, Ltd. v. Pinhas* (1991) 500 U.S. 322, 329, 111 S.Ct. 1842, 1847, 114 L.Ed.2d 366; *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hospital Assn.* (7th Cir.1994) 36 F.3d 664, 666; *Brown v. Our Lady of Lourdes Medical Center* (D.N.J.1991) 767 F.Supp. 618, 626.)

Here, as stated, the Senior Choice plan replaces Medicare coverage and operates pursuant to a contract with the federal government. Coverage is available only to Medicare patients; the patients pay for coverage through Social Security deductions or payments to Medicare. Additionally, according to Aetna's Medicare compliance manager, Aetna, in performing its Medicare contract, enters into interstate contracts with vendors and service providers operating on a national basis.

None of this evidence was disputed, nor does the record suggest any credibility issues or other factual conflicts which the court had to resolve in ruling that the Senior Choice plan did not involve interstate commerce. Reviewing the ruling independently as a question of law (see *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799, 35 Cal.Rptr.2d 418, 883 P.2d 960), we therefore conclude the plan involves interstate commerce and is subject to the preemption provision of the FAA. The remaining question is whether section 1363.1 is inconsistent with that

provision.

5. *Preemption of Section 1363.1*

[3] In *Doctor's Associates, Inc. v. Casarotto, supra,* 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902, the United States Supreme Court held the FAA preempted a Montana ****80** statute which ***652** required that an arbitration clause be typed in underlined capital letters on the first page of a contract in order to be enforceable. The court stated section 2 of the FAA precludes states from "singling out arbitration provisions for suspect status." It concluded the Montana law directly conflicted with section 2 by conditioning the enforceability of arbitration agreements "on compliance with a special notice requirement not applicable to contracts generally." (*Doctor's Associates, Inc., supra,* at p. 687, 116 S.Ct. 1652.)

Section 1363.1 similarly imposes on arbitration clauses in health care plans "a special notice requirement not applicable to contracts generally." Health care arbitration clauses must satisfy special requirements as to form and content which are not imposed on contracts generally, nor even on health care contracts generally unless they contain arbitration clauses. Section 1363.1 thus " 'takes its meaning precisely from the fact that a contract to arbitrate is at issue ...,' " and, consequently, conflicts with section 2 of the FAA. (*Doctor's Associates, Inc. v. Casarotto, supra,* 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902.) Section 1363.1 therefore is preempted as applied to the Senior Choice plan arbitration clause, and the lower court's refusal to enforce the clause can be upheld, if at all, only on the basis of generally applicable California law.

B. *Validity of Arbitration Clause Under General Principles of Law*

Mr. Erickson offers three generally applicable legal principles in support of the lower court's refusal to enforce the arbitration clause: first, that the Senior Choice plan is a contract of adhesion and the clause therefore cannot be enforced absent a showing that the plan member has been made aware of its existence and implications; second, that the language of the clause is too misleading to be valid even under the standards for nonadhesion contracts; and, third, that Mr. Erickson's mistaken interpretation of the clause prevented mutual assent, so that no agreement to arbitrate was formed. We discuss each contention in order.

1. *Contract of Adhesion*

[4] Although normally a party to a contract is bound by its provisions whether or not he or she is aware of them, courts will not enforce provisions in adhesion contracts which favor the stronger party unless they are conspicuous, clear, and not inconsistent with the parties' reasonable expectations. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710, 131 Cal.Rptr. 882, 552 P.2d 1178.) We reject Mr. Erickson's argument that the Senior Choice arbitration clause should be governed by these principles, for several reasons.

[5] ***653** First, Mr. Erickson did not make the adhesion argument in the lower court, and, as he recognizes, the court did not rule on the issue. Although an appellate court can affirm a ruling on a ground not adopted by the trial court, it should not do so where the alternative ground presents fact issues which the opposing party and trial court did not have an opportunity to address. (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 974, 219 Cal.Rptr. 381; *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227, 30 Cal.Rptr.2d 893.)

"Whether a contract is one of adhesion generally would present a mixed question of law and fact." (*Woodard v. Southern Cal. Permanente Medical Group* (1985) 171 Cal.App.3d 656, 667, 217 Cal.Rptr. 514.) To make that determination, a court would have to consider the conditions under which the contract was negotiated and executed, including an assessment of the parties' relative bargaining power. (See, e.g., *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 985, 64 Cal.Rptr.2d 843, 938 P.2d 903.) Such questions are better resolved by the trial court in the first instance.

[6] Second, there is nothing in the present record to support the assertion that the Senior Choice plan is a contract of adhesion. In fact, the record supports the opposite conclusion. In *Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d 699, 131 Cal.Rptr. 882, 552 P.2d 1178, the Supreme Court held that an arbitration clause in a group medical services contract negotiated by a state agency on behalf of public employees ****81** was not unenforceable under adhesion principles. The court noted the agency had considerable bargaining strength, employees were free to opt out of the plan, and the clause did not inherently favor the plan over the employees, as both sides stood to benefit from the speed and economy of arbitration. (*Id.,* at pp. 711–712, 131 Cal.Rptr. 882, 552

P.2d 1178.)[5]

Here, similarly, the Senior Choice plan is provided pursuant to an agreement negotiated between Aetna and an agency of the federal government, an entity which presumably had bargaining power comparable or superior to Aetna's. Medicare subscribers are not required to participate in the plan, and the arbitration clause does not inherently favor Aetna, but "merely substitutes one forum for another." (*Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d 699, 711, 131 Cal.Rptr. 882, 552 P.2d 1178.) The case is thus wholly unlike ***654** *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 133 Cal.Rptr. 775, 84 A.L.R.3d 343, on which Mr. Erickson relies. In *Wheeler,* this court held a patient was not bound by an arbitration clause contained in a hospital's standard printed "Conditions of Admission" form. (*Id.,* at p. 357, 133 Cal.Rptr. 775.) We stated, "A patient like Mr. Wheeler realistically has no choice but to seek admission to the hospital to which he has been directed by his physician and to sign the printed forms necessary to gain admission." (*Id.,* at p. 366, 133 Cal.Rptr. 775.) We also noted that " ... unlike the situation in *Madden,* Mr. Wheeler was not represented by a state agency which could neutralize the advantage in bargaining power enjoyed by the defendant hospital." (*Ibid.*)

Finally, it has repeatedly been stated that " ... state adhesion contract principles are inapplicable to the enforcement of arbitration clauses in an agreement governed by the Federal Arbitration Act...." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 637, 223 Cal.Rptr. 838; accord, *Tonetti v. Shirley* (1985) 173 Cal.App.3d 1144, 1148, 219 Cal.Rptr. 616.) Since we have concluded the Senior Choice plan is governed by the FAA, the validity of the arbitration clause must be determined by reference to the principles applicable to contracts generally rather than the special rules applicable to adhesion contracts. We turn now to that determination.

2. *Interpretation of Contract Language*

Mr. Erickson next argues that even under the standards for nonadhesion contracts, the language of the arbitration clause is too misleading to be valid. He focuses on the portions of the clause which inform the plan member that he or she "*may request* binding arbitration," and set forth the procedure to be followed "*If You Want* To Have Binding Arbitration." (Italics added.) According to Mr. Erickson, this permissive language conveys the impression arbitration is optional with the plan member rather than the only method available for resolution of disputes. Aetna, on the other hand, argues that, because the clause plainly states *any* disputes are "subject to binding arbitration," the earlier statement that a member "may" request arbitration, and the directions as to how to proceed if he or she should "want" arbitration, merely reflect the fact the member may opt not to proceed with arbitration if he or she is satisfied with the grievance outcome, not that he or she may forgo arbitration and proceed to court.

a. *Principles of Construction*

We first must determine the applicable principles of construction. California courts recognize that the FAA reflects " 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or ***655** procedural policies to the contrary.' " (*Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal.App.4th 452, 458, 10 Cal.Rptr.2d 427, quoting *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765; ****82** *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 633, 68 Cal.Rptr.2d 167.) Mr. Erickson notes, however, that "[t]he question of whether the parties agreed to arbitrate is answered by applying state contract law even when it is alleged that the agreement is covered by the FAA." (*Cheng–Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683, 57 Cal.Rptr.2d 867.) He characterizes the question whether the Senior Choice handbook provides for mandatory or only optional arbitration as a question of "whether the parties agreed to arbitrate." Therefore, he argues, the FAA policy favoring arbitration does not come into play in addressing that question.

[7] We do not agree. First, "California law incorporates many of the basic policy objectives contained in the FAA, including a presumption in favor of arbitrability...." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357, 72 Cal.Rptr.2d 598.) Thus, even in non-FAA cases, courts " 'are guided by the rule that, contractual arbitration being a favored method of resolving disputes, every intendment will be indulged to give effect to such proceedings.' [Citation.]" (*Titan Group, Inc. v. Sonoma Valley Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127, 211 Cal.Rptr. 62.) Additionally, where a transaction falls under the FAA, even the threshold decision of whether there is an agreement to arbitrate "must be made ' "with a healthy regard for the federal policy favoring arbitration." ' [Citation.]" (*The Energy Group, Inc. v. Liddington* (1987) 192 Cal.App.3d

1520, 1528, 238 Cal.Rptr. 202; accord, *Banner Entertainment, Inc. v. Superior Court, supra; City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407, 60 Cal.Rptr.2d 488.)

Moreover, *Cheng–Canindin v. Renaissance Hotel Associates, supra,* 50 Cal.App.4th 676, 57 Cal.Rptr.2d 867, and the cases on which it relied, involved true "threshold" issues of contract formation, which went to the very existence of an agreement to arbitrate, e.g., whether the procedure to which the parties agreed actually constituted arbitration (*Cheng–Canindin, supra,* at p. 684, 57 Cal.Rptr.2d 867; *Wasyl, Inc. v. First Boston Corp.* (9th Cir.1987) 813 F.2d 1579, 1581–1582); whether the parties intended to incorporate by reference an arbitration provision contained in a separate document (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d at p. 640, 223 Cal.Rptr. 838; *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional* (2d Cir.1993) 991 F.2d 42, 45–46; *Cook Chocolate Co. v. Salomon, Inc.* (S.D.N.Y.1988) 684 F.Supp. 1177, 1182); or whether a nonparty to the arbitration agreement could enforce the arbitration clause ***656** (*Ziegler v. Whale Securities, Co., L.P.* (N.D.Ind.1992) 786 F.Supp. 739, 741–742). In this case, in contrast, there is no dispute that the parties had a valid agreement which contained a clause providing for arbitration of disputes. The only question concerns the proper *construction* of that clause, i.e., whether it requires arbitration or merely makes it available at the option of the plan member.

[8] [9] Issues concerning "the construction of the contract language itself" are subject to the FAA. (*Moses H. Cone Hospital v. Mercury Constr. Corp., supra,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765.) Under section 2 of the FAA, a court may not construe an arbitration agreement "in a manner different from that in which it otherwise construes nonarbitration agreements under state law." (*Perry v. Thomas* (1987) 482 U.S. 483, 492–493, fn. 9, 107 S.Ct. 2520, 2527, 96 L.Ed.2d 426.) Thus, a court cannot apply a state law requirement that an arbitration clause be "express" or "unequivocal" if state law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence. (*Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional, supra,* 991 F.2d 42, 46; *Huntington Intern. Corp. v. Armstrong World Industries Inc.* (E.D.N.Y.1997) 981 F.Supp. 134, 138.) Similarly, where an FAA contract is involved, " ... ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a contract is construed most strongly against the drafter...." (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d 632, 639, 223 Cal.Rptr. 838.)

These authorities persuade us that, regardless of how the issue in this case is characterized, we must, in addressing it, be guided by the principles favoring arbitration ****83** as a preferred means of resolving disputes. With those principles in mind, we turn to the language of the arbitration clause in this case.

b. *Application*

The parties have not identified any authority construing the precise language at issue here, and we are aware of none. They do, however, cite three decisions which are instructive, as all concerned agreements which, like the present one, provided that disputes "may" be submitted to arbitration. In the first, *Service Employees Internat. Union, Local 18 v. American Building Maintenance Co.* (1972) 29 Cal.App.3d 356, 105 Cal.Rptr. 564 (*Service Employees*), the agreement provided that " 'the issue in dispute may be submitted to an impartial arbitrator.' " (*Id.,* at p. 358, 105 Cal.Rptr. 564, italics omitted.) The court held the clause provided for mandatory rather than consensual arbitration. Since the parties always could elect consensual arbitration without a ***657** contract provision, interpretation of the clause to require only consensual arbitration would make the provision of little purpose. (*Id.,* at p. 358, 105 Cal.Rptr. 564.) The court concluded the word "may" in this context merely meant a party who did not want arbitration had the option to abandon the claim. (*Id.,* at p. 360, 105 Cal.Rptr. 564.)

In *Titan Group, Inc. v. Sonoma Valley Sanitation Dist., supra,* 164 Cal.App.3d 1122, 211 Cal.Rptr. 62 (*Titan*), the agreement similarly stated that disputes "may" be subject to the decision of a third person to be agreed upon by the parties. However, it also provided that all disputes " ' ... will be decided by arbitration *if the parties hereto mutually agree, or in a court of competent jurisdiction* within the State in which the owner is located.' " (*Id.,* at p. 1125, 211 Cal.Rptr. 62, original and added italics.) The court found no mandatory arbitration requirement, distinguishing *Service Employees* on the basis that the agreement in that case made no mention of a court proceeding as an available option. (*Id.,* at p. 1129, 211 Cal.Rptr. 62.)

In *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 19 Cal.Rptr.2d 295 (*Pacific Gas & Electric*), the agreement stated disputes " 'may be submitted' " by either party to arbitration. (*Id.,* at p. 595, 19 Cal.Rptr.2d 295.) The court concluded this provision mandated arbitration, stating, "In this context the 'may' signifies the right of the party to invoke arbitration."

(*Ibid.*)

[10] [11] Applying these decisions, and keeping in mind the policy, discussed *ante,* favoring construction of agreements in favor of arbitration, we conclude the provision in this case should be interpreted to require arbitration rather than merely to permit it. As did the courts in *Service Empl–oyees* and *Pacific Gas & Electric,* we construe the permissive language to mean simply that a member may, in lieu of proceeding to arbitration, merely forgo further review and accept the proposed resolution of the grievance panel. Moreover, the provision in this case contains additional language not present in *Service Employees* and *Pacific Gas & Electric,* which further emphasizes the mandatory nature of arbitration. The provision states that "[a]ny" disputes other than those subject to the Medicare appeals procedure "are subject to binding arbitration." The phrase "subject to" means "conditioned upon, limited by, or subordinate to." (*Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1510, 66 Cal.Rptr.2d 541; see also *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 741, 78 Cal.Rptr.2d 250 ["The phrase 'subject to' means 'subordinate to.' "].) If a dispute is "subordinate to" binding arbitration, the reasonable conclusion is that arbitration is mandatory, not optional.

We also note that, in contrast to the agreement in *Titan,* the Senior Choice handbook makes no reference to court resolution of disputes subject to ***658** arbitration. Only with respect to Medicare appeals (which are excluded from the arbitration provision) is there any reference to court proceedings; the handbook indicates that a dissatisfied member in a Medicare appeal "may file a civil suit with a Federal district court." The absence of any such reference to a court proceeding in the arbitration provision further underscores the absence of a judicial remedy with respect to disputes which are subject to arbitration.

****84** We acknowledge the language of the arbitration clause could have been clearer.[6] But, as stated *ante,* we are not at liberty under section 2 of the FAA to impose heightened requirements of clarity on arbitration clauses beyond those applicable to contracts generally. It appears the lower court did just that in ruling that the clause in this case was not sufficiently clear and unequivocal to be valid. Since the court found the FAA did not apply, it understandably did not concern itself with whether the FAA might preclude such a heightened standard. At any rate, as we have seen, even under ordinary principles of construction as applied in *Service Employees* and *Pacific Gas & Electric,* which did not concern FAA contracts, the use of permissive language in this case did not make the clause so ambiguous as to be unenforceable.

[12] [13] Similarly, although we might in other circumstances construe any uncertainty against Aetna as the drafting party, that principle is subordinate to the policy favoring arbitration when construing FAA agreements. (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d 632, 639, 223 Cal.Rptr. 838.) Additionally, the principle does not apply where, as here, compulsory arbitration does not inherently favor the drafting party. (*Pacific Gas & Electric,* 15 Cal.App.4th 576, 596, 19 Cal.Rptr.2d 295.) We therefore conclude the court erred in ruling the clause was not sufficiently clear to be enforceable.

3. *Unilateral Mistake*

Mr. Erickson finally cites the principle that a party may rescind a contract on the ground of unilateral mistake, where the mistake " 'is known to the other contracting party and is encouraged or fostered by that party.' ***659** [Citation.]" (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 855, 41 Cal.Rptr.2d 567.) That principle, however, only applies where the mistaken party submits evidence that the other party knew about and encouraged or fostered the mistake. (*Ibid.*) As Aetna points out, Mr. Erickson submitted no such evidence.

III

DISPOSITION

The judgment is reversed. The matter is remanded with directions to grant Aetna's motion for arbitration.

HOLLENHORST, Acting P.J., and GAUT, J., concur.

All Citations

71 Cal.App.4th 646, 84 Cal.Rptr.2d 76, 99 Cal. Daily Op.

Serv. 2923, 1999 Daily Journal D.A.R. 3765

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.A.3.

1 As do the parties, we refer to the 1995 version of the Senior Choice handbook.

2 I.e., that any dispute will be determined by arbitration "and not by a lawsuit or resort to court process," and that the parties "are giving up their constitutional right to have any such dispute decided in a court of law before a jury...."

3 Section 1363.1 does not apply to policies issued before its enactment. (*Wolitarsky v. Blue Cross of California* (1997) 53 Cal.App.4th 338, 348, 61 Cal.Rptr.2d 629.) The statute was not enacted until 1994, after Mr. Erickson enrolled in the Senior Choice plan. The lower court ruled this fact was not significant because the plan was subsequently changed after the statute's effective date. We do not address the propriety of that ruling in view of our conclusion on the preemption issue.

** See footnote *, *ante.*

5 In *Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th 951, 64 Cal.Rptr.2d 843, 938 P.2d 903, the Supreme Court recognized that a group medical plan might have "characteristics of an adhesion contract" under some circumstances, such as if only a small number of employees were enrolled and the employer therefore did not have much bargaining power. (*Id.,* at p. 985, 64 Cal.Rptr.2d 843, 938 P.2d 903.) No comparable circumstances are present here.

6 Likewise, we do not intend our conclusion that the clause is enforceable in this case to suggest we endorse its form or content. To the contrary, the seemingly unnecessary inclusion of permissive language in the clause virtually invites a member who wishes to avoid arbitration to argue, as Mr. Erickson does here, that the clause only provides for voluntary and not mandatory arbitration. Ironically, an earlier version of the handbook, which was sent to Mr. Erickson in 1993, did not contain that language, stating simply that any dispute was "subject to binding arbitration" unless prohibited by the liability insurer for the member's physician.

End of Document

LEGAL AUTHORITY AA-83

114 Cal.App.4th 411
Court of Appeal, Second District, Division 1, California.

EVEREST INVESTORS 8 et al., Plaintiffs and Appellants,
v.
McNEIL PARTNERS et al., Defendants and Respondents.

No. B159267.
|
Dec. 16, 2003.
|
Certified for Partial Publication.*
|
Review Denied March 17, 2004.**

Synopsis

Background: Limited partners in real estate partnerships brought action for breach of fiduciary duty, unfair competition, and fraud against general partner, alleging that general partner benefitted itself to detriment of limited partners by retaining postmerger equity interest in partnerships, and selling postmerger entity at higher value than that allocated to limited partners in premerger cash-out. The Superior Court, Los Angeles County, No. BC243024, Andria K. Richey, J., granted summary judgment for general partner. Limited partners appealed.

Holdings: The Court of Appeal, Mallano, J., held that:

[1] limited partners' claims were individual, not derivative, in nature, and thus not barred by judgment in related class action, and

[2] genuine issues of triable fact as to defense of business judgment rule existed, precluding summary judgment.

Judgment reversed and order vacated.

See also 100 Cal.App.4th 1102, 123 Cal.Rptr.2d 297.

West Headnotes (18)

[1] **Partnership** Aggregate or entity theory
Partnership Interests of partners

A "partnership" is an entity separate and apart from the partners of which it is comprised, and it is the partnership entity which owns its assets, not the partners.

7 Cases that cite this headnote

[2] **Partnership** Aggregate or entity theory

A "partnership" is a "hybrid" organization that is viewed as an aggregation of individuals for some purposes, and as an entity for other purposes, such as ownership of property. West's Ann.Cal.Corp.Code § 15008 (Repealed).

1 Cases that cite this headnote

[3] **Partnership** Fiduciary Duty

Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other.

11 Cases that cite this headnote

[4] **Partnership** Good faith

In proceedings connected with the conduct of a partnership, partners are bound to act in the highest good faith to their copartners and may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

7 Cases that cite this headnote

[5] **Partnership**🔑General Partner

A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership.

3 Cases that cite this headnote

[6] **Partnership**🔑Fiduciary duty to partnership and limited partners

The fiduciary obligations of a general partner with respect to matters fundamentally related to the partnership business cannot be waived or contracted away in the partnership agreement.

3 Cases that cite this headnote

[7] **Partnership**🔑Good faith
Partnership🔑Fair dealing

A partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other.

3 Cases that cite this headnote

[8] **Partnership**🔑Fiduciary Duty
Partnership🔑As to fiduciary relation of partners

A partner's fiduciary duty extends to the dissolution and liquidation of partnership affairs, as well as to the sale by one partner to another of an interest in the partnership.

4 Cases that cite this headnote

[9] **Partnership**🔑Control and disposition of partnership property

A partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity; such a partnership opportunity may not be appropriated by one partner to the detriment of a copartner even after dissolution.

7 Cases that cite this headnote

[10] **Corporations and Business Organizations**🔑Nature and Form of Remedy

An action against a corporation is a "derivative action," that is, in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual partners, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.

13 Cases that cite this headnote

[11] **Partnership**🔑Derivative Action

The purpose of a limited partner's derivative action is to enforce a claim which the limited partnership possesses against others, including the general partners, but which the partnership refuses to enforce.

5 Cases that cite this headnote

[12] **Partnership**🔑Derivative Action

Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant, and, although a limited partner is

named as the plaintiff, it is the limited partnership which derives the benefits of the action.

7 Cases that cite this headnote

[13] **Partnership** Persons entitled to sue; standing

A limited partner may suffer an injury to its interest without the occurrence of any injury to the partnership entity or to the partnership assets, because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets.

7 Cases that cite this headnote

[14] **Partnership** Derivative Action

Limited partners' claims against general partner in action for breach of fiduciary duty, unfair competition, and fraud were individual, not derivative, in nature, and thus not barred by judgment in related class action; gravamen of allegations that general partner benefitted itself to detriment of limited partners by retaining postmerger equity interest in partnerships, and selling postmerger entity at higher value than that allocated to limited partners in premerger cash-out, was injury to interests of limited partners, not injury to general partner or partnerships.

See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnership, §§ 20, 31, 107; Cal. Civil Practice, Business Litigation, § 19:38; Cal. Jur. 3d, Partnership, § 183.

15 Cases that cite this headnote

[15] **Corporations and Business Organizations**
Business judgment rule in general

The "business judgment rule" is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.

19 Cases that cite this headnote

[16] **Corporations and Business Organizations**
Business judgment rule in general

The business judgment rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes.

12 Cases that cite this headnote

[17] **Corporations and Business Organizations**
Loyalty

The business judgment rule establishes a presumption that corporate directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith, but an exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest, and the rule does not shield actions taken without reasonable inquiry, or with improper motives.

29 Cases that cite this headnote

[18] **Judgment** Particular Cases

Genuine issues of material fact existed as to whether general partners were motivated by conflicts of interest, and thus were not entitled to business judgment defense in action by limited partners for breach of fiduciary duty, unfair competition, and fraud, precluding summary

judgment based on theory that general partners conducted good faith and reasonable investigation.

2 Cases that cite this headnote

Attorneys and Law Firms

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Browne & Woods, Eric M. George and Miles J. Feldman, Beverly Hills, for Defendants and Respondents.

Opinion

MALLANO, J.

A real estate limited partnership merges into a new entity, becoming a wholly owned subsidiary of the new entity. The interests of the limited partners are liquidated or cashed out, while the general partner retains an equity interest in the postmerger entity, which then sells the assets of the limited partnership to third parties for more than the assets were valued for purposes of the cash-out and merger. Under those circumstances, we hold that a limited partner's claim against the general partner — that the merger transaction harms the limited partner by undervaluing its partnership interest or by depriving it of the future earnings and growth generated by the assets of the ***416** limited partnership — is individual in nature. The claim is not derivative because it is not based on any injury to the limited partnership or its assets, both of which survive the merger transaction intact.

Accordingly, we reverse the summary judgment in favor of defendants because the trial court erroneously determined that the claims asserted by plaintiffs limited partners are not individual but derivative in nature, and because triable issues of fact exist with respect to the defense of the business judgment rule.

****34FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs[1] (referred to as Everest) are five California limited liability companies which held limited partnership interests in 14 public real estate limited partnerships (referred to as the McNeil Partnerships).[2] The McNeil Partnerships were all controlled by a general partner, defendant McNeil Partners, L.P., and defendants related entities (referred to as general partner or McNeil).[3] Together the McNeil Partnerships owned about 81 real estate holdings, including commercial property, apartment buildings, multi-family units and self-storage properties. The general partner owned a small percentage of the equity interests in the McNeil Partnerships; the limited partners together owned a 95 percent interest in McNeil Real Estate Funds IX, X, XI, and XII; the limited partners together owned a 99 percent interest in McNeil Real Estate Funds XIV, XV, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, and XXVII.

***417** In 1991 and 1992 the McNeil Partnerships were restructured, and the general partner agreed to commence a liquidation of the partnership properties seven years after the restructuring date and to use reasonable efforts to complete the liquidation and termination of the McNeil Partnerships by December 31, 1999. In 1995, some of the limited partners of some of the McNeil Partnerships filed a class action lawsuit against Robert McNeil and the general partner alleging that they breached their fiduciary duties to the limited partners in various ways, including rendering the limited partner units highly illiquid, artificially depressing the prices available for limited partner units in private sales, by charging excessive management fees and by not selling the real estate holdings and distributing the proceeds to the limited partners.

In September 1998, the parties to the class action lawsuit (referred to as the *Schofield* action) entered into a "Stipulation of Settlement" of all derivative and class claims pursuant to which the general partner would provide the limited partners with over $35 million in cash distributions and would purportedly implement a fair and impartial bidding process, overseen by PaineWebber, Inc., "designed to obtain the maximum value in connection with the ****35** sale, as part of one transaction, of the [McNeil Partnerships] and the management assets owned by certain defendants [i.e., McREMI]."

Before the execution of the Stipulation of Settlement, the general partner had solicited bids and was then pursuing negotiations with the three highest bidders in order to finalize a transaction with the highest value. The Stipulation of Settlement set out the procedures for the sale of the McNeil Partnerships and the allocation of the

net proceeds from such sale to the limited partners. The procedures set out in the Stipulation of Settlement included the following requirements: (1) that the plans for allocation of net proceeds be based upon arm's-length negotiations between the general partner and the limited partners, each side receiving advice and counsel from its own independent investment adviser; (2) that the limited partners retain an independent adviser to perform analyses of the partnership properties and management assets; and (3) that an independent investment adviser issue a fairness opinion that the proposed allocations are fair to the limited partners and the McNeil Partnerships from a financial point of view. The proposed plans for allocation of the proceeds of the sale were to be submitted to a vote of the limited partners of each McNeil Partnership.

In October 1998, the court in the *Schofield* action entered an order preliminarily approving the proposed settlement and providing that within a certain time period any member of the settlement class could "request exclusion from the class claims asserted in the Action," but that class members "cannot opt out of that portion of the Settlement which settles the ***418** derivative claims asserted in the Action." It is undisputed that Everest opted out of the class claims asserted in the *Schofield* action.

In March 1999, Whitehall Street Real Estate (Whitehall) sent to McNeil an outline of a proposed transaction, offering to "discuss an all cash purchase of the Commercial Properties by Whitehall directly." But McNeil refused to consider it, responding that "[a]n asset deal does not work for us" and that McNeil wanted "to share the proceeds of sales as partners."

Whitehall then made a "Total all-or-None Bid" for the McNeil Partnerships and McREMI in the total amount of $644,440,000, which PaineWebber deemed to be the highest bid. The general partner negotiated with Whitehall on the "possibility of the McNeil affiliates receiving an equity interest in the special purpose acquisition entity," namely the entity created to receive the assets of the McNeil Partnerships. The Whitehall transaction ultimately resulted in a merger of the McNeil Partnerships with Whitehall, pursuant to which the interests of Everest and all other limited partners in the McNeil Partnerships were liquidated. McNeil received an equity interest in the postmerger entity of about 46 percent, an increase from the 1***o***r 5 percent interest which McNeil had owned in the McNeil Partnerships. According to the proxy statement prepared in connection with the merger, as a result of the transaction, "each participating McNeil Partnership will become a direct and/or indirect wholly owned subsidiary of WXI/McN Realty [the entity acquiring the McNeil Partnerships]...."

In May 1999, the general partner set up an "independent special committee," comprised of a single individual, Paul Fay, Jr., an "independent director" on the general partner's board of directors, to negotiate the final terms and conditions of the transaction with Whitehall. Because the general partner and other McNeil affiliates would be acquiring an equity interest in the new entity created by the proposed ****36** transaction, the general partner's board of directors "determined that an independent special committee was necessary in light of the actual or potential conflicts of interest created by the acquisition by [McNeil] of equity in WXI/McN Realty as a result of the proposed transaction" and that the special committee was "to evaluate the transaction on behalf of the limited partners of the McNeil Partnerships."

Eastdil Realty Company was retained as the special committee's financial adviser. The McNeil Partnerships had previously, in January 1998, retained the investment banking firm Robert A. Stanger & Co. (Stanger) to render opinions as to the fairness of the consideration to be received by each of the McNeil Partnerships pursuant to a sale transaction. McNeil hired its own investment adviser, Houlihan Lokey Howard & Zukin Capital (Houlihan), to negotiate the terms of the merger and the final formula for allocation of the ***419** proceeds of the transaction. The plaintiffs in the *Schofield* action, on behalf of the limited partners, retained the investment banking firm CFC Capital Corp. to review the analyses performed by Stanger and Houlihan and to advise Lawrence Kolker, counsel for the *Schofield* action plaintiffs, during the negotiation process. After several days of negotiations characterized by Kolker as "arms-length" and "difficult," the parties reached an agreement as to the material terms of the merger transaction. According to Kolker, "virtually every valuation and allocation dispute was resolved in favor of the [*Schofield*] Class [of limited partners]."

Under Stanger's analysis of the Whitehall transaction, the McNeil Partnerships' real estate assets had an aggregate value of approximately $601.5 million, and the value of McREMI was $35 million. Of the total consideration of $644.5 million generated by the transaction, the amount allocated to the limited partners' interests was $605.5 million. Stanger provided opinions that the following aspects of the merger transaction were fair and reasonable to the limited partners: (1) the aggregate consideration to be paid for McREMI, the limited partner interests and the general partner interests; (2) the allocation of the aggregate consideration between McREMI and the partnerships; (3) the per partnership allocated value; and (4) the methodology of the allocation. The "independent special committee" (namely Paul Fay) also concluded that

Stanger's opinions were fair and reasonable and recommended the transaction to the limited partners.

On behalf of the plaintiffs in the *Schofield* action, CFC Capital Corp. agreed that the Stanger valuations and allocations were "well within a range of reasonableness" and that the valuation of McREMI reflected a conservative valuation "to the benefit of the limited partners." Kolker also agreed that the terms of the merger transaction "were resolved in a manner which is highly favorable to the Limited Partners" and recommended that the court approve the settlement.

Everest objected to the settlement. Nevertheless, the court in the *Schofield* action granted final approval of the settlement in July 1999 and entered a Final Order and Judgment authorizing the parties to consummate the settlement according to the terms of the Stipulation of Settlement and dismissing the action with prejudice. The Final Order and Judgment also provided that "there is no right to exclusion from the Settlement with respect to the derivative claims asserted in the Action" and that "each unitholder ... who owned Units ... during the Settlement Class Period, shall be bound by this Judgment and Settlement of the derivative claims in the Action regardless of whether ****37** or not any such persons timely and validly requested exclusion from the Settlement Class."

***420** A July 1999 "Supplemental Stipulation of Settlement and Order" provided in pertinent part: "Nothing contained herein shall act as a release of unknown, future claims whether derivative or individual for acts of the General Partner occurring after the date upon which the Final Order and Judgment is signed by the Court [(on July 8, 1999)]."

In January 2000, the merger transaction with Whitehall was consummated after the proposed transaction was submitted to the limited partners for approval. In December 1999, the limited partners had received a detailed proxy statement, including a description of the proposed terms of the settlement, the plan of allocation, and the fairness opinions prepared by Stanger. According to McNeil, the limited partners voted to approve the merger transaction by a vote of 62 percent, but the evidence offered by McNeil shows only that the limited partners of McNeil Real Estate Fund XXVII approved the transaction. But Everest maintained that each McNeil Partnership voted separately and some rejected the merger.

Brandon Flaming, a vice-president of McREMI, stated that the merger transaction resulted in Everest recouping more than a 150 percent return on its investment in the McNeil Partnerships. Everest, however, asserted that the limited partners should have recouped a greater return on their investment. Everest discovered that Whitehall had projected before the consummation of the merger that it would be able to "flip" or resell the properties acquired in the transaction for more than the values they had been allocated in the settlement, and Whitehall admitted that it sold some of the acquired properties within a year of the merger for more money than it had paid for them. Whitehall itself had valued the assets of the McNeil Partnerships at over $668 million, assigning a value of $0 to McREMI.

In January 2001, Everest filed the instant action for breach of fiduciary duty, unfair competition, and constructive fraud. Everest alleged that defendants breached their fiduciary duties by engaging in wrongful actions which benefited themselves at the expense of the limited partners, causing Everest's return on its investments in the McNeil Partnerships to be 10 to 20 percent lower, representing a loss to Everest of about $3 million. (Later, Everest recalculated its damages as exceeding $7 million.) The wrongful actions of defendants, as alleged in the complaint, or asserted by Everest in interrogatories and in opposition to the summary judgment motion, include: (1) structuring the transaction as a merger of the entire group of McNeil Partnerships rather than conducting sales of each partnership's real estate holdings, resulting in a distribution to the limited partners of an amount less than the fair market value of an individual partnership; (2) allocating a portion of the settlement price ($35 million) to the management company controlled by Robert McNeil (McREMI), notwithstanding that McREMI possessed only ***421** contracts that could be canceled on short-term notice and otherwise had no meaningful assets and no function other than to manage the real estate holdings for the McNeil Partnerships; (3) including in the transaction oppressive "break-up" fees of $18 million that were designed to deter competing offers from third parties or rejection of the deal by the limited partners; (4) requiring that the limited partners pay nearly $2 million in "success fees" to corporate insiders employed by McREMI; (5) structuring the transaction so that McNeil acquired an ownership interest in the postmerger entity, ****38** effectively constituting a sale of the McNeil Partnership assets to itself, giving it more incentive to value the assets for purposes of the merger at a lowball price, and allowing it to profit from the sale of the assets to third parties at higher prices, which it did, thus obtaining a benefit from the transaction which the limited partners could not share.

Everest claimed that had the transaction been conducted properly, the total distribution to the limited partners and the general partner would have been increased by $159 million (comprised of $31 million improperly allocated as the value of McREMI, $126 million in higher purchase prices, and $2 million in improperly allocated success fees), with the limited partners receiving 95 percent of that increase, or about $151 million. Everest's share of the increased distribution to the limited partners, or 4.5 percent, would have been approximately $7.1 million.

McNeil moved for summary judgment on two grounds: (1) that Everest's claims are derivative in nature and therefore barred because they were released pursuant to the judgment in the *Schofield* action and because Everest lacks standing to pursue the derivative claims; and (2) that Everest's claims are barred by application of the business judgment rule, by which the courts defer to the business decisions of managers whose actions are the product of negotiation, analysis, and approval of a disinterested special committee.

Everest opposed the motion, arguing as follows: Its action was individual or direct, and California law allows a limited partner to proceed directly against a general partner who breaches its fiduciary duty by misallocating proceeds among itself and the limited partners. In this situation, the action is direct and not derivative because the limited partners are harmed, but the general partner is not harmed, and the partnership as a whole is not harmed because its assets remain intact. The merger constituted a breach of fiduciary duty because it did not maximize the return to the limited partners in each individual McNeil Partnership, which would have occurred if the real estate holdings had been sold or liquidated on an individual basis. Because of the all-or-nothing aspect of the merger transaction, Whitehall had very little competition; the deal was structured "to eliminate buyers who could not finance an entire portfolio, and to eliminate buyers who want only a single property or property type (e.g., apartments), ***422** and thereby drive away competition for the properties.... The result? A substantially lower total price for the partnerships' properties.... [¶] ... Take, for example, the self-storage properties. In the Whitehall transaction, $35 million in value was attributed to the 8 self-storage properties in the portfolio [owned by McNeil Real Estate Funds XXVII]. Nonetheless, Whitehall sold all 8 of these properties to a single buyer for $42 million within weeks after the transaction closed, resulting in an immediate 20% profit."

With respect to the "business judgment rule," Everest contended that triable issues of material fact exist as to the applicability of the rule because of McNeil's conflicts of interest arising out of its increased equity ownership in the postmerger entity, facts which were admitted in the proxy statement sent to the limited partners in December 1999.

McNeil filed a reply, and after a hearing on the motion, the court granted summary judgment. The court's February 22, 2002 minute order provided in pertinent part that the motion was granted "as to all defendants on the ground that the claims are derivative in nature and are therefore barred by the Court's judgment in the *Schofield* action. Plaintiffs' interrogatory ****39** responses make clear that the types of wrongdoing alleged do not relate to a special duty owed to plaintiffs or have their origin in circumstances independent of plaintiffs' status as unitholders. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 124, 84 Cal.Rptr.2d 753. Rather, the types of wrongdoing alleged are 'incidental to an injury' to the entire partnership. [Citations.] [¶] Plaintiffs attempt to distinguish the case law relied upon by defendants on the ground that the cases do not involve partnerships; however, persuasive federal authority attached to defendants' Reply indicates that there is no basis for a special rule governing limited partners' claims against general partners. [(*Mieuli v. DeBartolo* (N.D.Cal. May 7, 2001, No. C-00-3225 JCS) 2001 WL 777091 at pp. *5-*7.)]"

Everest filed a timely notice of appeal from the April 9, 2002 judgment.[4] The principal issues presented are: (1) whether Everest's claims are barred on the ground that they are derivative in nature and seek recovery for injuries to the partnership entities, or whether the claims are actionable on the ground that they are individual or "direct" in nature and seek recovery for injuries sustained by Everest; and (2) even if the claims are individual, whether they are nevertheless barred under the business judgment rule.

***423** The notice of appeal states that Everest also appeals from a January 29, 2002 order denying Everest's motion to set the discovery cutoff and deadline for expert witness disclosure. In the event that the summary judgment is reversed, Everest seeks to vacate a prior order cutting off discovery and precluding expert witness disclosure based on a previous March 20, 2002 trial date. Everest requests that on remand discovery should be reopened.

On this appeal, the parties do not dispute that any derivative claims sought to be asserted by Everest in this action are barred and that Everest can assert only claims that are properly classified as individual. Thus, the parties' disagreement concerns whether the nature of the claims asserted by Everest are derivative or individual.

DISCUSSION

A. Standard of Review

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The burden of persuasion remains with the party moving for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 861, 107 Cal.Rptr.2d 841, 24 P.3d 493....)" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002–1003, 75 P.3d 30.) We review the record and the determination of the trial court de novo. (*Id.* at p. 1003, 4 Cal.Rptr.3d 103, 75 P.3d 30.)

The general rule on summary judgment is that the evidence and the inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the opposing party.(*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) And, when a motion for summary judgment includes a test as to whether the complaint states a viable claim, "the court will apply the rule applicable to demurrers and accept ****40** the allegations of the complaint as true," and we will also consider those matters subject to judicial notice. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118, 51 Cal.Rptr.2d 251, 912 P.2d 1198.)

Accordingly, considering Everest's allegations and accepting the facts offered by Everest and the reasonable inferences therefrom, our first task is to determine whether Everest's claims against McNeil are derivative or individual. In this case, that distinction involves a consideration of the nature of partnerships and the fiduciary obligations of general partners.

*424 B. Nature of Partnerships and Fiduciary Obligations of General Partners

[1][2] A partnership is an entity separate and apart from the partners of which it is comprised, and it is the partnership entity which owns its assets, not the partners. (*Evans v. Galardi* (1976) 16 Cal.3d 300, 307, 128 Cal.Rptr. 25, 546 P.2d 313 [limited partner has no property interest in specific partnership assets].) "California law treats a partnership as a 'hybrid' organization that is viewed as an aggregation of individuals for some purposes, and as an entity for others. (*Epstein v. Frank* (1981) 125 Cal.App.3d 111, 119, 177 Cal.Rptr. 831....) One of the primary areas in which a partnership is viewed as an entity is with respect to ownership of property. California Corporations Code section 15008 specifically provides that a partnership may hold title to real property...." (*Bartlome v. State Farm Fire & Casualty Co.* (1989) 208 Cal.App.3d 1235, 1240, 256 Cal.Rptr. 719.)

[3][4][5][6] Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other. (*BT–I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410, 89 Cal.Rptr.2d 811.) In proceedings connected with the conduct of a partnership, partners are bound to act in the highest good faith to their copartners and may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. (*Id.* at pp. 1410–1411, 89 Cal.Rptr.2d 811.) A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership. (*Id.* at p. 1411, 89 Cal.Rptr.2d 811.) The fiduciary obligations of a general partner with respect to matters fundamentally related to the partnership business cannot be waived or contracted away in the partnership agreement. (*Id.* at pp. 1411–1412, 89 Cal.Rptr.2d 811 [fiduciary duty not to purchase partnership debt and foreclose on one's partner cannot be contracted away in the partnership agreement].)

[7][8][9] "There is an obvious and essential unfairness in one partner's attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners." *(Leff v. Gunter* (1983) 33 Cal.3d 508, 514, 189 Cal.Rptr. 377, 658 P.2d 740.) Thus, a partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other. (*Laux v. Freed* (1960) 53 Cal.2d 512, 522, 2 Cal.Rptr. 265, 348 P.2d 873; see also *Smith v. Tele–Communication, Inc.* (1982) 134 Cal.App.3d 338, 345, 184 Cal.Rptr. 571(*Smith*) [fiduciary has burden of justifying conduct].) A partner's fiduciary duty extends to the dissolution and liquidation of partnership affairs, as well as to the sale by one partner to another of an interest in the partnership. (*Laux v. Freed, supra,* 53 Cal.2d at p. 522, 2 Cal.Rptr. 265, 348 P.2d 873.) " 'A partner ****41** may not dissolve a partnership to gain the benefits of the business for himself, unless he fully ***425** compensates his copartner

for his share of the prospective business opportunity.' " (*Leff v. Gunter, supra,* 33 Cal.3d at p. 515, 189 Cal.Rptr. 377, 658 P.2d 740.) Such a partnership opportunity may not be appropriated by one partner to the detriment of a copartner even after dissolution. (*Ibid.*)

In the corporate context, it has also been held that directors breach their fiduciary duty to minority stockholders by using their control of the company to obtain an advantage not available to all stockholders to the detriment of the minority stockholders and without a compelling business purpose for the directors' conduct. (*Fisher v. Pennsylvania Life Co.* (1977) 69 Cal.App.3d 506, 513, 138 Cal.Rptr. 181.) "Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business." (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108, 81 Cal.Rptr. 592, 460 P.2d 464(*Jones*).) " 'Self-dealing in whatever form it occurs should be handled with rough hands for what it is — dishonest dealing. And while it is often difficult to discover self-dealing in mergers, consolidations, sale of all the assets or dissolution and liquidation, the difficulty makes it even more imperative that the search be thorough and relentless.' " (*Id.* at p. 111, 81 Cal.Rptr. 592, 460 P.2d 464.)

C. Derivative Versus Individual Actions

[10] An action is derivative, that is, in the corporate right, " 'if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' " (*Jones, supra,* 1 Cal.3d at p. 106, 81 Cal.Rptr. 592, 460 P.2d 464.)

[11][12] "The purpose of a limited partner's derivative action is to enforce a claim which the limited partnership possesses against others [including the general partners] but which the partnership refuses to enforce. [Citations.] Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action." (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1449, 27 Cal.Rptr.2d 834 [under the California Uniform Limited Partnership Act, a limited partner may file a derivative action against general partners for self-dealing and breach of fiduciary duties by leasing partnership property to themselves without paying rent to partnership].)

***426** Thus, where the wrongful acts of a majority shareholder amounted to misfeasance or negligence in managing the corporation's business, causing the business to lose earnings, profits, and opportunities, and causing the stock to be valueless, the court held that the claim was derivative and not individual because the resulting injury was to the corporation and the whole body of its stockholders.(*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 125–127, 84 Cal.Rptr.2d 753(*Nelson*).) In a case involving the fraudulent transfer of the assets of a limited liability company, without the payment of compensation to the company, a derivative, but not an individual, action was held to lie because the gravamen of the alleged wrongs was an ****42** injury to the company. (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964–965, 109 Cal.Rptr.2d 436(*PacLink*) [diminution in the value of the members' 38 percent ownership interest was incidental to injury to company, which was improperly deprived of its assets].)

Similarly, the allegations by shareholders of a bank — that the bank directors breached their duties of care and loyalty by mismanaging operations and improperly placing the bank into voluntary receivership — described an injury to the bank and not to the individual shareholders. (*Pareto v. FDIC* (9th Cir.1998) 139 F.3d 696, 699–700(*Pareto*) [depreciation of stock value was an indirect result of injury to the bank and an injury that fell on every stockholder alike, whether majority or minority].)

In *Mieuli v. DeBartolo, supra,* 2001 WL 777091(*Mieuli*), the court, applying California law, held that cases applying the derivative versus individual distinction in the corporate context also applied in the context of a limited partnership and that the limited partner had not asserted an individual claim. The limited partner alleged that the general partner breached his fiduciary duty by converting partnership funds and engaging in other acts of mismanagement and self-dealing which damaged the limited partner by depriving him of partnership distributions and reducing the value of his interest in the partnership. (*Mieuli, supra,* at p. *3.) Interpreting plaintiff's allegations of mismanagement and self-dealing as tantamount to the assertion that, as a limited partner, he was injured "only indirectly through an injury to the partnership," the court concluded that such claims must be brought derivatively. (*Id.* at p. *7.)

On the other hand, California cases recognize that a stockholder's individual suit " 'is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' " (*Jones, supra,* 1 Cal.3d at p. 107, 81 Cal.Rptr. 592, 460 P.2d 464.)*Jones,* a seminal case, involved a complaint by a minority shareholder for breach of fiduciary duties by majority stockholders in a savings and loan association. The majority shareholders allegedly took advantage of a bull market to render their own stock more valuable and the minority shareholders' stock less valuable by creating a holding company, transferring their ***427** control block of shares to the holding company, receiving a majority of the holding company shares, excluding the minority shareholders from participation in the holding company, and pledging the association's assets and earnings to secure the holding company's debt that had been incurred for the majority shareholders' own benefit. After the above actions had rendered the association stock unmarketable except to the holding company, the majority shareholders refused to either purchase the minority shareholder's stock at a fair price or exchange the stock for that of the holding company on the same basis afforded to the majority. (*Id.* at p. 105, 81 Cal.Rptr. 592, 460 P.2d 464.)

The court in *Jones* concluded that the minority shareholder had asserted an individual (or nonderivative) action, reasoning that the plaintiff "does not seek to recover on behalf of the corporation for injury done to the corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority stockholders. [¶] ... The individual wrong necessary to support a suit by a shareholder ****43** need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (*Jones, supra,* 1 Cal.3d at p. 107, 81 Cal.Rptr. 592, 460 P.2d 464, fn. omitted; see also *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 521–522, 123 Cal.Rptr. 419(*Crain*) [individual action stated by minority shareholders where majority shareholders engaged in self-enriching activities which rendered worthless only the stock of the minority shareholders].)

Jones expressly disapproved of the articulation of the test in *Shaw v. Empire Savings & Loan Assn.* (1960) 186 Cal.App.2d 401, 407, 9 Cal.Rptr. 204(*Shaw*), which required that a minority shareholder demonstrate that the injury to him was different from that suffered by other minority shareholders. (*Jones, supra,* 1 Cal.3d at pp. 107–108, 81 Cal.Rptr. 592, 460 P.2d 464.) The *Jones* court stated that "[a]nalysis of the nature and purpose of a shareholder's derivative suit will demonstrate that the test, adopted in the *Shaw* case does not properly distinguish the cases in which an individual cause of action lies." (*Jones, supra,* 1 Cal.3d at p. 106, 81 Cal.Rptr. 592, 460 P.2d 464.)

Shaw also stated in a one sentence dictum that a stockholder may maintain an individual action "where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a stockholder," citing only Annotation (1945) 167 A.L.R. 285 as its authority. (*Shaw, supra,* 186 Cal.App.2d at p. 407, 9 Cal.Rptr. 204, italics omitted.) Although the court in *Jones* did not specifically discuss the "special duty" language in *Shaw,* the test for an ***428** individual action as articulated in *Jones* does not require that the wrongdoer owe the plaintiff a "special duty" independent of the stockholder relationship. We decline to follow *Shaw*'s dictum because it is inconsistent with *Jones.* We note that other appellate courts (as well as McNeil herein) have continued to cite *Shaw* 's "special duty" language. (See, e.g., *Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 95, 121 Cal.Rptr. 348; *Nelson, supra,* 72 Cal.App.4th at p. 124, 84 Cal.Rptr.2d 753 [citing *Rankin*].)

Nor in an individual action must a plaintiff sue on behalf of all minority shareholders or limited partners, or must all minority shareholders or limited partners assert the same claim. In *Low v. Wheeler* (1962) 207 Cal.App.2d 477, 24 Cal.Rptr. 538, a case which predates *Jones,* the court affirmed a judgment in favor of the plaintiff minority shareholder where the other minority shareholders had signed releases to the defendants as part of the sale of their stock. The court stated that the defendants "cannot be heard to complain that the other two [minority shareholders] were not parties, for if they had been successful parties, the judgment would have been larger."(*Low v. Wheeler, supra,* 207 Cal.App.2d at p. 483, 24 Cal.Rptr. 538; see also *Nelson, supra,* 72 Cal.App.4th at p. 127, 84 Cal.Rptr.2d 753.)

Following the test in *Jones,* the court in *Smith, supra,* 134 Cal.App.3d 338, 184 Cal.Rptr. 571, held that a minority shareholder in a subsidiary asserted an individual cause of action for fraud and breach of fiduciary duty against directors of the subsidiary and the parent corporation, when the defendants allegedly had manipulated a consolidated tax procedure to afford increased tax benefits to the corporations, which resulted in a decreased

distributive share to the plaintiff upon a sale of the assets of the subsidiary. The court concluded that "[h]ere, it is clear that Smith ****44** does not seek to recover on behalf of Crystal Brite [(the subsidiary)]. He does not contend that the diminishment in his share of the assets reflects an injury to Crystal Brite and a resultant depreciation in the value of its stock. As in [*Jones*], the gravamen of the causes of action is injury to Smith as the only minority shareholder. Smith suffered sufficient injury to bring this action in his individual capacity." (*Smith, supra,* 134 Cal.App.3d at p. 343, 184 Cal.Rptr. 571.)

[13] In sum, a limited partner may suffer an injury to its interest without the occurrence of any injury to the partnership entity or to the partnership assets because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets.

D. Everest's Claims Are Individual, Not Derivative

[14] Applying the foregoing principles, we conclude that the gravamen of the claims asserted by Everest is an injury only to the interests of the limited ***429** partners and not to the interests of the general partner or to the McNeil Partnerships. Everest asserts that McNeil used its management and control of the McNeil Partnerships to structure a merger transaction which afforded benefits and opportunities for itself from which the limited partners were excluded. McNeil allegedly breached its fiduciary duties by, among other things, appropriating for itself the opportunity to acquire an equity interest in the postmerger entity. Thus, as the assets of the McNeil Partnerships were sold to third parties for more than the value assigned to those assets when the limited partners' interests were cashed out, McNeil was able to enjoy a greater value or return on its investment than the limited partners.

Under Everest's claims, the merger transaction did not constitute an injury to the McNeil Partnerships or to the general partner, or result in a diminution in value of the assets of the McNeil Partnerships because the McNeil Partnerships and their assets survived the merger transaction intact and therefore the NcNeil Partnerships suffered no harm by the merger transaction. On the other hand, when, soon after the merger, the assets of the McNeil Partnerships were sold to third parties for amounts more than the values they had been assigned for purposes of the merger and cashout, harm to the limited partners' interests became evident. Either the McNeil Partnerships were worth more than the values assigned to them for purposes of the merger and cashout, or the partnerships' real estate holdings had appreciated in value after the merger. In the first instance, Everest would be injured by the undervaluation of the McNeil Partnerships; in the second instance, Everest would be injured by its exclusion from partnership opportunities (an equity interest in the postmerger entity or a share of the proceeds from subsequent sales of the real estate holdings) which McNeil arrogated unto itself. We conclude that the circumstances here are analogous to those in *Jones, Smith,* and *Crain* and distinguishable from the circumstances in *Nelson,PacLink, Mieuli,* and *Pareto.* As a matter of law, Everest's claims are individual in nature and not derivative. The trial court erred in granting summary judgment on the ground that the claims were derivative.[5]

****45E. Business Judgment Rule**

McNeil argues that the business judgment rule is an independent ground on which summary judgment can be affirmed.

[15][16][17] The business judgment rule is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. ***430**(*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 711, 57 Cal.Rptr.2d 798.) "The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. [Citations.] The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Ibid.*) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 715, 57 Cal.Rptr.2d 798.) The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Ibid.*)

[18] We agree with Everest that triable issues of fact as to the existence of McNeil's improper motives and a conflict of interest preclude summary judgment based on the business judgment rule. The proxy statement identified the following conflicts of interest involved in the merger transaction: "[McNeil], including some members of the McNeil Investors board of directors, have interests in the transaction or relationships, including those referred to below, that may present actual or potential conflicts of

interests in connection with the transaction.... [¶] ... The transaction provides some benefits to [McNeil] that may be in conflict with the benefits provided to the limited partners of the McNeil Partnerships.... The transaction also provides some benefits to [McNeil] that are not provided to the limited partners of the McNeil Partnerships. [McNeil] had an economic interest, separate from that of the limited partners, in structuring the transaction to achieve these benefits. [¶] For example, McNeil Partners [[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[[6] will receive a significant, although non-controlling, equity interest in WXI/McN Realty [(the postmerger entity)] if the transaction is completed."

The proxy statement also acknowledged that upon completion of the transaction McNeil Partners would receive membership interests in the postmerger entity and credit for a capital contribution in the amount equal to approximately $65 million. As structured, the transaction also allowed McNeil to make contributions to the postmerger entity on a tax-deferred basis and the partners of McNeil Partners to defer substantial income tax liability. "If the transaction had been structured as an acquisition of the entire McNeil portfolio for cash, it is estimated by Arthur Andersen LLP that the partners of McNeil Partners would have been required to pay approximately $30,563,000 in taxes in connection with the transaction. The transaction, as structured, will ***431** permit the partners of McNeil Partners to defer this tax liability until such time as the properties currently owned by the McNeil Partnerships are ****46** sold or until such time as McNeil Partners disposes of its equity interest in WXI/McN Realty."

The proxy statements were sent to the limited partners in December 1999, *after* the July 1999 final judgment in the *Schofield* action. And, Everest points to events subsequent to July 1999 which give rise to an inference of the existence of a conflict of interest, including the postmerger sale of the self-storage properties for more than the value assigned to them when the limited partners' interests were cashed out. Accordingly, even though the July 1999 final judgment in the *Schofield* action provides that the settlement "is hereby approved by this Court as fair, reasonable and adequate to the Settlement Class ... and the Partnerships," and even though various individuals in the *Schofield* action offered fairness opinions regarding the transaction, those findings and opinions were based on a different set of facts and circumstances than are presented in this record. Because triable issues of fact exist regarding McNeil's conflict of interest, summary judgment cannot be upheld based on the business judgment rule.

McNeil argues that "[e]ven if Everest could overcome the rule's presumption with specific factual evidence [regarding a conflict of interest], the business judgment rule bars Everest's suit based on McNeil's 'good faith and reasonable investigation.' " McNeil essentially maintains that its reliance on the special committee and the professional opinions of other business experts regarding the fairness of the merger transaction constitutes a separate defense to Everest's action, apart from the business judgment rule. Yet McNeil cites no pertinent authority to support the proposition that such reliance constitutes a defense to claims of breach of fiduciary duty and constructive fraud in the context of an *individual* action.[7]

***432** In *Finley v. Superior Court, supra,* 80 Cal.App.4th 1152, 96 Cal.Rptr.2d 128, a derivative action, the court held that the special litigation committee defense is a valid defense in California (*id.* at p. 1158, 96 Cal.Rptr.2d 128), but that " 'judicial review of the independence, good faith, and investigative techniques of a special litigation committee is governed by traditional summary judgment standards.' " (*Id.* at pp. 1160–1161, 96 Cal.Rptr.2d 128; see also *Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190, 133 Cal.Rptr.2d 408 [if a trial court detects a factual dispute concerning the independence of the special litigation committee or the adequacy of its investigation, the case may not be dismissed short of trial].)

****47** Even if we assume, without deciding, that McNeil can assert a defense based on a good faith and reasonable investigation, we would conclude that triable issues of fact exist as to this issue as well. "[T]he business judgment rule protecting the directors' decision does not apply in the case of bad faith or fraud. The purpose of the court's inquiry into the independence of the committee members and the adequacy of their investigation is to uncover the existence of circumstances that would preclude application of the rule. [Citation.]" " 'The policy reasons for keeping a court from evaluating after the fact the wisdom of a particular business decision do not apply when the issue is whether a party to that decision acted fraudulently or in bad faith. The assessment of fraud or bad faith is a function courts are accustomed to perform, and in performing it the courts do not intrude upon the process of business decisionmaking beyond assuring that those decisions are not improperly motivated.'...." (*Desaigoudar v. Meyercord, supra,* 108 Cal.App.4th at p. 188, 133 Cal.Rptr.2d 408.) On this record, triable issues of fact exist regarding whether McNeil was motivated by conflicts of interest and whether the merger transaction was preceded by a good faith and reasonable investigation into whether the merger transaction was in the best

interests of the limited partners. Accordingly, summary judgment cannot be upheld based on the theory that McNeil conducted a good faith and reasonable investigation.

F. January 29, 2002 Order[***]

***433 DISPOSITION**

The summary judgment is reversed. The January 29, 2002 order denying further discovery and designation of experts is vacated. Everest is entitled to costs on appeal.

We concur: SPENCER, P.J., ORTEGA, J.

All Citations

114 Cal.App.4th 411, 8 Cal.Rptr.3d 31, 03 Cal. Daily Op. Serv. 10,871, 2003 Daily Journal D.A.R. 13,688

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part F.

** George, C.J., and Brown, J., did not participate therein.

1 Plaintiffs are Everest Investors 8, Everest Investors 9, Everest Investors 12, Everest Management, and KM Investments.

2 The 14 limited partnerships at issue in this case are: McNeil Real Estate Funds IX, McNeil Real Estate Funds X, McNeil Real Estate Funds XI, McNeil Real Estate Funds XII, McNeil Real Estate Funds XIV, McNeil Real Estate Funds XV, McNeil Real Estate Funds XX, McNeil Real Estate Funds XXI, McNeil Real Estate Funds XXII, McNeil Real Estate Funds XXIII, McNeil Real Estate Funds XXIV, McNeil Real Estate Funds XXV, McNeil Real Estate Funds XXVI, and McNeil Real Estate Funds XXVII. The limited partners in each of the McNeil Partnerships were not identical.

3 Defendants are McNeil Partners, L.P., a Delaware limited partnership; McNeil Investors, Inc., a Delaware corporation; McNeil Real Estate Management, Inc., a Delaware corporation; and Robert A. McNeil.
The general partner in the McNeil Partnerships was McNeil Partners, a limited partnership. The general partner in McNeil Partners was McNeil Investors, Inc., the principal business of which was to act as general partner in McNeil Partners. Robert McNeil was the sole owner of McNeil Investors, Inc. Robert McNeil also owned a 25 percent limited partnership interest in McNeil Partners, with McNeil Investors, Inc. owning a 75 percent general partnership interest in McNeil Partners. McNeil Real Estate Management, Inc. (McREMI) was also wholly owned by Robert McNeil, and McREMI was the management company for the properties owned by the 14 McNeil Partnerships.

4 McNeil also prepared, and the judge signed, an 11–page order granting summary judgment which contains a detailed, though selective, factual background as well as five pages of legal analysis. Inasmuch as we review the record and the determination of the trial court de novo (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116), we need not summarize the order.

5 We do not reach the issue, and express no opinion, as to whether all of the items of damages sought by Everest are recoverable in an individual, as opposed to a derivative, action.

6 See footnote 3, *ante.* The general partner of McNeil Partners was McNeil Investors, Inc., whose sole owner was Robert McNeil. Robert McNeil individually owned a 25 percent interest in McNeil Partners, and McNeil Investors, Inc. owned a 75 percent interest in McNeil Partners.

7 McNeil concedes that "California has not expressly extended the business judgment rule to conduct approved by a special committee," but only to conduct approved by a special *litigation* committee. The special litigation committee defense "arises out of the interplay between the business judgment rule and the requirement in a stockholder's derivative action that the plaintiff must have made a demand on the board of directors to have the corporation pursue the action. (See Corp.Code, § 800, subd. (b)(2).) Thus, it has been held that, once a duly appointed committee of disinterested directors reasonably determines that it is not in the

best interests of the corporation to pursue the claims asserted in the derivative action, that decision is protected by the business judgment rule. The trial court must determine, as a matter of fact, whether the committee members were disinterested and whether they conducted an adequate investigation. If it answers yes to both questions, however, it must dismiss the derivative action." (*Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1158, 96 Cal.Rptr.2d 128.)

McNeil intimates that a general partner can delegate or contract away to a special committee or other business experts those fiduciary duties owed by a general partner to a limited partner. No authority is cited for this proposition.

*** See footnote *, *ante*.

LEGAL AUTHORITY AA-84

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited Claimants, and Internet Corporation for Assigned Names and Numbers ("ICANN") Respondent.	)	ICDR CASE NO. 01-19-0004-0808

DECISION ON REQUEST FOR

INTERIM MEASURES OF PROTECTION

August 7, 2020

Emergency Panelist:
Christopher S. Gibson

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. This is the Decision on a Request for Interim Measures of Protection in this Independent Review Process ("IRP") case, administered by the International Centre for Dispute Resolution ("ICDR") under its International Arbitration Rules, amended and effective June 1, 2014 ("ICDR Rules"), as supplemented by the Interim Supplementary Procedures for Internet

Corporation for Assigned Names and Numbers Independent Review Process, adopted October 25, 2018 ("Interim Supplementary Procedures").

2. Claimants are Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited ("Claimants"). Claimants state that they each effectively own and/or control independent applications to own and operate the generic top-level domain ("gTLD"), .HOTEL.[1] Mike Rodenbaugh and Marie Richmond of Rodenbaugh Law appeared on behalf of the Claimants.

3. Respondent Internet Corporation for Assigned Names and Numbers ("Respondent" or "ICANN") is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community.[2] Jeffrey A. LeVee and Sarah Podmaniczky McGonigle of Jones Day appeared on behalf of ICANN. Amy Stathos, Deputy General Counsel for ICANN, and Cassandra Furey, Associate General Counsel for ICANN, attended the telephonic hearing on June 3, 2020.

4. The Emergency Panelist, Christopher S. Gibson, was duly appointed by the ICDR in accordance with the ICDR Rules (Article 6) and the Interim Supplementary Procedures (Rule 10) to consider Claimants' request for interim measures. The ICDR formalized the appointment of the Emergency Panelist, notified all parties of the appointment, and gave the parties an opportunity to object to the appointment in writing. No objection was made, and the appointment was duly finalized.

5. Claimants' IRP questions whether ICANN breached its Articles of Incorporation ("Articles"), Bylaws and internal policies and procedures through actions or inactions by ICANN's Board of Directors ("Board") in relation to the community-based application of Hotel Top-Level Domain S.a.r.l ("HTLD") for the .HOTEL gTLD, which was submitted to ICANN under the New gTLD Program and given "Community Priority" status over the other .HOTEL applications.

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[1]Request for Independent Review Process by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated December 16, 2019 ("IRP Request"), p.4.
[2] ICANN'S Response to Request for Independent Review Process, dated February 3, 2020 ("ICANN's IRP Response"), ¶ 1.

6. In a prior related IRP, *Despegar et al. v. ICANN* (the "*Despegar* IRP"),[3] the claimants there previously requested review of whether ICANN had breached its Articles, Bylaws and the Applicant Guidebook ("Guidebook") in relation to HTLD's application for .HOTEL. Those claimants requested, among other things, that ICANN should reject the decision that HTLD's application for .HOTEL be granted Community Priority over the claimants' applications.[4] The IRP panel in the *Despegar* IRP denied the claimants' requests and designated ICANN as the prevailing party, while raising several issues of concern, as discussed below.[5]

7. The present IRP concerns decisions ("actions or failures to act") taken by ICANN's Board *after* the *Despegar* IRP – including the Board's decisions on Claimants' Reconsideration Request 16-11 ("Request 16-11")[6] and Reconsideration Request 18-6 ("Request 18-6")[7] – both of which concern HTLD's community-based application to operate the .HOTEL gTLD. Claimants have also brought a Request for Interim Measures of Protection in this IRP, which is the impetus for this Decision.

II. PROCEDURAL BACKGROUND

8. On December 19, 2019, following a failed Cooperative Engagement Process ("CEP")[8] with ICANN, Claimants submitted a Request for Independent Review Process ("IRP Request"), with supporting exhibits, in relation to ICANN's treatment of the gTLD string, .HOTEL.

9. On 30 December 2019, ICANN notified the ICDR Administrator that, consistent with ICANN's standard practice and "as Claimants are aware, without emergency measures of protection, ICANN will proceed with the contracting phase for the prevailing .HOTEL application, after which the gTLD will move to the delegation phase."[9]

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[3] *Despegar et al. v. ICANN*, Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016 ("*Despegar* IRP Declaration"), at https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf.
[4] Id., ¶ 41.
[5] Id., ¶¶ 154, 155 &b 158.
[6] Reconsideration Request 16-11 ("Request 16-11"), dated August 25, 2016 seeking reconsideration of the ICANN Board's August 2016 Resolutions.
[7] Reconsideration Request 18-6 ("Request 18-6"), dated April 14, 2018, at https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf.
[8] The CEP was commenced on October 2, 2018. See Ex. R-34 (Cooperative Engagement and Independent Review Processes Status Update (Dec. 23, 2019)).
[9] Ex. RE-2.

10. On January 30, 2020, Claimants submitted their Request for Interim Measures of Protection ("Claimants' IM Request"), with supporting exhibits, "essentially under protest"[10] pursuant to the Interim Supplementary Procedures, Article 10 (Interim Measures of Protection). Among the interim measures sought, Claimants request that ICANN be required maintain the *status quo* as to the .HOTEL gTLD (i.e., keep it out of the delegation phase) during the pendency of this IRP.

11. On February 3, 2020, ICANN submitted its Response to Request for Independent Review Process ("ICANN's IRP Response"), with supporting exhibits.

12. The Emergency Panelist convened a telephonic preparatory conference call with the parties on April 7, 2020 for the purpose of discussing the dispute between them and related organizational matters, including a timetable for further written submissions and oral arguments.

13. On April 24, 2020, Claimants submitted their Brief in Support of Request for Interim Measures ("Claimants' Brief"), with supporting exhibits.[11]

14. On May 12, 2020, ICANN submitted its Opposition to Claimants' Amended Request for Emergency Measures ("ICANN's Opposition"), with supporting exhibits.

15. On May 20, 2020, Claimants submitted their Reply in Support of Request for Interim Measures ("Claimants' Reply"), with supporting exhibits.

16. The Emergency Panelist conducted a telephonic hearing with the parties on May 26, 2020. Shortly before the hearing, on May 26th ICANN submitted a copy of a PowerPoint slide deck to be used in support of its presentation at the hearing. Claimants objected to use of the slide deck. Having heard the parties, and with their agreement, the Emergency Panelist issued Procedural Order No. 2 scheduling a further telephonic hearing with the parties on June 3, 2020, and providing a schedule for the submission of slide decks to be used in support of the parties' respective hearing presentations.

[10] Request for Interim Measures of Protection by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated January 30, 2020 ("Claimants' IM Request"), p.2.
[11] Brief in Support of Request for Interim Measures by Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions PTE. LTD., and Domain Venture Partners PCC Limited, dated April 24, 2020 ("Claimants' Brief").

17. On June 1, 2020, Claimants submitted their slide deck in support of their interim measures request ("Claimants' Slide Deck").

18. On June 2, 2020, ICANN submitted its revised slide deck in support of ICANN's opposition to Claimants' request for interim measures ("ICANN's Slide Deck").

19. The Emergency Panelist conducted a telephonic hearing with the parties on June 3, 2020 (the "June 3rd Hearing"), at which the parties' representatives made their substantive submissions. An audio recording of this hearing was made with the agreement of the parties and the Emergency Panelist.

20. During the hearing on June 3rd, counsel for ICANN provided an undertaking on behalf of ICANN that it had already sent letters to The Economist Intelligence Unit ("EIU") and FTI Consulting, Inc. ("FTI") requesting that they preserve relevant documents related to this IRP case.[12] The Emergency Panelist requested that ICANN supply copies of these letters. On June 4, 2020, ICANN submitted copies of the letters that it had sent to EIU and FTI, each dated May 22, 2020. The letters are discussed below in Part VI, Section C(2) below.

21. On June 11, 2020, ICANN submitted a letter in response to a question that had been posed by the Emergency Panelist during the June 3, 2020 hearing. At the hearing, the Emergency Panelist asked counsel for ICANN why should ICANN not be required to cover the administrative costs of this IRP, as provided by ICANN's Bylaws Article 4, § 4.3(r) (providing that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members"), despite the fact that the Standing Panel has not yet been constituted? ICANN's June 11th letter is discussed in Part VI, Section C(6) below.

22. On June 15, 2020, the Emergency Panelist acknowledged receipt of ICANN's June 11th letter and directed a further question to ICANN. During ICANN's presentation at the June 3rd hearing, counsel had stated "that the claimants have never addressed [ICANN's] repeated point that about three-quarters of their claims are time-barred, and not time-barred by a day or two, time barred by months and in some instances, two years." The Emergency Panelist thus asked,

[12] See ICANN's Slide Deck, slide 29.

"Can you please clarify this point by identifying which claims ICANN considers are time barred, and which claims, if any, may not be time barred?"

23. On June 16, 2020, Claimants submitted an email in which they stated their position on the issue of the IRP administrative costs. Claimants' email is discussed in Part VI, Section C(6) below.

24. On June 16, 2020, ICANN submitted a letter responding to the Emergency Panelist's question (in the Emergency Panelist's email of June 15th), requesting that ICANN clarify which of Claimants' claims ICANN considers to be time barred. In its letter, ICANN provided a chart (included in Part VI, Section B(1) below) with detailed explanations addressing ICANN's position on whether or not the various challenges brought by Claimants in this IRP are time-barred.[13]

25. On June 17, 2020, the Emergency Panelist acknowledged receipt of ICANN's June 16th letter and declared the hearing closed, while reserving the right to ask further questions of the parties.

26. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant's email of June 16th concerning the IRP administrative costs. ICANN's June 18th letter is discussed in Part VI, Section C(6) below.

III. BACKGROUND

A. Prior Related Proceedings and ICANN Board Decisions

27. ICANN oversees the technical coordination of the DNS on behalf of the Internet community. To that end, ICANN contracts with entities that operate gTLDs, that is, the portion of an Internet domain name to the right of the final dot, such as ".COM" or ".ORG."[14] ICANN's launched a New gTLD Program for the expansion of the DNS, with the adoption of the Guidebook in June 2011 to facilitate implementation of the Program and the opening of applications for new gTLDs in January 2012.

[13] ICANN Counsel's Letter dated June 16, 2020.
[14] ICANN's IRP Response, ¶ 1.

28. The final version of the Guidebook was published on June 4, 2012, setting out detailed instructions to gTLD applicants and procedures for evaluating new gTLD applications.[15] The Guidebook provides that applicants may designate their applications as either "standard" or "community-based", with the latter to be "operated for the benefit of a clearly delineated community."[16] Various entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. The New gTLD Program has thus far resulted in the introduction of over 1,200 new gTLDs into the DNS.[17]

29. The relevant history related to the applications, challenges, and ICANN's processes and decisions pertaining to the .HOTEL gTLD extends for almost eight years, and the early background is set forth in the *Despegar* IRP Declaration.[18] That history adds a degree of complexity to this IRP case and to this Decision on Claimants' request for interim measures of protection.

30. ICANN received seven applications for the .HOTEL gTLD – six standard applications, including those submitted by Claimants or their subsidiaries, and one community-based application submitted by HTLD, a non-party to this IRP case. Only one applicant can be awarded a particular gTLD, so the seven applications were placed into a contention set pursuant to the procedures in the Guidebook.

31. If a community-based application is made for a gTLD, such as HTLD's application for .HOTEL, that applicant is invited to elect to proceed to Community Priority Evaluation ("CPE"), whereby its application is evaluated by a CPE Panel in order to establish whether the application met the CPE criteria.[19] If an applicant prevails in CPE, it will proceed to the next

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[15] *Despegar* IRP Declaration, ¶ 17.
[16] Guidebook § 1.2.3.1.
[17] ICANN's IRP Response, ¶ 2.
[18] *Despegar* IRP Declaration, ¶¶ 16-40.
[19] Id., ¶ 19. The Guidebook, § 1.2.3.1 (Definitions) provides in relevant part:

> "Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. Additional information may be requested in the event of a community priority evaluation (refer to section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:
>
> 1. Demonstrate an ongoing relationship with a clearly delineated community.
> 2. Have applied for a gTLD string strongly and specifically related to the community named in the application.

stage of evaluation and the other standard applications for the same gTLD will not proceed; the community-based application will be considered to have achieved Community Priority.[20] ICANN appointed an external provider, the Economic Intelligence Unit ("EIU"), to act as the CPE Panel to evaluate CPEs.

32. On June 11, 2014, the EIU found that HTLD's .HOTEL application should be awarded Community Priority, meaning that HTLD's application, as a community-based application, would be given priority over the other .HOTEL applications.[21]

33. In 2014, certain of the applicants for .HOTEL submitted Reconsideration Requests ("RFR") 14-34 and 14-39 challenging (i) the CPE result awarding HTLD's application Community Priority, and (ii) ICANN's response to requests for documents relating to the CPE,[22] respectively. Both RFRs were denied by the Board Governance Committee ("BGC").[23] Thereafter, some of the applicants for the .HOTEL gTLD filed an IRP in March 2015 (the *Despegar* IRP) challenging the BGC's decisions on the Reconsideration Requests. The Final Declaration for the *Despegar* IRP was issued in February 2016.[24]

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3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.

4. Have its application endorsed in writing by one or more established institutions representing the community it has named."

The CPE Panel can award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points, the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).

[20] *Despegar* IRP Declaration, ¶ 19 (citing Guidebook § 4.2.2).

[21] IRP Request, p.6, n.4 (Ex. D).

[22] ICANN has a Documentary Information Disclosure Policy ("DIDP"), which permits requests to be made to ICANN to make public documents "concerning ICANN's operational activities, and within ICANN's possession, custody or control." *Despegar* IRP Declaration, ¶ 22. In response to the document requests, "ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request." Id., ¶ 32.

[23] On 22 July 2017, ICANN's Bylaws were amended re-designating the responsibilities for Reconsideration Requests from the BGC to the Board Accountability Mechanisms Committee ("BAMC"). The Board confirmed this shift and adopted the revised charters for the BCG and BAMC in its September 2017 Resolution. Board Resolution 2017.09.23.12 – 2017.09.23.14, dated September 23, 2017, at https://www.icann.org/resources/board-material/resolutions-2017-09-23-en.

[24] *Despegar et al. v. ICANN* Final Declaration, ICDR Case No. 01-15-0002-80-61, dated February 11, 2016, at https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf.

34. While the *Despegar* IRP was pending, the claimants in that case added a claim that HTLD's application should be rejected because individuals associated with HTLD allegedly exploited the privacy configuration of ICANN's new gTLD applicant portal to access confidential data of other applications, including data of the other applicants for the .HOTEL (the "Portal Configuration issue").[25]

35. The IRP panel in the *Despegar* IRP Declaration declared ICANN to be the prevailing party,[26] stating:

> "Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIOP [Documentary Information Disclosure Policy] Process in rejecting the Claimants' DIOP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed."[27]

36. As to the CPE process, the *Despegar* IRP panel observed that

> "Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by EIU in considering community based applications, and the provisions of the Guidebook. However, *the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues*.
>
> Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration."[28]

37. While recognizing that the New gTLD Program was near its end and that "there is little or nothing that ICANN can do now," the IRP panel recommended that a system should be put in place to ensure that CPE evaluations are conducted "on a consistent and

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[25] In February 2015, ICANN discovered that the privacy settings for the new gTLD applicant and related portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other users without permission. See Portal Configuration Notice (https://www.icann.org/news/announcement-2015-03-01-en); New gTLD Applicant and GDD Portals Q&A (https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf).
[26] *Despegar* IRP Declaration, ¶ 154.
[27] Id., ¶ 155.
[28] Id., ¶ ¶ 143-144 (italics added).

predictable basis by different individual evaluators,"[29] and that ICANN's core values "flow through…to entities such as the EIU."[30]

38. With respect to the Portal Configuration issue, the *Despegar* IRP panel found that "serious allegations"[31] had been made and that the "approach taken by the ICANN Board *so far* in relation to this issue does not, in the view of the Panel, comply with [Article III(1) of ICANN's Bylaws]"[32] in effect at that time, providing that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."[33] However, the *Despegar* IRP panel also noted that "at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board,"[34] and that ICANN "also gave an undertaking… that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel."[35] The *Despegar* IRP panel thus declined to make a finding on the Portal Configuration issue, indicating "that it should remain open to be considered at a future IRP should one be commenced in respect of this issue."[36]

39. On March 10, 2016, ICANN's Board (the "Board") accepted the findings in the *Despegar* IRP Declaration and directed, among other things, that ICANN:

> (i) "ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations" and
>
> (ii) "complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation."[37]

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[29] Id., ¶ 147.
[30] Id., ¶ 150.
[31] Id., ¶ 131.
[32] Id., ¶ 134 (italics added).
[33] ICANN Bylaws, Art. III.1, as amended July 30, 2014.
[34] *Despegar* IRP Declaration, ¶ 135.
[35] Id., ¶ 137.
[36] Id., ¶ 138.
[37] ICANN Board Resolutions 2016.03.10.10 –2016.03.10.11, at https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a.

40. ICANN conducted a forensic investigation of the Portal Configuration issues and the related allegations by the *Despegar* IRP claimants. ICANN's Portal Configuration investigation found, among other things, that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted between March and October 2014 using a limited set of user credentials issued to Dirk Krischenowski, Katrin Ohlmer and Oliver Süme.[38]

41. On August 9, 2016, the Board passed two resolutions ("August 2016 Resolutions") concluding, among other things, that the cancellation of HTLD's .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD's application.[39] In particular, the Board concluded that "ICANN has not uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE."[40]

42. Request 16-11: On August 25, 2016, Claimants submitted a Reconsideration Request 16-11 seeking reconsideration of, among other things, the August 2016 Resolutions.[41] Request 16-11 claimed, among other things, that ICANN violated its Articles, Bylaws and policies "by giving undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant."[42] Request 16-11 was placed on hold by ICANN for more than a year while a review was conducted of the CPE process and the related interactions of ICANN's staff with the CPE provider.

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[38] ICANN's IRP Response, ¶ 24. See Announcement: New gTLD Applicant and GDD Portals Update (https://www.icann.org/news/announcement-2015-05-27-en); Response to DIDP Request No. 20150605-1 (https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf); ICANN Board Resolutions 2016.08.09.14 –2016.08.09.15 (https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h).

[39] ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 ("August 2016 Resolutions"), at https://www.icann.org/resources/board-material/resolutions-2016-08-09-en.

[40] Id.

[41] Reconsideration Request 16-11 ("Request 16-11"), dated August 25, 2016, at https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf.

[42] Id.

43. On January 27, 2019, the Board accepted the Board Accountability Mechanisms Committee's ("BAMC") recommendation to deny Request 16-11 ("January 2019 Resolution").[43] While Claimants in Request 16-11 had requested reconsideration of the Board's August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.[44] Further, the January 2019 Resolution found that any claims with respect to the *Despegar* IRP Declaration were time-barred, or alternatively, that statements made by one IRP panel (e.g., in the *Dot Registry* IRP Declaration) cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP.[45]

44. Request 16-11 and the Board's January 2019 Resolution 11 are discussed in detail in Part VI, Section B(2)(a) below.

45. Request 18-6: While Request 16-11 was pending, in September 2016 the Board directed ICANN "to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider"[46] The BGC further determined that the review should include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process ("CPE Process Review").[47] FTI's Global Risk and Investigations Practice and Technology Practice were retained by counsel for ICANN to conduct the CPE Process Review.[48] Meanwhile, the BGC also decided that pending Reconsideration Requests

[43] Ex. R-29; ICANN Board Resolution 2019.01.27.23 ("January 2019 Resolution"), § 2(f), at https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f.rationale.
[44] Id.
[45] Id.
[46] ICANN Board Resolution 2016.09.17.01, at https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a.
[47] See https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.
[48] See Recommendation of BAMC dated June 14, 2018, at https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf.

relating to CPEs, including Request 16-11, would be placed on hold until the CPE Process Review was completed.[49]

46. On December 13, 2017, ICANN published three reports on the CPE Process Review ("CPE Process Review Reports").[50] On March 15, 2018, the Board passed several resolutions ("March 2018 Resolutions"), which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that there would be no overhaul or change to the CPE process for the current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.[51]

47. On April 14, 2018, several of the applicants for .HOTEL submitted Request 18-6, challenging the Board's March 2018 Resolutions.[52]

48. On May 19, 2018, Request 18-6 was sent to the Ombudsman for review and consideration. The Ombudsman recused himself from this matter on May 23, 2018 pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.[53]

49. On July 18, 2018, the Board denied Request 18-6 ("July 2018 Resolution"), concluding that the Board considered all material information and that the Board's March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN's mission, commitments, core values, and policies.[54]

50. Request 18-6 and the Board's July 2018 Resolution are discussed in detail in Part VI, Section B(2)(b) below.

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[49] BGC Letter dated April 26, 2017, at https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn), 14-32 (.INC) (withdrawn), 14-33 (.LLP) (withdrawn), 16- 3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

[50] See https://www.icann.org/news/announcement-2017-12-13-en.

[51] ICANN Board Resolutions 2018.03.15.08 - 2018.03.15.11, at https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.

[52] Request 18-6, dated April 14, 2018, at https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf.

[53] See Ex. R-37 (email chain of ICANN's request to ICANN's Ombudsman Herb Waye and Mr. Waye's response dated May 23, 2018), at https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf.

[54] ICANN Board Resolution 2018.07.18.09, at https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g ("July 2018 Resolution").

B. Overview of Claimants' IRP Claims and ICANN's Responses

51. The standards for granting interim measures of protection under Rule 10 of the Interim Supplementary Procedures (discussed in Parts V and VI below) require that a claimant establish, *inter alia*, a "likelihood of success on the merits" or "sufficiently serious questions related to the merits." Both parties refer to their submissions in the underlying IRP case,[55] including Claimants' IRP Request, ICANN's IRP Response, and the respective accompanying exhibits, all of which were provided to the Emergency Panelist. Moreover, the issues in the underlying IRP were discussed at the June 3rd Hearing. As a preliminary point, the Emergency Panelist acknowledges ICANN's arguments that Claimants' briefs in support of their request for interim measures give meagre attention to the underlying merits of this IRP. Claimants argued that there needs to be further briefing and discovery, which would take place in the main IRP proceedings.[56] However, the materials, submissions and arguments presented to the Emergency Panelist, including those submissions in the underlying IRP and those targeted to Claimants' request for interim measures, are sufficient to enable the Emergency Panelist to apply the standards of Rule 10.

52. A summary of the parties' claims and arguments in the IRP is provided below.

1) Claimants' Submissions

53. Claimant's IRP Request states that the following issues must be substantively reviewed: (i) "ICANN subversion of the .HOTEL CPE and first IRP (*Despegar*)"; (ii) "ICANN subversion of FTI's CPE Process Review"; (iii) "ICANN subversion of investigation into HTLD theft of trade secrets"; and (iv) "ICANN allowing a domain registry conglomerate to takeover the 'community-based' applicant HTLD."[57] Claimants make references to Request 16-11 and Request 18-6 in their IRP Request and briefs, and confirmed during the June 3rd Hearing that their focus is on these Reconsideration Requests, and on the Board's action (or failure to act)

[55] See Claimants Reply, p. 11 ("Claimants' rely upon their IRP Complaint and the voluminous evidence presented thus far, to raise sufficient questions in this IRP to permit the interim relief that they request"); Claimants' Slide Deck, slides 5-8; ICANN Opposition, ¶ 23 ("As discussed in detail in ICANN's IRP Response, dated 3 February 2020, Claimants literally ignore the key question in this IRP: were any of the Board's actions on Requests 16-11 and 18-6 inconsistent with the Articles, Bylaws, or Guidebook? As set forth in the ICANN's IRP Response, the answer is a categorical 'no'."); ICANN's Slide Deck, slides 8-15.
[56] June 3rd Hearing, audio transcript (2:11:30 – 2:12:50; 2:17:12 – 2:17:27).
[57] IRP Request, p. 4.

in accepting the BAMC's recommendations concerning these requests.[58] The allegations in Claimants' IRP Request align, at least in large part (excluding (iv) concerning the sale of HTLD to Afilias), with issues addressed in the Board's July 2018 Resolution and January 2019 Resolution, accepting the BAMC's recommendations in each case and denying, respectively, Claimants' Request 18-6 and Request 16-11.

54. Claimants also submit that they should be entitled to Ombudsman review of Request 16-11 and Request 18-6 as called for in the Bylaws,[59] that "ICANN should get an IRP Standing Panel and Rules of Procedure in place, after six years of minimal progress since required by the Bylaws," and that "ICANN should be forced to preserve and produce CPE documents as they produced in the *Dot Registry* IRP, and other documents re [sic] the CPE Process Review, Portal Configuration investigation and Afilias deal. Only then can Claimants fairly address the BAMC's arguments."[60] These last points are also the subject of Claimants' request for interim relief.

55. Claimants have stated the following specific claims in their IRP Request:

(a) Claimants seek review of whether ICANN had undue influence over the EIU with respect to EIU's CPE decisions, and over FTI with respect to the CPE Process Review, alleging that (i) ICANN's and EIU's communications are critical to this inquiry, but have been kept secret; (ii) the *Dot Registry* IRP Declaration and FTI's report reveal a lack of independence of the EIU, and relevant documents have not been disclosed; and (iii) ICANN materially misled Claimants and the *Despegar* IRP panel in relation to these issues, (iv) that the Board has failed to meet Bylaws obligations of transparency, due diligence upon reasonable investigation, and independent judgment by not requiring disclosure of relevant documents to Claimants to provide opportunity for any meaningful review by this IRP Panel and Claimants.[61]

(b) Claimants seek review whether they were discriminated against in violation of Bylaws, as ICANN allegedly reconsidered other CPE results but not those for the .HOTEL. Claimants

[58] June 3rd Hearing, audio transcript (2:14:20 – 2:15:05).
[59] Id., pp. 4 & 12.
[60] Id., p. 4.
[61] IRP Request, pp. 12-21.

allege the Board addressed the violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants. Claimants request that ICANN be required to take the necessary steps to ensure a meaningful review of the CPE regarding .HOTEL, and of the Claimants' RFRs – at least to ensure consistency of approach with ICANN's handling of the *Dot Registry* IRP case.[62]

(c) Claimants seek review of ICANN's Portal Configuration investigation and refusal to penalize HTLD's willful accessing of Claimants' confidential, trade secret information. Claimants contend, among other things, that the alleged misdeeds of a major shareholder or other decision makers should be imputed to their closely held corporation, and this argument supports imputing to HTLD the actions of those persons affiliated with HTLD who accessed Claimants' private trade secret data. Claimants allege ICANN refused to produce key information underlying its reported conclusions in the investigation, and it violates the duty of transparency to withhold them. Claimants claim the Board action to ignore such facts and law is also violation of Bylaws. At minimum, Claimants contend the circumstances require further discovery in this IRP of all documents concerning ICANN's Portal Configuration investigation of the data breach. Further, to extent the BAMC and/or Board failed to have such information before deciding to ignore HTLD's breach, that violated their duty of due diligence upon reasonable investigation, and their duty of independent judgment.[63]

(d) Claimants seek review of ICANN's decision to approve the sale of HTLD, the .HOTEL community-based applicant, to Afilias, a domain registry conglomerate (operating no less than 25 TLDs including .INFO, .GLOBAL, .ASIA, .VEGAS and .ADULT), without requiring Afilias to satisfy a new CPE nor make any promises regarding the community. Claimants contend HTLD is no longer the same company that applied for the .HOTEL; instead, it is now a registry conglomerate with no ties to the purported, contrived community that it claims to serve.[64]

[62] Id., pp. 21-24.
[63] Id., pp. 24-26.
[64] Id., pp. 26-28.

56. Claimants aver that HTLD's .HOTEL application should be denied, or at least its Community Priority relinquished, as a consequence not only for HTLD's alleged spying on competitors' secret information, but also because HTLD is no longer the same company that applied for the .HOTEL gTLD. Claimants requests the following relief in the IRP:

- grant the interim measures of protection sought by Claimants;
- order appropriate discovery from ICANN;
- independently review ICANN's actions and inactions as set out in Claimants' IM Request;
- render a Final Declaration that ICANN has violated its Bylaws; and
- require that ICANN provide appropriate remedial relief.[65]

2) ICANN's Submissions

57. ICANN has submitted the following contentions in opposition to Claimants' IRP Request:

(a) ICANN states that this IRP proceeding calls for a determination of whether ICANN complied with its Articles, Bylaws and internal policies and procedures in evaluating Claimants' Reconsideration Requests concerning HTLD's community-based application to operate the .HOTEL gTLD.[66] ICANN argues that Claimants want to force an auction for control of .HOTEL, even though HTLD's application properly prevailed under the terms of the Guidebook.[67]

(b) ICANN contends that Claimants' arguments suffer from a systemic problem – they do not identify what was wrong with the BAMC's Recommendations or the Board's actions on Request 16-11 and Request 18-6. ICANN claims that Claimants ignore the key question: were any of the Board's actions on Request 16-11 and Request 18-6 inconsistent with the Articles, Bylaws or Guidebook?[68]

[65] Id., p. 28.
[66] ICANN's IRP Response, ¶ 3.
[67] Id., ¶ 4.
[68] Id., ¶ 38.

(c) ICANN contends that the Board's actions on Request 16-11 complied with ICANN's Articles, Bylaws and established policies and procedures, which is why Claimants are attempting to re-litigate time-barred disputes and cast unfounded aspersions on ICANN.

(d) ICANN contends that Claimants requests for an Ombudsman to be assigned in relation to Request 16-11 and 18-6 are untimely and baseless. While Claimants seek Ombudsman review of the BAMC's decision on Request 16-11, ICANN contends that neither the current Bylaws nor the Bylaws that governed Request 16-11 require the Ombudsman to review BAMC recommendations on RFRs. Further, the Ombudsman does not investigate complaints that are simultaneously being addressed by one of the other formal accountability mechanisms.[69] In addition, the Bylaws in effect when the BAMC and Board acted on Request 18-6, which are the same Bylaws in effect today in all relevant aspects, did not require the Ombudsman to review the BAMC's recommendation or the Board's action, and the Ombudsman does not investigate complaints subject to other pending accountability mechanisms, such as this IRP.[70] The issues concerning appointment of an Ombudsman for Request 16-11 nd 18-6 are subject to Claimants' request for interim measures of protection, addressed below.

(e) ICANN states that Claimants' challenge to the Board's resolutions accepting the *Despegar* IRP Declaration is untimely and lacks merit. Claimants' challenge to the Board's action accepting the *Despegar* IRP Declaration was untimely when Claimants submitted Request 16-11. Further, ICANN contends that Claimants have not identified any incorrect statement or conclusion regarding the *Despegar* IRP issues in the Board's denial of (or the BAMC's Recommendation to deny) Request 16-11. As to Claimants' argument that ICANN should have produced the documents Claimants sought in the *Despegar* IRP because they were the same documents ultimately produced in the *Dot Registry* IRP, ICANN states that the key difference is that the panel in the *Dot Registry* IRP ordered ICANN to produce the requested documents, while the panel in the *Despegar* IRP did not.[71]

[69] Id., ¶¶ 40-41.
[70] Id., ¶ 63.
[71] Id., ¶¶ 42-49.

(f) ICANN contends it did not discriminate against Claimants by reviewing other CPE results but not reviewing the .HOTEL CPE result. While Claimants suggest this was a violation of ICANN's commitment to make decisions by applying documented policies consistently without singling out any particular party for discriminatory treatment, ICANN responds that Claimants are not similarly situated to the *Dot Registry* IRP claimants. ICANN evaluated the different circumstances of the cases and acted differently according to those circumstances, including that the *Dot Registry* IRP panel found in favor of the claimant there, while the panel in the *Despegar* IRP did not.[72]

(g) ICANN contends that it handled the Portal Configuration investigation and consequences in a manner fully consistent with the Articles, Bylaws, and established policies and procedures. The Portal Configuration investigation shows that ICANN investigated the issues with efficiency, operating with transparency by providing regular updates to the public.[73]

(h) ICANN claims that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, while ICANN did not produce documents in response to Claimants' document request in the *Despegar* IRP, ICANN has been contractually barred from disclosing these documents and no Article, Bylaws provision, policy or procedure requires ICANN to breach its contractual duties. Further, contrary to the *dicta* in the *Dot Registry* IRP Declaration, the EIU affirmed that it never changed the scoring or results of a CPE based on ICANN's comments, and FTI concluded that ICANN (i) never questioned or sought to alter the EIU conclusions; and (ii) never dictated that the EIU take a specific approach to a CPE. Moreover, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review. Finally, Claimants' requests for FTI and EIU documents are premature.[74]

[72] Id., ¶¶ 50-57.
[73] Id., ¶¶ 58-61.
[74] Id., ¶¶ 62-78.

(i) ICANN contends that the challenges to ICANN's inaction concerning HTLD's ownership are untimely and without merit. These claims are time-barred as Claimants waited for over three years before bringing them; and they are meritless because no Article, Bylaws provision, or policy required the Board to approve the transaction or to submit it for public comment.[75]

(j) ICANN submitted a chart (see Part VI, Section B(1) below) in response to the Emergency Panelist's request, in which it acknowledged that challenges to the Board's decisions to deny Request 16-11 and Request 18-6 are timely, but claimed that Claimants' challenges to the following points are untimely: (a) that ICANN should re-evaluate the HTLD CPE result; (b) that ICANN's Board should not have accepted the *Despegar* IRP Declaration; (c) that ICANN should have taken action concerning the *Despegar* IRP in light of the *Dot Registr*y IRP Declaration; (d) that the Ombudsman should have reviewed Request 16-11 and Request 18-6, respectively. Further, ICANN indicated in the chart that Claimants' request that ICANN should produce FTI's and the CPE Provider's (EIU) documents is premature.

IV. CLAIMANTS' REQUESTED INTERIM MEASURES OF PROTECTION

58. Claimants in their IM Request have requested (i) as a preliminary matter, that the ICDR must recuse itself due to an alleged conflict of interest, and (ii) ***six*** interim measures of protection. Claimants demands can be grouped into ***three*** categories as to which it appears that the requests in categories I and III raise issues of first impression, in that this type of relief has never before been requested in other IRPs or by means of interim relief:

59. **I –** ***Request ICDR's recusal due to alleged conflict of interest***:

(i) Claimants object to the ICDR's administrative role in this IRP, alleging a conflict of interest, and request that the "ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request."[76] At minimum, Claimants

[75] Id., ¶¶ 79-88.
[76] Claimants' Brief, p.7.

request that the ICDR and ICANN must "fully disclose the terms of their financial relationship"[77] so that the issue can be properly considered and resolved.

60. **II –** ***Request protective measures for the main IRP proceedings:***

Claimants request that ICANN be required:

(ii) to "not change the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP"[78];

(iii) to "preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review"[79] in this IRP;

61. **III –** ***Request that ICANN be ordered to implement procedural rights as allegedly required by ICANN's Bylaws:***

Claimants request that ICANN be required:

(iv) to "appoint an independent ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6";[80]

(v) to "appoint and train a Standing Panel of at least seven members as defined in the Bylaws and [Interim Supplementary Procedures], from which any IRP Panel shall be selected…and to which Claimants might appeal, *en banc*, any IRP Panel Decisions per Section 14 of the [Interim Supplementary Procedures]";[81]

(vi) to "adopt final Rules of Procedure";[82] and

(vii) to "pay all costs of the Emergency Panel and of the IRP Panelists."[83]

V. STANDARDS FOR REVIEW

62. The Interim Supplementary Procedures, as adopted on October 25, 2018, provide in their introductory paragraph that "[t]hese procedures apply to all independent review process

[77] Id., p.5.
[78] Id., p.7.
[79] Id.
[80] Id.
[81] Id.
[82] Id.
[83] Id.

proceedings filed after 1 May 2018." Further, these procedures, in Rule 2 (Scope), provide in relevant part that

> "[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced."

63. Claimants filed their IRP Request on December 19, 2019. At that time, the Interim Supplementary Procedures of October 25, 2018 were in effect – they apply to the proceedings in this IRP, including Claimants' request for interim measures of protection.

64. The applicable Articles for purposes of this IRP are ICANN's current Articles, as approved by the Board's on August 9, 2016, and filed with the California Secretary of State on October 3, 2016. The Articles provide in Article III, as follows:

> "The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

65. The applicable Bylaws for this IRP – necessary to consider, *inter alia*, the merits of Claimants' substantive claims in this IRP (e.g., whether the Board's action or failure to act breached any Articles, Bylaws or other policies or commitments in effect at the relevant time) as directed by Rule 10 of the Interim Supplementary Procedures (discussed below) – may be determined by reference to the date on which Claimants submitted their challenges to ICANN's Board decisions (e.g., through Reconsideration Requests). For example, issues related to Request 16-11 are assessed under ICANN's Bylaws of February 11, 2016 in effect at the time when Request 16-11 was submitted in August 2016. Similarly, ICANN's Bylaws of July 22, 2017 were in effect when Claimants submitted Request 18-6 in April 2018. Questions concerning whether Claimants' IRP claims are timely are also considered, for purposes of completeness, under both the Bylaws and the Interim Supplementary Procedures, in effect for this case.

66. The standards for assessing whether to grant interim measures of protection in an IRP are set out expressly in Rule 10 of the Interim Supplementary Procedures and in the ICANN Bylaws.[84] The parties agree that Rule 10 applies,[85] although Claimants – by referencing *interchangeably* the words "harm" and "hardships" from the Rule 10 standard in their briefing and by citing several previous IRP cases where interim relief was sought – at times assert standards that might not be fully consistent with the current Rule 10 standards. The Emergency Panelist confirms, in any event, that in accordance with Rule 2 of the Interim Supplementary Procedures,[86] the standards set forth in Rule 10 apply.

67. Rule 10 provides in relevant part as follows:

> "10. Interim Measures of Protection
>
> A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).
>
> An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief.[87] Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:
>
> (i) A harm for which there will be no adequate remedy in the absence of such relief;

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[84] The standard for interim relief provided in Rule 10 of the Interim Supplementary Procedures is identical to the standard in ICANN's Bylaws, Art. IV, § 4.3(p), as amended November 28, 2019. This standard was first implemented in ICANN's Bylaws dated October 1, 2016.

[85] Claimants' IM Request, p. 4 (as stated in their IM Request, "Claimants respectfully seek Interim Measures of Protection pursuant to Section 10 [Rule 10] of the Interim Rules [Interim Supplementary Procedures]"); ICANN's Opposition, ¶ 18.

[86] Interim Supplementary Procedures, Rule 2 ("These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.")

[87] "Emergency Panelist" is defined in Rule 1 of the Interim Supplementary Procedures as follows:

> "EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6)."

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief."

68. Rule 5 of the Interim Supplementary Procedures provides that "[i]n the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief…, the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate."

69. Rule 11 of the Interim Supplementary Procedures[88] provides further general guidance on the standards to be applied, stating in relevant part:

"11. Standard of Review

Each IRP PANEL shall conduct an objective, *de novo* examination of the DISPUTE[[89]].

a. With respect to COVERED ACTIONS[[90]], the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

d. . . . . "

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[88] Rule 11 of the Interim Supplementary Procedures matches the language in ICANN's Bylaws, Art. IV, § 4.3(i).

[89] "Disputes" are defined to including the following relevant circumstances:

"(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws;
. . . . . ."

Bylaws, Art. IV, § 4.3(b)(iii).

[90] "Covered Actions" are defined as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute." Bylaws, Art. IV, § 4.3(b)(ii).

70. Finally, the ICDR Rules, Article 6 (Emergency Measures of Protection), section (5) provides in relevant part that

> *"*The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise."

71. In view of Article 6(5), it is clear that this Decision of the Emergency Panelist concerning interim relief can be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel. For any request for interim relief that is denied by the Emergency Panelist, Claimants may renew their request and present their full case on the merits to the IRP Panel.

VI. DISCUSSION AND ANALYSIS

72. This Part addresses first whether the ICDR should be ordered to recuse itself in this case due to an alleged conflict of interest (Section A). After addressing that preliminary issue, the Emergency Panelist turns to assess whether Claimants have satisfied the second element in the standard for interim measures under Rule 10 of the Interim Supplementary Procedures (Section B). The section then addresses the parties' submissions on each of the issues for which Claimants request interim measures of protection, with the Emergency Panelist's analysis under the first and third elements of Rule 10 and a decision on each issue (Section C).

A. Request for ICDR's Recusal Due to Alleged Conflict of Interest

73. Claimants object to the ICDR's role in this IRP, alleging a conflict of interest and requesting that the "ICDR must therefore recuse itself, and the parties must agree upon another forum for adjudication of this request."[91] At minimum, Claimants request that the ICDR and ICANN must "fully disclose the terms of their financial relationship"[92] so that the issue can be properly considered and resolved.

[91] Claimants'' IM Request, p. 4; Claimants' Brief, p.7.
[92] Claimants' Brief, p.5.

74. Claimants contend that ICDR has a financial conflict of interest as to this request for interim measures, or, at minimum, there is an *apparent* conflict because ICDR is the sole provider of IRP services to ICANN.[93] Claimants maintain that if an IRP Standing Panel is created, the ICDR could lose cases and fees that it otherwise would maintain. Claimants allege that ICDR will face competition for its role as facilitator of the new Standing Panel.[94] That conflict must be subject to proper disclosure.[95]

75. Claimants further contend that each case generates initial filing fees for the ICDR, and the New gTLD Program is expected to expand in coming years, with a proportionate share of additional disputes reasonably expected to arise. Claimants argue that this should be enough of a "significant financial interest," under the IBA Guidelines (see below), to raise justifiable doubts as to the ICDR's impartiality and independence as to Claimants' demand for the immediate imposition of the Standing Panel. Claimants also state that ICANN's Bylaws regarding Conflicts of Interest, Article IV, § 4.3(q)(ii), require: "(ii) The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding."[96] Moreover, Claimants contend that the ICDR has demonstrated bias in favor of ICANN specifically with respect to Claimants'' request for interim measures in this case and presumably in other cases. Claimants explain that typically in IRP proceedings, the ICDR requires the parties make equal monetary deposits to secure the IRP panelists' time. However, with respect to requests for interim measures, ICDR requires that claimants pay 100% of the deposit and ICANN to pay nothing.

76. Claimants, in emails to the ICDR case administrator in this IRP (dated March 24, 2020 and March 31, 2020), challenged the ICDR on this approach and asked for clarification of what "ICDR procedure" requires that the filing party must submit the full initial deposit for an Emergency Panelist.[97] The ICDR replied by email dated April 1, 2020 as follows:

> "The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to

[93] Claimants'' IM Request, p. 2.
[94] Claimants Brief, p. 3.
[95] Claimants'' IM Request, p. 2.
[96] Claimants' Brief, pp. 5-6.
[97] Ex. E.

insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently outlined in the rules but it will be addressed in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy."[98]

77. Claimants cite to the IBA Guidelines on Conflicts of Interest in International Arbitration.[99] Claimants contend the Guidelines are applicable to this situation, and should be deemed authoritative. General Standard 2(a) provides: "An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent." General Standard 2(c) provides an objective "reasonable person" test to analyze such conflicts. General Standard 2(d) further provides: "Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List." That list includes in paragraph 1.3: "The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case."[100] General Standard 3(a) provides: "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties,… prior to accepting his or her appointment." Further, General Standard 3(d) provides: "Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure." Finally, Claimants contend that General Standard 5(b) provides that ICDR as administrator is bound by the same rules as set forth above, and "it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected." Claimants thus request that ICDR and ICANN disclose the terms of their financial relationship, particularly as it relates to ICANN activities to create the IRP Standing Panel that has been required by ICANN's Bylaws.[101] At the June 3rd hearing, Claimants stated that the

[98] Id.
[99] IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by IBA Council in 2014 ("IBA Guidelines"), at file:///C:/Users/cgibson/AppData/Local/Temp/IBAGuidelinesonConflictofInterest2014.pdf.
[100] IBA Guidelines, Non-Waivable Red List, ¶1.3.
[101] Claimants claims they are entitled to see all contracts between ICANN and ICDR, as well as a summary of payments made by ICANN to ICDR each year since inception of the relationship. In addition, Claimants claims they are entitled to see all correspondence between ICANN and ICDR relating to the Standing Panel.

analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator.[102]

78. ICANN, on the other hand, contends that nothing in the ICDR's actions as the IRP Provider in this proceeding demonstrates a violation of ICANN's Bylaws or a conflict of interest. According to ICANN, Claimants misunderstand ICDR's role in this proceeding and its relation to the IRP Standing Panel. ICANN claims that (i) the ICDR is not "adjudicating" this request for interim relief; instead, the ICDR has an administrative function; (ii) the fact that a Standing Panel will be established will not automatically revoke the ICDR's position as the IRP Provider; (iii) the ICDR has no financial interest in selecting panelists – it receives no portion of the panelist fees and its only revenue comes from administrative fees, which any other dispute resolution provider would also charge; (iv) the Bylaws direct the IRP Provider to "function independently from ICANN";[103] (v) Claimants' challenge ignores explicit provisions in the Bylaws directing the administration of the IRP in this manner until the IRP Standing Panel is established;[104] (vi) pursuant to the ICDR's longstanding policy (which applies to all cases administered by the ICDR and not just to IRPs), the ICDR requires the party requesting emergency relief to pay the initial deposit for the emergency arbitrator, and this does not demonstrate any bias toward ICANN; (vii) the ICDR has already disclosed the terms of its financial relationship with ICANN – that is, the only revenues the ICDR receives from IRP proceedings are the standard filing fees for non-monetary claims; and (viii) in light of this last point, Claimants already have the relief they seek (disclosure). ICANN also contends that the IBA Guidelines are not referenced in ICANN's Bylaws, the Interim Supplementary Procedures or the ICDR Rules, and therefore there is no basis to enforce the IBA Guidelines here.[105]

79. The Emergency Panelist observes, as an initial matter, that Claimants challenge against the ICDR does not prevent the ICDR from administering this case. Rule 2 of the Interim Supplementary Procedures provides that the "Interim Supplementary Procedures, *in addition to the ICDR RULES*," apply "in all cases submitted to the ICDR in connection with Article 4,

[102] June 3rd Hearing, audio transcript (8:40 – 8-50).
[103] ICANN Bylaws, Art. 4, § 4.3(m).
[104] Id., Art. 4, § 4.3(k)(ii) (IRP Panel); id. § 4.3(p) (Emergency Panelist).
[105] June 3rd Hearing, audio transcript (54:45 – 55:20).

Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect." The ICDR Rules, in turn, in Article 19.4 provide in relevant part:

> "Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator [ICDR] from proceeding with administration and shall be referred to the tribunal for determination once constituted."

80. The Emergency Panelist finds that the ICDR has not been compromised in its role as administrator of this IRP, even in view of Claimants' interim relief request that ICANN be ordered to appoint the IRP Standing Panel. As indicated by Article 19.4, the Emergency Panelist, not the ICDR, will rule on issues directed to jurisdiction in this case, including whether the ICDR can administer this IRP. Moreover, the Emergency Panelist, not the ICDR, will determine whether or not to grant Claimants' interim relief request that ICANN be ordered to appoint the IRP Panel.[106]

81. Furthermore, the Emergency Panelist recognizes that the ICDR "has been designated and approved by ICANN's Board of Directors as the IRP Provider…under Article 4, Section 4.3 of ICANN's Bylaws."[107] This designation has not been withdrawn, even while the process is underway for the appointment of members of the IRP Standing Panel. The Emergency Panelist finds that the ICDR meets or exceeds the standard set forth in the current Bylaws that "[a]ll IRP proceedings shall be administered by a well-respected international dispute resolution provider ('IRP Provider')."[108] The Bylaws require that the ICDR, as the IRP Provider, "shall function independently from ICANN"[109] Claimants have not provided any evidence that the ICDR has failed to act independently in its administration functions. In addition, ICANN's Bylaws, in the Conflict of Interest provision for IRPs, Article IV, § 4.3(q)(ii), provide:

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[106] The Emergency Panelist also notes that to the extent Claimants' challenge against the ICDR can be considered an indirect challenge to the jurisdiction of the Emergency Panelist (appointed by the ICDR under the ICDR Rules), the Emergency Panelist refers to the ICDR Rules, Art. 19.1 providing that:

> The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s)…."

[107] See Interim Supplementary Procedures, Rule 1 (Definitions): "ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the IRP Provider (IRPP) under Art. 4, Section 4.3 of ICANN's Bylaws."

[108] Bylaws, Art. 4, § 4.3(m)(i).

[109] ICANN Bylaws, Art. 4, § 4.3(m).

> "The IRP Provider shall disclose any material relationship with ICANN, a Supporting Organization, an Advisory Committee, or any other participant in an IRP proceeding."[110]

82. Here, the ICDR, when requested by Claimants, disclosed the relevant information concerning its relationship with ICANN, the source of any revenue received by the ICDR in connection with IRP cases, and the basis for requesting that Claimants pay the full deposit for the Emergency Panelist's fees. The ICDR case administrator, in an email dated March 20, 2020 stated:

> "In furtherance to our email of February 28, 2020 and pursuant to our fee schedule found here, filing fees are paid by the party that brings a claim before the ICDR. Should a Respondent file a counterclaim, they would be responsible for the appropriate filing fees at the time of filing.
> . . . .
> The compensation and expenses for the Panelist are disclosed and set at the time of appointment. The ICDR will process invoices upon receipt and disburse payment to the Arbitrator from the deposits made by the parties. The itemized invoices will be available for the parties to view online through AAAWebfile. *The ICDR does not withhold or receive any portion of the compensation paid to the panelists. The ICDR's only revenue is the amounts described in the above-reference fee schedule or possibly a room rental fee for a hearing conducted in one of our facilities*.
>
> Lastly, in 2006, the ICDR was designated by ICANN as the Independent Review Panel Provider (IRPP) pursuant to their bylaws. *There were no payments made by ICANN to the ICDR in relation to this designation*."

83. Regarding the approach taken by the ICDR requiring Claimants to pay the full deposit for the fees of the Emergency Panelist – discussed in Part VI, Section (C)(6) below, with ICANN changing its position and now committing to pay such fees – the ICDR case administrator, in an email dated April 1, 2020, stated:

> *"The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR*. It was developed after many years of processing emergency applications in an effort to insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently not outlined in the rules but it will be addressed it in our next revision. *It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules*.

[110] Claimants' Brief, pp. 5-6.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy."[111]

84. The role for the ICDR since its designation by the ICANN Board as the IRP Provider has not changed over the years, even as ICANN's Bylaws have called for the establishment of an IRP Standing Panel. As ICANN has indicated, the appointment of a Standing Panel does not mean that IRP cases will no longer need to be administered by a dispute resolution provider, or that the ICDR will be replaced.[112] Moreover, the Interim Supplementary Procedures envisage circumstances where, if the Standing Panel is not in place *or even if it is in place*, the ICDR will have a role to play. For example, Rule 3 of the Interim Supplementary Procedures provides in relevant part:

> "In the event that a STANDING PANEL is not in place when the relevant IRP is initiated *or is in place but does not have capacity due to other IRP commitments*, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, *the ICDR RULES shall apply to selection of the third panelist*."

85. Claimants argue that, because their request for interim measures calls for the immediate appointment of the Standing Panel, the ICDR faces a conflict of interest and cannot administer this case. The Emergency Panelist disagrees. Here, the Emergency Panelist determines that Claimants have not demonstrated a conflict of interest or any bias on the part of the ICDR, and the ICDR has already provided Claimants disclosure of "any material relationship with ICANN" under Article IV, § 4.3(q)(ii). It appears from the evidence before the Emergency Panelist that – even if a Standing Panel is constituted in the near future – this will not alter the ICDR's status as the IRP Provider. Any decision to consider whether to replace the ICDR would be the subject of a separate ICANN initiative, one that ICANN has not called for and that currently does not exist.

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[111] Ex. E.

[112] ICANN cites to the transcript of a meeting of the IRP Implementation Oversight Team ("IRP-IOT"), a committee constituted to oversee the IRP. The Chair of the IRP-IOT explains that as to the IRP Provider and the Standing Panel, "the two are separate," and even as a Standing Panel is appointed, "ICDR will stand and continue their administrative work throughout." Ex. RE-9, pp. 13-14. Moreover, another committee member stated that after the 2016 Bylaw revisions, "there has not been a switch from the ICDR as the administrator." Moreover, "[t]he existence of the [S]tanding [P]anel will not change the fact that all of the parties to an arbitration need an administrative force behind it." Id., p. 14. ICANN thus reports that the IRP-IOT discussed this issue with ICANN after the Board approved the October 2016 Bylaws revisions, but decided it was not necessary at that time "to change service providers." ICANN's Opposition, ¶ 65 (citing Ex. RE-9).

86. Finally, to the extent the IBA Rules might apply,[113] the Emergency Panelist disagrees with Claimants contention that the analysis of conflict of interest for an administrator such as the ICDR is the same as that for an arbitrator. The provisions of the IBA rules cited by Claimants, with the exception of General Standard 5(b), refer to arbitrators, not to a dispute resolution administrative provider such the ICDR. In particular, General Standard 5 (Scope) confirms that "[t]hese Guidelines apply equally to tribunal chairs, sole arbitrator and co-arbitrators, howsoever appointed." Further, General Standard 5(b), cited by Claimants, provides that

> "Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration."

87. General Standard 5(b) does not apply to the ICDR in its role as the administrator of IRP cases, because the ICDR does not act as an "arbitral or administrative secretary" or "assistant" to IRP Panelists or to the Emergency Panelist.

88. All of this is not to say that there could never be circumstances indicating bias or conflict of interest on the part of an institution such as ICDR. However, in this case, the record establishes that the ICDR, in requesting from Claimants the payment of the full deposit for the Emergency Panelist fees, was following its standard practices for all commercial arbitration cases involving requests for interim relief – this is not evidence of bias. Further, as noted above, there is no indication that the ICDR will be removed from its role as the IRP Provider, even if a Standing Panel is ordered to be appointed. Finally, it is not for the ICDR to determine whether ICANN has violated its Bylaws by declining to pay the deposit for fees of the Emergency Panelist (although as discussed in Part VI, Section C(6) below, ICANN has changed its position on this issue).[114]

89. For all of the above reasons, the Emergency Panelist denies Claimants' request that the ICDR be ordered to recuse itself from this IRP. As with the entirety of this Decision, this finding

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[113] The Emergency Panelist need not decide in this case whether the IBA Guidelines apply, and recognizes that neither the Bylaws, Interim Supplementary Procedures, nor ICDR Rules incorporate the IBA Guidelines. The Emergency Panelist does observe that ICANN's Bylaws, Art. 4, § 4.3(n)(ii), indicate that the "Rules of Procedure shall be informed by international arbitration norms."

[114] See ICANN's Bylaws, Art. 4, § 4.3(r) ("ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members.").

does not bind the IRP Panel. The Emergency Panelist leaves Claimants to reassert this request in the main IRP proceedings, should Claimants wish to do so.

B. Sufficiently Serious Questions Related to the Merits

90. Rule 10 of the Interim Supplementary Procedures requires that "[i]nterim relief may *only* be provided if the EMERGENCY PANELIST determines that the Claimant has established *all* of the [three] factors" listed in Rule 10.[115] As emphasized by ICANN at the June 3rd Hearing, the burden under this rule is on Claimant to satisfy these three factors. However, the second factor (ii) is expressed in the disjunctive: "(A) likelihood of success on the merits; *or* (B) sufficiently serious questions related to the merits."[116]

91. Claimants at the June 3rd Hearing contended that the focus, at this point, should be on the standard set out in (B), "sufficiently serious questions related to the merits."[117] Claimants argue that a "detailed analysis of the merits is inappropriate at this stage of the proceeding" and "[s]ubstantive issues are for the full panel, not this Emergency Panel."[118] ICANN contends, on the other hand, that "an analysis of the merits is not just appropriate but essential."[119] The Emergency Panelist agrees with ICANN on this point. The Emergency Panelist must review the merits of the underlying IRP, at least to the extent necessary to determine whether Claimant has established that there are "sufficiently serious questions related to the merits."

92. The Emergency Panelist will address the "sufficiently serious questions" issue first to determine if that standard is met; if it is not met, there is no need to evaluate each of Claimants' individual requests for interim relief under factors (i) ("A harm for which there will be no adequate remedy in the absence of such relief") and (iii) ("A balance of hardships tipping decidedly toward the party seeking relief").

1) ICANN Alleges Time-Bar Against Some of Claimants' IRP Claims

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[115] Interim Supplementary Procedures, Rule 10 (italics added).
[116] Id. (italics added).
[117] Claimants' Slide Deck, slide 5 ("Claimants have raised 'sufficient questions'"); June 3rd Hearing, audio transcript (2:13:45 – 2:13:60).
[118] See Claimants' Slide Deck, slides 3 & 5.
[119] June 3rd Hearing, audio transcript (1:01:25 – 1:02:30).

93. ICANN contends that a number of Claimants' IRP claims are time-barred and stressed at the June 3rd Hearing that this was an important point.[120] In doing so, ICANN has characterized and classified Claimants' IRP claims, as listed in the chart in paragraph 94 below.[121] Claimants during the June 3d Hearing objected to ICANN's classification of its IRP claims, arguing that Claimants' "arguments are as stated in our Complaint."[122] Indeed, the Emergency Panelist has summarized Claimants' claims in Part III, Section B(1) above. The Emergency Panel decides, however, that it is useful, before further review of the IRP merits, to consider whether one or more of Claimants' IRP claims is time-barred. If a claim is time-barred, that finding would defeat the possibility that the particular claim raises "sufficiently serious questions related to the merits." The Emergency Panelist reiterates, however, that the preliminary assessment made here, regarding issues of any time-barred claims, does not finally resolve the merits of these issues, which are to be fully addressed by the IRP Panel.

94. As noted in paragraph 24 above, ICANN submitted a letter on June 16, 2020 responding to a question from the Emergency Panelist requesting that ICANN clarify which of Claimants' claims ICANN contends are time barred.[123] In its letter, ICANN provided the following chart setting forth Claimants' claims (as framed by ICANN); ICANN's position on the timeliness of each claim; the date of any allegedly relevant ICANN Board action; and the alleged deadline that would have applied for filing an IRP claim[124]:

Claim	ICANN's Position on Timeliness	Date of ICANN Action (if any)	Deadline for Filing IRP (Governing Rule)
[1] ICANN should have re-evaluated the HTLD CPE Result	Untimely (and meritless)	22 Aug. 2014	20 Sept. 2014 (30 July 2014 Bylaws)
[2] The Board should not have accepted the *Despegar* IRP Final Declaration	Untimely (and meritless)	10 Mar. 2016	8 Apr. 2016 (11 Feb. 2016 Bylaws)

[120] ICANN's Opposition, ¶ 23 ("Claimants barely *reference* the Board's actions on Requests 16-11 and 18-6 in their IRP Request, instead attempting to re-litigate the underlying claims, which are long since time-barred."); June 3rd Hearing, audio transcript (54:00 – 54:15).
[121] See also ICANN's Slide Deck, slides 12-14, ICANN's Opposition ¶¶ 23-24, and ICANN's IRP Response, ¶¶ 43-44, 51, 58, 64, 75-76, and 80-82.
[122] June 3rd Hearing, audio transcript (2:12:00 – 2:12:40).
[123] ICANN Counsel's Letter dated June 16, 2020.
[124] ID. ICANN's chart was provided with a number of footnotes providing references and further explanation. Those footnotes have been omitted in this copy of the chart. The Emergency Panelist also added numbering in square brackets "[ ]" to each of the claims listed in the chart.

[3] ICANN should not have allowed Afilias to acquire HTLD	Untimely (and meritless)	None, but information public since at least 23 March 2016	N/A or 21 Apr. 2016 (11 Feb. 2016 Bylaws)
[4] ICANN should have taken some (unspecified) action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration	Untimely (and meritless)	9 Aug. 2016	7 Sept. 2016 (11 Feb. 2016 Bylaws)
[5] The Ombudsman should have reviewed Request 16-11	No such requirement and/or Untimely	N/A and/or 15 Feb. 2018	N/A (11 Feb. 2016 Bylaws) and/or 15 June 2018 (Interim Procedures)
[6] The Ombudsman should have evaluated Request 18-6	Untimely (and meritless)	N/A or 23 May 2018	N/A or 20 Sept. 2018 (Interim Procedures)
[7] The Board should not have denied Request 18-6	Timely (but meritless)	18 July 2018	N/A (IRP timely filed)
[8] The Board should not have denied Request 16-11	Timely (but meritless)	27 Jan. 2019	N/A (IRP timely filed)
[9] ICANN should produce FTI's and the CPE Provider's Documents	Premature request	None	N/A (request premature)

95. ICANN indicated in its chart that different versions of the Bylaws (with different deadlines for filing IRP claims) apply to Claimants' claims made in this IRP. ICANN also stated that

> "Even if all of the ICANN actions identified in this chart are evaluated under the time for filing set forth in Rule 4 of the Interim Supplementary Procedures, which became effective 25 October 2018…, those claims would still be untimely. Under the Interim Procedures, Claimants had 120 days (instead of 30) to initiate a CEP or IRP, and they did not do so. Nor did they file this IRP within the 12-month outside limit for filing IRP claims set forth in Rule 4 of the Interim Procedures."[125]

96. The Interim Supplementary Procedures, Rule 4 (Time for Filing) provides in relevant that:

> "A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

97. Referring to ICANN's list of claims above, the Emergency Panelist notes that ICANN has acknowledged Claimants' claims in this IRP related to the Board's denial of Request 18-6 [7]

[125] ICANN acknowledges that when Claimants initiated CEP on October 2, 2018, it tolled the statute of limitation on potential claims. ICANN Counsel's Letter dated June 16, 2020, p. 3, n. 10 and n. 12.

and Request 16-11 [8] were filed in a timely fashion. To the extent Claimants' IRP claims are based on the Board's decisions (and BAMC's recommendations) to deny Claimants' Request 18-6 and Request 16-11, such claims are timely. Further, ICANN has not challenged the timeliness of Claimants' current request that ICANN should be required to produce FTI's and the CPE Provider's (EIU) documents [9], but instead contends that the request is premature.

98. The Emergency Panel has reviewed claims [1] through [6], as classified and listed by ICANN, in view of both the Bylaws in effect at the relevant time and the deadlines in Rule 4 of the Interim Supplementary Procedures. Items [1], [2], [3] and [4] can be addressed first, followed by items [5] and [6], which are addressed together to consider both timeliness and the merits in relation to appointment of an Ombudsman:

99. [1] ICANN should have re-evaluated the HTLD CPE Result: The Emergency Panelist observes that this claim, as stated by ICANN, is similar to a claim that was considered by the *Despegar* IRP panel: "The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered."[126] As discussed in relation to item [2] and [4] below, to the extent Claimants seek to bring a "[d]irect challenge to the HTLD CPE result"[127] outside of the matters covered by Request 16-11 (and the subsequent BAMC recommendation and Board decision to deny Request 16-11), that claim would be untimely under both the July 30, 2014 version of the Bylaws[128] and Rule 4 of the Interim Supplementary Procedures.[129]

100. [2] The Board should not have accepted the *Despegar* IRP Final Declaration: Claimants did not directly challenge the Board's acceptance of the *Despegar* IRP Declaration – the Board accepted that Final Declaration on March 10, 2016. As discussed in paragraph 43 above, ICANN's Board in its January 2019 Resolution found that claims with respect to the *Despegar*

[126] *Despegar* IRP Declaration, ¶ 55(i).
[127] ICANN's Slide Deck, slide 12.
[128] Under ICANN's Bylaws, as amended July 30, 2014, Art. IV, § 3(3), "[a] request for independent review must be filed *within thirty days* of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation" (italics added).
[129] Under Rule 4 of the Interim Supplementary Procedures, a challenge would have to be brought "no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

IRP Declaration were time-barred. If Claimants are attempting to bring an outright challenge to the Board's acceptance of the *Despegar* IRP Declaration now, the challenge would be untimely under both the February 11, 2016 Bylaws[130] in effect at the relevant time, and under Rule 4 of the Interim Supplementary Procedures.[131]

101. However, when the Board accepted the *Despegar* IRP Declaration, it directed that ICANN:

> (i) "ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations" and
>
> (ii) "complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation."

102. As to the first of these issues, the *Despegar* IRP panel noted that while many general complaints were made by the Claimants as to the CPE process, "the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues."[132] As to the second of these directives, the *Despegar* IRP panel declined to make a finding on the Portal Configuration issue, indicating "that it should remain open to be considered at a future IRP should one be commenced in respect of this issue."[133]

103. It appears that Claimants, instead of directly challenging the Board's acceptance of the *Despegar* IRP Declaration, waited (i) to submit Request 16-11, after ICANN had completed an investigation of the Portal Configuration issues, and the Board had acted upon the findings of that investigation by passing its two August 2016 Resolutions (on August 9, 2016), concluding, among other things, that the cancellation of HTLD's .HOTEL application was not warranted, and directing ICANN to move forward with processing HTLD's application;[134] and (ii) to submit Request 18-6 after the completion of the CPE Process Review and the Board's acceptance of the results in its March 2018 Resolutions, where the Board concluded that no

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[130] In terms identical to the July 2014 Bylaws, ICANN's Bylaws as amended February 11, 2016, provide in Art. IV, § 3(3) that an IRP must be filed within 30 days of the posting of the minutes of the relevant Board meeting.

[131] Under Rule 4 of the Interim Supplementary Procedures, if they apply, a challenge against the *Despegar* IRP Declaration would have to be brought "no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

[132] *Despegar* IRP Declaration, ¶ 143.

[133] Id., ¶ 138.

[134] August 2016 Resolutions.

overhaul or change to the CPE process for the current round of the New gTLD Program is necessary. As noted above, the IRP claims regarding Request 16-11 and Request 18-6 were timely submitted; however, to the extent Claimants' IRP claims directly challenge the Board's acceptance of the *Despegar* IRP Declaration, they are untimely and therefore do not raise "sufficiently serious questions related to the merits."

104. [3] ICANN should not have allowed Afilias to acquire HTLD: ICANN contends Claimants' claim – that ICANN should *not* have allowed Afilias to acquire HTLD – is untimely. The Emergency Panelist observes that Claimants in their IRP Request challenged "ICANN allowing a domain registry conglomerate [Afilias] to takeover the 'community-based' applicant HTLD" and that "HTLD is no longer the same company that applied for the .HOTEL TLD."[135]

105. ICANN in its June 16, 2020 letter to the Emergency Panelist contends that

> "There was no Board action or inaction in conjunction with this matter, and thus under the Bylaws in effect at that time, Claimants could not have filed an IRP. Even if there was a viable argument regarding Board action or inaction (which there is not), information regarding Afilias' acquisition of HTLD was publicly available as of 23 March 2016, which would have resulted in an IRP filing deadline of 21 April 2016."[136]

106. ICANN refers to a letter dated March 23, 2016[137], which was available on ICANN's website in its correspondence files, in which Philipp Grabensee, Managing Director of HTLD, informed ICANN that, among other things "Afilias will in the near future be the sole shareholder of Applicant." Further on the issue of timeliness, ICANN in its IRP Response stated that

> "These claims accrued no later than 25 August 2016, when Claimants acknowledged in Request 16-11 (but did not challenge) that Afilias was acquiring all shares of HTLD. Claimants did not assert that the Board should have taken any action as a result of Afilias' acquisition of the remaining shares of HTLD until submitting their IRP Request in December 2019, more than three years later."[138]

107. The Emergency Panelist observes that the Board's August 2016 Resolutions (dated August 9, 2016), which were the basis for Claimants' Request 16-11, stated in relevant part:

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[135] IRP Request, p. 4.
[136] ICANN Counsel's Letter dated June 16, 2020, p. 2, n. 5.
[137] Claimants' Ex. ZZ (23 March 2016 Letter), p. 2.
[138] ICANN's IRP Response, ¶ 80.

> "Lastly, Mr. Grabensee noted the following recent changes to HTLD's relationship with Mr. Krischenowski: (i) the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015; (ii) Mr. Krischenowski stepped down as a managing director of GmbH Berlin effective 18 March 2016; (iii) Mr. Krischenowski's wholly-owned company transferred its 50% shares in GmbH Berlin to Ms. Ohlmer (via her wholly-owned company); (iv) *GmbH Berlin will transfer its shares in HTLD to Afilias plc*; and (v) Mr. Grabensee is now the sole Managing Director of HTLD."[139]

108. The Emergency Panelist further observes that Claimants in Request 16-11 did not directly challenge the sale of HTLD to Afilias. However, Request 16-11 contains the following passages relevant to the issue of whether Claimants were aware of the sale of HTLD shares to Afilias:

> "HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. *It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest holder in the same application, Afilias.*
>
> After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.
>
> One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).
>
> The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. *The sale to Afilias of shares (or Afilias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds***.** The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.[140]

[139] August 2016 Resolutions (italics added).
[140] Request 16-11, pp. 18-19 (italics added). Further, Claimants in Ex. Z have submitted a copy of an article dated May 12, 2016, publicly available, stating that "Afilias will become the sole shareholder of HTLD." Claimants' Ex. Z.

109. At the June 3rd Hearing, Claimants argued there is insufficient evidence to determine when Claimants learned "about ICANN's inaction as to the Afilias transaction," and that further briefing is needed on this issue.[141] ICANN, on the other hand, stated at the hearing that the sale of HTLD to Afilias "was public," that "ICANN posts these things on its website," and that ICANN permits these transfers to occur, usually through a "staff action" without Board involvement.[142]

110. In view of all of the above evidence, the Emergency Panel determines that an attempt by Claimants to bring an outright challenge to an action or failure to act by the ICANN Board concerning the transfer of ownership interests from HTLD to Afilias is time-barred. The evidence indicates that, at least as of August 25, 2016 when Claimants submitted Request 16-11, Claimants were aware of relevant facts concerning this transfer. Even if no Board action was involved (as alleged by ICANN), and therefore there were no "minutes of the relevant Board meeting" from which the 30-day limitation of the February 2016 Bylaws could be tallied, nonetheless, Rule 4 of the Interim Supplementary Procedures provides that a claim should be asserted, at the latest, no "more than twelve (12) months from the date of such action or inaction." Here, it appears that Claimants claim challenging the transfer of ownership interest from HTLD to Afilias was first asserted, at the earliest, on October 2, 2018 when Claimants initiated the CEP with ICANN, and more than two years after Request 16-11 was submitted.

111. In determining that this claim is untimely, the Emergency Panelist concludes that it does not raise "sufficiently serious questions related to the merits." However, this decision on untimeliness concerning a claim directly challenging the transfer of ownership interest from HTLD to Afilias does not prevent Claimants from raising the factual circumstances of that transfer – as Claimants referenced in Request 16-11 – in support of their contentions concerning the Portal Configuration issue (discussed below).

112. Moreover, the Emergency Panelist recognizes that Claimants claim directly challenging the transfer of ownership interest from HTLD to Afilias is one of Claimants' principal claims in this IRP. The Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

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[141] June 3rd Hearing, audio transcript (2:12:15 – 2:13:15).
[142] June 3rd Hearing, audio transcript (1:35:32 – 1:38:47).

113. [4] ICANN should have taken some (unspecified) action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration: ICANN contends that Claimants' IRP claim is untimely to the extent it challenges that ICANN should have taken some action concerning the *Despegar* IRP in light of the *Dot Registry* IRP Declaration. The Emergency Panelist disagrees. ICANN in its June 16, 2020 letter indicates that the Board action (accepting the *Dot Registry* IRP Declaration) was taken on August 9, 2016,[143] and that under the February 2016 Bylaws the deadline for making a challenge would have been September 7, 2016. Further, at the June 3rd Hearing, ICANN's counsel explained that there is a "new IRP decision [*Dot Registry* IRP] and Board action on that decision, and if there was an argument to make, the time to make that argument was after the *Dot Registry* IRP and the Board action on the *Dot Registry* IRP, and Claimants did not make that here."[144]

114. The *Dot Registry* IRP Declaration was issued on July 29, 2016 and the Board accepted that declaration on August 9, 2016. Claimants filed Request 16-11 on August 25, 2016, 16 days after the Board's August 2016 resolution accepting the *Dot Registry* IRP. Request 16-11 asserts claims that (i) "[t]he ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case"[145] and (ii) the Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the Board's acceptance of the *Despegar* IRP Declaration.[146] In particular, Request 16-11 sets out:

> "The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information."[147]

115. Request 16-11 asserted that ICANN breached its transparency obligations based on information that only became clear after the *Dot Registry* Final Declaration was issued:

> "The Despegar et al. Panel's reliance on false information that the EIU served as an independent panel (i.e., without intimate involvement of ICANN staff) was material

[143] See ICANN August 2016 Resolutions 2016.08.09.11-2016.08.09.13, at https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g.
[144] June 3rd Hearing, audio transcript 1:22:30 – 1:24:03.
[145] Request 16-11, p. 8.
[146] Id. ("The ICANN Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board's acceptance of the IRP Declaration regarding the .hotel gTLD (the '*Despegar et al.* IRP Declaration')").
[147] Id., p. 9

> to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.
>
> Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information."[148]

116. Request 16-11 also alleges that the "ICANN Board discriminated against Requesters by accepting *Dot Registry* IRP Determination and refusing to reconsider its position on the CPE determination re .hotel."[149] In view of these arguments made in reference to the Board's decision to accept the *Dot Registry* IRP, as well as other claims asserted, Claimants in Request 16-11 sought several measures of relief, including "[t]he ICANN Board is requested to declare that HTLD's application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary."

117. The Emergency Panelist determines that, to the extent Claimants in this IRP raise a claim in Request 16-11 based on the Board's decision to accept the *Dot Registry* IRP Declaration on August 9, 2016 (at which time Claimants would have been put on notice of the impact of any action or failure to action by the Board giving rise to alleged harm to Claimants), that claim is timely under the February 2016 Bylaws and Rule 4 of the Interim Supplementary Procedures.[150]

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[148] Id., pp. 13-14.
[149] Id., p. 18.
[150] Under Rule 4, the claim is brought "no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE."

118. [5] and [6] The Ombudsman should have reviewed Request 16-11 and Request 18-6: The Emergency Panelist reviews Claimants' Ombudsman claims both as to timeliness and the merits.

119. Claimants' IRP Request seeks that the IRP Panel "immediately appoint an ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6, as required by the Bylaws,"[151] and Claimants' IM Request correspondingly seeks the same relief by way of interim measures.[152] ICANN contends that to the extent Claimants assert IRP claims that Request 16-11 and Request 18-6 should have been reviewed by the Ombudsman, these claim are untimely and without merit.

120. Ombudsman for Request 16-11: ICANN claims that "the Ombudsman had no role in Reconsideration Requests when Request 16-11 was submitted."[153] In its June 16, 2020 letter, ICANN explains that at the time when Request 16-11 was submitted, the "operative Bylaws (11 Feb. 2016 Bylaws) did not provide for Ombudsman review of Reconsideration Requests."[154] ICANN also contends that even if there was a viable argument regarding Ombudsman review, Claimants were on notice that no such review was part of the process for Request 16-11 as of February 15, 2018, when the Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process That Were Placed On Hold Pending Completion Of The CPE Process Review ("Roadmap") was publicly posted.[155]

121. Claimants contend, on the other hand, that "as to RFR-16-11, even though the BAMC decided to consider that RFR in 2018, it failed to refer it to the Ombudsman as required by the Bylaws *then in effect*."[156] Claimants essentially argue that Request 16-11 – at least with respect to the

[151] IRP Request, p. 12.
[152] Claimants' IM Request, p. 4.
[153] ICANN's IRP Response, pp. 11-12; ICANN's Opposition, p. 10, n. 42.
[154] ICANN Counsel's Letter dated June 16, 2020, p.2 n. 7 (citing BAMC Recommendation on Request 16-11, p 18, at https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf; and Board Resolution 2019.01.27.23, at https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f.
[155] Id. The Roadmap specifically states that "Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed." The Roadmap provides detail on the steps to be taken for each of the Reconsideration Requests; those steps do not include reference to the Ombudsman.
[156] IM Request, p.7; Claimants' Brief, p. 14 (italics added).

question of whether Claimants' request was entitled to Ombudsman review – should have been considered under Bylaws in effect at the time when ICANN lifted the "hold" that had been placed on Request 16-11 (and several other Reconsideration Requests), rather than under the February 2016 Bylaws in effect when Request 16-11 was filed. As noted above, the hold had been ordered by the BGC until the CPE Process Review was completed.

122. The Emergency Panelist disagrees with Claimants' view. Request 16-11 was filed on August 25, 2016, alleging that certain action or inaction by ICANN violated its Articles, Bylaws or other policies and commitments in effect at that time. When Request 16-11 was filed, there was no procedure in place for the Ombudsman to review Reconsideration Requests.[157] Further, a claim to request Ombudsman review is untimely in view of the Roadmap published by ICANN on February 15, 2018. Under the February 2016 Bylaws, although they did not provide for Ombudsman review, if there had been such a procedure, an IRP claim would have been required to be made within 30 days of the publication of the Roadmap. Further, under Rule 4 of the current Interim Supplementary Procedures governing this IRP, Claimants would have 120 days from the date Claimants became aware of publication of the Roadmap ("aware of the material effect of the action or inaction giving rise to the DISPUTE") to bring their IRP claim (or engage in the CEP). Claimants, in response to ICANN's contentions, have not alleged that they were unaware of the publication of the Roadmap, with its specific steps for moving forward on the several Reconsideration Requests that had been placed on hold, including Request 16-11. As noted above, Claimants did not initiate the CEP until October 2, 2018. The Emergency Panelist finds that Claimants IRP claim that Request 16-11 should have been reviewed by the Ombudsman is without merit because there was no such requirement in the February 2016 Bylaws and is also untimely; it therefore fails to raise "sufficiently serious questions related to the merits."

123. Ombudsman for Request 18-6: With respect to Request 18-6, Claimants contend that they are entitled to what the Bylaws allegedly require – an independent Ombudsman review of Reconsideration Requests, prior to any decision by the BAMC.[158] Claimants state that the Board has never once rejected a BAMC (or BGC) recommendation on any Reconsideration

[157] The Ombudsman's role was incorporated into the version of the Bylaws in effect as of October 1, 2016.
[158] Claimants' Reply, p. 12.

Request. The independent Ombudsman is supposed to provide a check on that, but has inexplicably recused himself from every single relevant case. Claimants argue ICANN has no excuse for this, and offers no explanation as to why a substitute Ombudsman could not have been appointed. Claimants assert that ICANN could hire a substitute now, and Claimants could have that independent check in this case. Claimants argue they have been irreparably harmed because they have been denied that independent check, required by the Bylaws.[159]

124. ICANN contends that conduct by the Ombudsman is not subject to challenge in a Reconsideration Request or an IRP, which is why ICANN put "N/A" in the chart included in its letter of June 16, 2020 (see paragraph 94 above).[160] ICANN further states that the Ombudsman made the decision to recuse himself on May 23, 2018.[161] The Ombudsman's recusal letter is posted on ICANN's website, along with all of the other relevant submissions and links to ICANN's BAMC recommendation and Board decision in connection with Request 18-6.[162] Given the May 2018 date, ICANN contends that September 20, 2018 would have been the applicable deadline (under the Interim Supplementary Procedures, Rule 4) for the filing of an IRP, if Ombudsman action could be the subject to an IRP.[163]

125. The Emergency Panelist agrees with ICANN and determines that Claimants' IRP claim is untimely regarding the appointment of an Ombudsman for Request 18-6. By comparison, as noted above, the claims in this IRP with respect to Request 16-11 and Request 18-6 *are* timely. However, neither Request 18-6 nor Request 16-11 included any claim as to the appointment of an Ombudsmen. The earliest date from which to assess timeliness of Claimants' Ombudsman claim is October 2, 2018, when Claimants initiated the CEP. Under the Interim Supplementary Procedures, Rule 4, Claimants would have had 120 days to bring an IRP claim (or engage in the CEP) from May 23, 2018, the date when the Ombudsman recused himself.[164] Claimants have not contended that they were unaware of the Ombudsman's recusal in May 2018. For this

[159] Id., pp. 12-13.
[160] ICANN Counsel's Letter dated June 16, 2020, p.2 n. 8.
[161] See Ex. R-37 (email chain of ICANN's request to ICANN's Ombudsman Herb Waye and Mr. Waye's response dated May 23, 2018 regarding Request 18-6), at https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf.
[162] See ICANN's Request 18-6 webpage, with links to documents, resources and ICANN decisions, at https://www.icann.org/resources/pages/reconsideration-18-6-trs-et-al-request-2018-04-17-en.
[163] ICANN Counsel's Letter dated June 16, 2020, p.2 n. 8.
[164] See R-33 (The provisions for extending the time to file an IRP while Claimants participated in the CEP); Ex. R-34 (Claimants did not enter CEP until October 2, 2016, more than 120 days after the Ombudsman recused himself).

reason of untimeliness, Claimants have failed to raise "sufficiently serious questions related to the merits."

126. Moreover, the Emergency Panelist determines that, regarding the merits of Claimants' claim that an Ombudsmen should have been appointed for Request 18-6, Claimants have also failed to raise "sufficiently serious questions related to the merits."

127. Claimants have contended that

> "ICANN has subverted this check on its decisions by failing to provide a non-conflicted Ombudsman, not just in this case but in every single case concerning the new gTLD program at least since 2017. Indeed, it appears the Ombudsman has recused itself in 15 out of 18 cases, including 14 of 14 cases involving New gTLD applicants."[165]

128. Further, Claimants argue that "[i]t clearly violates ICANN's Bylaws to systematically refuse to provide this important, purportedly neutral and independent check prior to consideration and adoption by the BAMC or Board."[166] Without this mechanism, Claimants allege that the accountability process involving Reconsideration Requests is a sham.

129. ICANN has explained that the "Ombudsman provides to the BAMC an evaluation of the Reconsideration Request before the BAMC makes a recommendation to the Board." The Ombudsmen is supposed to serve as "an objective advocate for fairness and "to provide an "independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly."[167]

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[165] Claimants' IM Request, p. 9.
[166] Id.
[167] Art. 5, § 5.2 provides:

> "The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results. With respect to the Reconsideration Request Process set forth in Section 4.2, the Ombudsman shall serve the function expressly provided for in Section 4.2."

130. Claimants' concerns, if correct, serve to reveal a deficiency in the current approach for ICANN's Ombudsmen system: due to the Ombudsmen's informal role under the Bylaws, Article 5, that same Ombudsmen is frequently required to exercise recusal in relation to duties for Reconsideration Requests, as set forth in the Bylaws, Article 4, Section 4.2(l). The Emergency Panelist recommends that ICANN should, as Claimants propose, consider engaging more than one Ombudsmen to avoid recurrent recusals.

131. Even so, the Ombudsman correctly recused himself under the Bylaws in effect for Request 18-6, and the Emergency Panelist determines that there has been no violation by the Ombudsman or by the Board of ICANN's Articles, Bylaws or other policies, that would give rise to "sufficiently serious questions related to the merits." The Ombudsman letter of recusal stated: "*Pursuant to Article 4, Section 4.2(l)(iii)*, I am recusing myself from consideration of Request 18-6."[168] Article 4, Section 4.2(l)(iii) of the July 22, 2017 Bylaws, in effect when Request 18-6 was submitted, which are identical to ICANN's current Bylaws on this point, provides:

> "For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman."

132. ICANN asserts in relation to Article 4, Section 4.2(l)(iii) that:

> "it is entirely proper – indeed, required – for the Ombudsman to recuse himself in any Reconsideration Request involving matters for which the Ombudsman took a position before the Reconsideration Request was filed. Moreover, this provision provides the 'specific reasons' Claimants seek as to the Ombudsman's recusal from Request 18-6: he recused himself '[p]ursuant to Article 4, Section 4.2(l)(iii)' of the Bylaws, meaning the ICANN Ombudsman took a position concerning the subject of Request 18-6, before Request 18-6 was filed."[169]

133. The Emergency Panelist also observes that under the July 2017 Bylaws (and the current Bylaws), Article 5, Section 5.3(a), the Ombudsman only investigates complaints "which have not otherwise become the subject of either a Reconsideration Request or Independent Review

[168] Ex. R-37 (italics added).
[169] ICANN's Opposition, ¶ 25.

Process."[170] ICANN has argued that the lack of Ombudsman review does not create "any possibility of irreparable harm to Claimants."[171] Given that Claimants have initiated this IRP and will receive a fair decision on their claims from the independent IRP Panel, the Emergency Panelist finds that under Rule 10 of the Interim Supplementary Procedures, Claimants have not established "harm for which there will be no adequate remedy in the absence of such relief."

134. Claimants' request for interim measures of protection that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied. However, as previously noted, in determining that interim relief is not appropriate at this time with respect to the appointment of the Ombudsman, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

2) Sufficiently Serious Questions Related to the Merits of Claimants' Claims (that are not Time-Barred)

135. From the analysis above, it remains to be determined whether Claimants have, pursuant to Rule 10 of the Interim Supplementary Procedures, established "sufficiently serious questions related to the merits" as to any of Claimants' claims that are not time-barred. The Emergency Panelist considers Requests 16-11 and Request 18-6, which ICANN has acknowledged are not time-barred, as well as relief requested in relation to the ICANN Board's decision to accept the *Dot Registry* IRP Declaration, insofar as that relief is requested in Request 16-11. As discussed above, the Emergency Panelist as determined that Claimants claim regarding the sale of HTLD to Afilias is untimely.

136. (a) Request 16-11: Request 16-11 alleged, among other things, that the Board (i) failed to take into account the impact of the *Dot Registry* IRP Declaration,[172] a case that had been decided in July 2016 (after the *Despegar* IRP Declaration issued in February 2016), and that the Board's acceptance of the *Dot Registry* IRP Declaration on August 9, 2016 is incompatible with the

[170] Bylaws, Art. 5, § 5.3(a); see ICANN's IRP Response, ¶ 40; ICANN's Opposition, ¶ 9. See also Ex. E (email dated March 16, 2020 from the Ombudsman to Claimants' counsel, in response to Claimants' request for assistance "in all of these ways, with respect to ICANN's apparently willful failure to implement basic procedural rights required by Bylaws since 2013." The Ombudsman, noting that an IRP had already been filed and citing the Bylaws, Art. 5, § 5.3, stated: "Note that my powers end where IRPs begin.").

[171] ICANN's Opposition, ¶ 39.

[172] *Dot Registry LLC v. ICANN,* Declaration of the Independent Review Panel, ICDR Case No. 01-14-0001-5004, dated July 29, 2016 ("*Dot Registry"* IRP Declaration"), at https://www.icann.org/ en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

Board's acceptance of the *Despegar* IRP Declaration; (ii) failed to consider the unfair competitive advantage HTLD obtained by accessing trade secrets of competing prospective registry operators; (iii) relied on false and inaccurate material information regarding the EIU's CPE results; (iv) failed to take material action to investigate and address allegedly illegal actions attributable to HTLD (including allegations that one of the individuals who had accessed the data, Ms. Ohlmer, was "the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information");[173] (v) failed to remedy violations of ICANN's Articles and Bylaws while doing so for other for other applicants; (vi) unjustifiably refused to cancel HTLD's application in violation of ICANN's core obligations; and (vii) discriminated against the .HOTEL gTLD applicants by accepting the *Dot Registry* IRP Declaration while refusing to reconsider the Board's position on the CPE determination for .HOTEL. Request 16-11 requested that the Board cancel HTLD's .HOTEL application and take other necessary steps, and if the application is not canceled, refrain from executing the registry agreement with HTLD and provide full transparency about communications between ICANN, ICANN's Board, HTLD, EIU and third parties (including individuals supporting HTLD's application), and in any event, (viii) asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach with its handling of the *Dot Registry* IRP case and the CPE results there.[174]

137. On January 27, 2019, the Board accepted the BAMC's recommendation to deny Request 16-11 in its January 2019 Resolution.[175] While Claimants in Request 16-11 had requested reconsideration of the Board's August 2016 Resolutions concerning the Portal Configuration issues because ICANN had allegedly failed to properly investigate those issues, the January 2019 Resolution found that the Board had adopted August 2016 Resolutions after considering all material information and without reliance on false or inaccurate material information.[176]

[173] Request 16-11, pp. 15-16. According to Request 16-11, Ms. Ohlmer "was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Board's decision is based on Mr. Krischenowski's actions and affiliation to HTLD only." Id.
[174] Request 16-11.
[175] Ex. R-29.
[176] Id.

138. On one of the issues, the BAMC recommendation focused primarily on one of the three individuals who accessed the data, Mr. Krischenowski, who had "acted as a consultant for HTLD's Application at the time it was submitted in 2012,"[177] stating that

> "Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party."

and

> "Mr. Krischenowski was not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD."[178]

139. The BAMC recommendation further states that

> "In its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014."[179]

140. Further, the BAMC recommendation states:

> "Specifically, whether HTLD's Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013 – all of which occurred before Mr. Krischenowski or his associates accessed any confidential information, which occurred from March 2014 through October 2014."[180]

141. In a footnote, the BAMC addressed the allegation concerning access to the data by Ms. Ohlmer, who was alleged by Claimants in Request 16-11 to be the CEO of HTLD:

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[177] See Recommendation of BAMC on Request for Reconsideration 16-11, dated November 16, 2018, p. 10, at https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-bamc-recommendation-request-16nov18-en.pdf.
[178] Id.
[179] Id.
[180] Id., pp. 11-12.

> "The BAMC concludes that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 §8, at Pg. 15) does not support reconsideration *because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD* or resulted in an unfair advantage to HTLD's Application in CPE."[181]

142. The January 2019 Resolution concluded, in particular, that there was no evidence that the Board did not consider the alleged "unfair advantage" HTLD obtained as a result of the Portal Configuration issues, and that there was no evidence the Board discriminated against Claimants. The January 2019 Resolution agreed with the BAMC that Krischenowski's unauthorized access did not affect HTLD's application, including the CPE result.[182] As to allegation concerning Ms. Ohlmer, the Board considered and addressed a rebuttal submission that had been made by Claimants. In the rebuttal submission, Claimants alleged that they were "given no access to essential documents kept by ICANN and are therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC" on these issues.[183] Further, as to Ms. Ohlmer, one of the individuals alleged to have had access to the private data, the rebuttal states:

> "The BAMC ignores that this material information was not considered by the ICANN Board and should, along with the other facts in this matter, have led to the disqualification of HTLD as an applicant. The Recommendation mentions Ms. Ohlmer's unauthorized involvement in a footnote, (i) alleging that Requesters acknowledge that Ms. Ohlmer's prior association with HTLD had ended no later than 17 June 2016, and (ii) concluding that her prior association with HTLD *does not support reconsideration 'because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD* or resulted in an unfair advantage to HTLD's Application in CPE.'
>
> Both the BAMC's allegation and its conclusion are incorrect. First, Requesters' statement that Ms. Ohlmer was listed as CEO in HTLD's application until 17 June 2016 is not an acknowledgment that Ms. Ohlmer's prior association with HTLD had ended by then. Second, *Ms. Ohlmer illegally accessed confidential information at a time when she was CEO of HTLD. Through her access of this confidential information as CEO, the information was automatically provided to HTLD. Indeed, the individual who manages (or managed) HTLD was informed of competitors' trade secrets as from the moment Ms. Ohlmer accessed the confidential information. HTLD acknowledged that she was (i) principally responsible for representing HTLD, (ii) highly involved in the process of*

[181] Id., p. 10, n. 44 (italics added).
[182] January 2019 Resolution, § 3(D)(3).
[183] Rebuttal to the BAMC Recommendation in Reconsideration Request 16-11, dated November 30, 2018, p. 1, at https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-requestor-rebuttal-bamc-recommendation-30nov18-en.pdf.

organizing and garnering support for the .hotel application, and (iii) responsible for the day-to-day business operations of HTLD. The fact that unauthorized access occurred on more than one occasion by different individuals associated to HTLD and that information contained in the applications of direct competitors was targeted, shows that the unauthorized access by HTLD's executives was made willfully and with intent.

. . . .

In any event, given Ms. Ohlmer's position with HTLD at the time of illegal access, it is impossible for her to make an affirmative statement that she did not and would not share the confidential information with HTLD. As a result, it is also impossible for HTLD to confirm that it did not access the confidential information."[184]

143. In response to this rebuttal allegation concerning Ms. Ohlmer, the ICANN Board in its January 2019 Resolution acknowledged that "The Requestors claim that Ms. Ohlmer was CEO of HTLD when she accessed the confidential information of other applicants, and that she had been CEO from the time HTLD submitted HTLD's Application until 23 March 2016." The Board however concludes:

> "The Board finds that this argument does not support reconsideration as the Board did consider Ms. Ohlmer's affiliation with HTLD when it adopted the 2016 Resolutions. Indeed, the Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 notes that: (1) Ms. Ohlmer was an associate of Mr. Krischenowski; (2) Ms. Ohlmer's wholly-owned company acquired the shares that Mr. Krischenowski's wholly-owned company had held in GmbH Berlin (itself a 48.8% minority shareholder of HTLD); and (3) Ms. Ohlmer (like Mr. Krischenowski) "certified to ICANN [org] that [she] would delete or destroy all information obtained, and affirmed that [she] had not used and would not use the information obtained, or convey it to any third party." As the BAMC noted in its Recommendation, Mr. Grabensee affirmed that GmbH Berlin would transfer its ownership interest in HTLD to another company, Afilias plc. Once this transfer occurred, Ms. Ohlmer's company would not have held an ownership interest in HTLD.[185]

144. The Emergency Panelist determines that Claimants have raised "sufficiently serious questions related to the merits" in in relation to the Board's denial of Request 16-11, with respect to the allegations concerning the Portal Configuration issues in Request 16-11. This conclusion is made on the basis of all of the above information, and in view of Claimants' IRP Request claim that ICANN subverted the investigation into HTLD's alleged theft of trade secrets.[186] In particular, Claimants claim that ICANN refused to produce key information underlying its reported conclusions in the investigation; that it violated the duty of transparency by

[184] Id., pp. 3-4 (italics added).
[185] January 2019 Resolution, § 3(D)(3).
[186] Claimants IRP Request, p. 4.

withholding that information; that the Board's action to ignore relevant facts and law was a violation of Bylaws; and further, to extent the BAMC and/or Board failed to have such information before deciding to disregard HTLD's alleged breach, that violated their duty of due diligence upon reasonable investigation, and duty of independent judgment.[187]

145. The Emergency Panelist echoes concerns that were raised initially by the *Despegar* IRP Panel regarding the Portal Configuration issues, where that Panel found that "serious allegations" had been made[188] and referenced Article III(1) of ICANN's Bylaws in effect at that time,[189] but declined to make a finding on those issues, indicating "that it should remain open to be considered at a future IRP should one be commenced in respect of this issue."[190] Since that time, ICANN conducted an internal investigation of the Portal Configuration issues, as noted above; however, the alleged lack of disclosure, as well as certain inconsistencies in the decisions of the BAMC and the Board regarding the persons to whom the confidential information was disclosed and their relationship to, or position with HTLD, as well as ICANN's decision to ultimately rely on a "no harm no foul" rationale when deciding to permit the HTLD application to proceed, all raise sufficiently serious questions related to the merits of whether the Board breached ICANN's Article, Bylaws or other polices and commitments.

146. Further, Claimants have raised sufficiently serious questions in their IRP Request whether ICANN materially misled Claimants and the *Despegar* IRP Panel, which allegedly relied on false and inaccurate material information, as subsequently revealed by the IRP Panel's findings in (and the Board's acceptance of) the *Dot Registry* IRP Declaration.[191] Claimants allege that "the fact that material information was hidden from Claimants and the *Despegar* Panel is a violation of ICANN's obligations to conduct its operations in a transparent [manner]."[192] Claimants consequently seek review whether they were discriminated against in violation of Bylaws, as Claimants allege that the Board addressed alleged violations of its Bylaws in the CPE for *Dot Registry*, but not for Claimants.[193] If (as Claimants allege) ICANN materially

[187] Id., pp. 24-26.
[188] *Despegar* IRP Declaration, ¶ 131.
[189] Article III(1) of ICANN's Bylaws provided that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."
[190] *Despegar* IRP Declaration, ¶ 138.
[191] Claimants IRP Request, pp. 18-21.
[192] Id., p. 20.
[193] Id., pp. 21-24.

misled Claimants and the *Despegar* IRP Panel, as later revealed by the *Dot Registry* IRP Declaration, then it is not a sufficient justification, as asserted by ICANN, that the key difference in relation to the disputed disclosure issues in the *Dot Registry* IRP and *Despegar* IRP cases, respectively, is that the IRP Panel in the *Dot Registry* case ordered ICANN to produce the requested documents, while the IRP Panel in the *Despegar* case did not.[194]

147. (b) Request 18-6: Request 18-6 claimed that ICANN's March 2018 Resolutions are contrary to ICANN commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner. In addition, Request 18-6 claims that the Board failed to offer a meaningful review of Claimants' complaints regarding HTLD's application for .HOTEL. Request 18-6 requests that, unless ICANN cancels HTLD's .HOTEL application, the Board should reverse its decisions in which it (i) accepted the findings in the CPE Process Review Reports; (ii) concluded that no overhaul or change to the CPE process for the current round of the New gTLD Program is necessary; and (iii) declared that the CPE Process Review has been completed. In the event that ICANN does not reverse its decisions, Request 18-6 asks that ICANN organize a hearing on these issues and that, prior to the hearing, ICANN provide full transparency regarding all communications between ICANN, the Board and ICANN's counsel, on the one hand, and the CPE Process Reviewer (FTI), on the other hand, and provide transparency on its consideration of the CPE Process and the CPE Process Review and give access to all material the BAMC and Board considered during its meetings on the CPE Process and the CPE Process Review.

148. On July 18, 2018, the Board denied Request 18-6 in its July 2018 Resolution, concluding that the Board considered all material information and that the Board's March 2018 Resolutions concerning the CPE Process Reviews are consistent with ICANN's mission, commitments, core values, and policies.[195] The Board found that Claimants provided no evidence

[194] ICANN's IRP Response, ¶¶ 42-49. Claimants in their IRP Request claim that "Claimants had explicitly asked for and been denied this information, and the *Despegar* Panel had expressly questioned ICANN about this information at the IRP hearing. Claimants' IRP Request, p. 20. Claimants allege that "the unanimous *Dot Registry* panel required ICANN to turn over all relevant internal correspondence and correspondence with the EIU, which ICANN had denied to the *Despegar* panel had even existed. Id., p. 9. Claimants allege that "[i]It is inexcusable that ICANN did not inform Claimants and the Panel at that time – or since – that it had disclosed such material information to *Dot Registry* and to that IRP Panel. Claimants IRP Request, p. 20.

[195] ICANN Board Resolution 2018.07.18.09, at https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g ("July 2018 Resolution").

demonstrating how the March 2018 Resolutions concerning the CPE Process Review violated ICANN's commitment to fairness, or that the Board's actions were inconsistent with ICANN's commitments to transparency, multi-stakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.[196] In particular, the Board's July 2018 Resolution found that the CPE Process Review satisfied applicable transparency obligations, and that challenges to FTI's methodology and to the scope of the CPE Process Review did not warrant reconsideration.

149. Claimants in their IRP Request claim that (i) ICANN subverted FTI's CPE Process Review[197] and exercised undue influence over both EIU (with respect to EIU's CPE decisions) and FTI (with respect to the CPE Process Review); (ii) ICANN's, EIU's and FTI's communications are critical to this inquiry, but have been kept secret; and (iii) the FTI's report reveals a lack of independence of the EIU, and relevant documents have not been disclosed.[198] Claimants claim the BAMC conducted no independent investigation of its own despite the mandate of the *Dot Registry* decision and the noted failure by FTI to obtain critical evidence from the EIU and ICANN staff.

150. ICANN, on the other hand, responds that the Board's action on Request 18-6 complied with ICANN's Articles, Bylaws and established policies and procedures. ICANN states that while Claimants argue ICANN should have reconsidered Board resolutions concerning the CPE Review because FTI was unable to review the EIU's internal correspondence, Claimants do not challenge any of the Board's (or BAMC's) conclusions in response to Request 18-6. Further, the Board was entitled to accept FTI's conclusion that it had sufficient information for its review.[199]

151. The Emergency Panelist finds, as to Request 18-6, that Claimants have failed to raise "sufficiently serious questions related to the merits." There is insufficient evidence in the record, despite Claimants' assertion that FTI was ICANN's "hand-picked a consulting firm,"

[196] Id.
[197] IRP Request, p. 4.
[198] IRP Request, pp. 12-21.
[199] ICANN's IRP Response, ¶¶ 62-78.

to impugn the independence and integrity of FTI and its methodology and the scope of work in relation to the CPE Review Process. As ICANN's Board indicated in its July 2018 Resolution, "[t]he Board selected FTI because it has 'the requisite skills and expertise to undertake' the CPE Process Review, and relied on FTI to develop an appropriate methodology."[200] Moreover, although EIU refused FTI's request to produce certain categories of documents, the Board found there is no policy or procedure that would require ICANN to reject FTI's CPE Process Review Reports because the EIU did not produce certain internal emails.[201]

152. Rule 11 of the Interim Supplementary Procedures provides in relevant part that "the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment." In view of the evidence submitted in relation to Request 18-6, the Emergency Panelist determines that the Boards decision to accept FTI's CPE Process Review Reports was within the realm of reasonable business judgment.

C. Harm for Which There will be No Adequate Remedy in the Absence of Relief and Balance of Hardships Tipping Decidedly Toward Party Seeking Relief

153. In light of the Emergency Panelist's decision that Claimants have raised sufficiently serious questions related to the merits with respect to the BAMC's recommendation for, and Board's acceptance of, Request 16-11, the Emergency Panelist will assess Claimants requests for interim relief under the remaining two factors of Rule 10 of the Interim Supplementary Procedures. As discussed above, Rule 10 requires that Claimants must established – in addition to (A) likelihood of success on the merits or (B) sufficiently serious questions related to the merits – each of the following two factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

154. The Emergency Panelist will now address each of the Claimants' requests for interim measures while applying these two standards.

[200] July 2018 Resolution, Analysis and Rationale, Section 3.A.2.
[201] Id.

1) Claimants' request that ICANN be required to *not* change the status quo as to the .HOTEL Contention Set during the pendency of this IRP

155. Claimants allege that ICANN proposes to award the .HOTEL gTLD registry agreement to HTLD, thereby eliminating Claimants' applications from contention for award of that contract. Claimants claim that ICANN's threatened action would make this IRP meaningless, and a complete waste of time and money, because Claimants would have no recourse even if they prevail. ICANN will have already awarded the contract, and the .HOTEL gTLD could be operational by HTLD before this IRP concludes. That would leave Claimants with no possible redress.[202]

156. Claimants contend that ICANN shows no respect for unanimous IRP precedent prohibiting ICANN from changing the *status quo* as to any gTLD Contention Set during the pendency of an IRP that could materially affect that Contention Set. ICANN takes this position despite its own Bylaws, which state that prior IRP decisions must be respected by ICANN as binding precedent.[203]

157. Claimants further contend that in all prior and relevant cases, IRP Emergency Panels have held that ICANN could not change the *status quo* as to a Contention Set under such circumstances.[204] In particular, Claimants cite to the interim decisions by emergency panelists in the *Dot Registry, LLC v. ICANN* and *DCA Trust v. ICANN* cases, alleging both involved the

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[202] Claimants IM Request, p. 5.
[203] Claimants' Brief, p. 8.
[204] Id.; see Ex. RELA-5: *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist's Order on Request for Emergency Measures for Protection (Dec. 23, 2014) ("*Dot Registry* Interim Decision") (ordering ICANN to refrain from proceeding with Contention Set resolution, stating that "... the need for interim measures is urgent to prevent the imminent dissipation of substantial rights."; also stating that if ICANN was allowed to proceed with the auction, Dot Registry would potentially suffer an "irrevocable loss" that "would not be compensable by monetary damages."); Ex. RELA-4: *DCA Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (May 7, 2014) ("*DCA* Interim Decision*")* (ordering "ICANN [to] immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same."; "In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review."); Ex. RELA-6: *GCC v. ICANN* , ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (Feb. 12, 2015) ("*GCC* Interim Decision") (ordering ICANN to "refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted"); see also, *Donuts v. ICANN*, ICDR Case No. 01-14-0000-1579, Resolution of Request for Emergency Relief (Nov. 21, 2014) (after forcing Claimant to file a Request for Emergency Relief, ICANN voluntarily agreed to a stay as to three new gTLD applications, in exchange for Claimant withdrawing that Request).

identical situation where ICANN threatened to delegate a TLD, which was subject to a competing applicant's IRP. In both decisions, the panelists required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved. Claimants argue that here is no reason for any different result in this case, and that any different result would violate ICANN's Bylaws, Article 2, §2.3,[205] which requires equal treatment of similarly situated parties.[206]

158. In the *Dot Registry* IRP, the Emergency Panelist stated in relevant part:

> "While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.[207]

159. Claimants allege that ICANN's Bylaws provide that prior IRP decisions must be respected by ICANN as binding precedent. Article 4, §4.3(a)(vi), provides that one of the "Purposes of the IRP" is to

> "Reduce Disputes *by creating precedent* to guide and inform the Board, Officers[ ], Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation."

160. In addition, Article 4, §4.3(i)(ii) provides that: "All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law *and prior relevant IRP decisions*." And furthermore, Article 4, §4.3(v) states (emphasis added):

> "[A]ll IRP decisions … shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law."

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[205] Art. 2, § 2.3(Non-Discriminatory Treatment): "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."
[206] Claimants' Brief, p. 3.
[207] *Dot Registry* Interim Decision, ¶ 54.

161. Claimants contend that ICANN has no justification for ignoring the prior, binding precedents. The Bylaws do not materially differ from those in the prior cases. The facts and Bylaws as to the *Dot Registry* case, in particular, are relevantly virtually identical. Therefore, Claimants state that the Emergency Panelist must order ICANN to stay all action as to the .Hotel Contention Set, until such time as the IRP is resolved.[208]

162. ICANN, on the other hand, claims that Claimants will not suffer irreparable harm if .HOTEL is delegated.[209] ICANN contends that Claimants' argument incorrectly assumes that once a gTLD is contracted for and delegated, the registry agreement (and operation of the gTLD) can never be assigned to another registry operator. However, ICANN states there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a registry agreement is in place or even after a gTLD has been delegated. Rather, ICANN's registry agreements specifically contemplate transition of control of gTLDs, and ICANN has a process for transitioning to a prospective successor.[210] ICANN states it will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP.[211] Even if the IRP Panel determines that ICANN violated its Articles or Bylaws, and the ICANN Board then determines (based upon the Board's review of the IRP Panel's conclusions and recommendations) that .HOTEL should be subject to auction that results in another applicant being awarded the right to operate .HOTEL, ICANN states it would have the right to enter into a registry agreement with a new prevailing party. Emergency relief is unnecessary because any harm to Claimants can be adequately remedied.[212]

163. ICANN contends that Claimants do not submit actual evidence supporting their claim that they will suffer irreparable harm if .HOTEL proceeds to contracting and delegation. Instead, Claimants rely on decisions on requests for interim relief in other IRP proceedings. In addition to those other proceedings being distinguishable, ICANN states the California Superior Court has found that any harm caused by delegation of a gTLD is not irreparable and therefore cannot support a request for interim relief. In 2017, in *DotConnectAfrica Trust v. ICANN*, an applicant

[208] Claimants' Brief, p. 10.
[209] ICANN's Opposition, ¶ 29.
[210] ICANN's Opposition, ¶ 29.
[211] Id., ¶ 30.
[212] Id.

for .AFRICA ("DCA") moved for a preliminary injunction to prevent ICANN from entering into a registry agreement for .AFRICA with a competing applicant.[213] The California Superior Court denied the motion, finding "no potential for irreparable harm" to DCA.[214] The court explained that the "gTLD can be re-[assigned] to DCA in the event DCA prevails."[215] The court further noted that re-assigning gTLDs "is not uncommon and has occurred numerous times," acknowledging ICANN's established procedure for assigning registry agreements.[216]

164. ICANN claims that the same is true here. ICANN states that it will contractually preserve the option of effecting an assignment of .HOTEL to another registry operator pending the outcome of this IRP. Then, if the IRP Panel agrees with Claimants, and the ICANN Board determines (based on its review of the IRP Panel's declaration) that HTLD should not operate .HOTEL, ICANN can effect an assignment of .HOTEL to another registry operator.[217]

165. ICANN claims that neither the *Dot Registry* Interim Decision nor the *DCA* Interim Decision considered the fact that the registry agreements for the gTLDs at issue could be assigned to another registry operator.[218] In addition, the *GCC* Interim Decision, cited by Claimants, is different in a critical respect from the dispute here: in that case, the claimants opposed the existence of the .PERSIANGULF gTLD because "the GCC and its members are extremely sensitive to use of the term 'Persian Gulf' in virtually any context, including its use as a top level domain."[219] Thus, ICANN states the delegation (and "operation" by any entity) of .PERSIANGULF was the harm – not the operation of the gTLD by one applicant rather than another. Here, the delegation of .HOTEL in itself is not the harm; Claimants allege harm related to the identity of the registry operator, but this harm can be adequately remedied through the registry transfer process.

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[213] Ex. RELA-2: Order Denying Plaintiff's Motion for Preliminary Injunction, *DotConnectAfrica Trust v. ICANN*, Case No. BC607494 (Super. Ct. Cal. 3 Feb. 2017) ("*DCA Trust* Superior Court Decision").
[214] Id., p. 4.
[215] Id.
[216] Id. Similarly, ICANN claims that in 2016, the District Court for the Central District of California denied an application to prevent the .WEB contention set from proceeding to "auction [to] award the rights to operate the registry to the winning bidder." Order Denying Plaintiff's Ex Parte Application for Temporary Restraining Order, at Pg. 1, *Ruby Glen, LLC v. ICANN*, Case No. CV 16-5505 PA (C.D. Cal. 26 July 2016), Ex. RELA-3. "[B]ecause the results of the auction could be unwound, Plaintiff ha[d] not met its burden to establish that it will suffer irreparable harm" if the auction proceeded. Id. at p. 4.
[217] ICANN's Opposition, ¶ 33.
[218] See *DCA* Interim Decision, ¶¶ 39-50; *Dot Registry* Interim Decision, ¶¶ 50-52.
[219] *GCC* Interim Decision, ¶ 10.

166. ICANN concludes that while the older IRP interim decisions did not consider whether the harm identified here can be remedied by transferring the registry agreement after delegation, the more recent California Superior Court decision addressed exactly this issue and concluded that there was no irreparable harm under the circumstances. ICANN urges that the Emergency Panelist should do the same here because the same remedy will be available when this IRP concludes: ICANN would be able to terminate the registry agreement with HTLD and enter into a registry agreement with another party, if required by the circumstances.[220]

167. Claimants, in their Reply Brief, emphasize that ICANN's Bylaws require it to respect the prior IRP interim decisions as binding precedent, a key point that ICANN does not address. Claimants have cited the *Dot Registry* Interim Decision and the *DCA* Interim Decision – both involved the identical situation where ICANN threatened to delegate a TLD that was subject to a competing applicant's IRP. In both decisions, the emergency panelist required ICANN to maintain the contention set and not delegate the disputed TLD until the IRP was resolved.[221]

168. Claimants state that the California Superior Court decision denying the preliminary injunction did not consider prior IRP precedents and ICANN's Bylaws in its analysis.[222] In addition, Claimants here, unlike in that case, do not seek damages and seek only injunctive relief. Further, there is no intervener in this case that would suffer any damage. Also, the California court found a public interest in launching the .AFRICA gTLD; such an interest that does not exist as to .HOTEL, as both the .HOTELES and .HOTELSs gTLDs have been delegated for SEVERAL years with zero registrations to-date.[223] Therefore, the California Superior Court preliminary decision cannot override unanimous IRP precedent that binds ICANN and this panel.[224]

169. Claimants allege that reliance on ICANN's Transition Policy is an extremely uncertain and inadequate remedy. Claimants state that while ICANN presents that TLD registry transition is a simple process and that gTLDs are fungible assets (like second-level domain names, e.g., "example.com"), ICANN's argument is fanciful, as clearly evidenced by the complex

[220] ICANN's Opposition, ¶ 36.
[221] Claimants' Reply, pp. 3-4.
[222] Id., p. 4.
[223] Ex. K.
[224]Claimants' Reply, p. 4.

Transition Policy itself, especially with respect to Community TLDs.[225] Claimants contend they would be irreparably harmed if ICANN proceeded to delegate the .HOTEL gTLD to Claimants' competitor, HTLD, particularly as a "community" TLD. HTLD would be permitted to launch .HOTEL and could ruin the market before it can be assigned to another applicant. Claimants argue this is far less speculative than the notion that HTLD would simply assign over the gTLD if Claimants prevail in this IRP. While ICANN states that it "will contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome following the IRP," it has provided no sworn statement to that effect. Moreover, a statement to "preserve the option" is not a promise that ICANN would exercise such option. Claimants state that ICANN cites no precedent for such a clause in any registry agreement, as there is none. ICANN cannot confirm that HTLD would accept such a clause, and cannot confirm that HTLD would abide by such a clause, even if HTLD did accept it.[226] Moreover, Claimants allege there are other technical and business concerns addressed in the Transition Policy, which have no certainty as to outcome. The ICANN Board would need to approve the assignment, which would have to be proposed by HTLD – and neither of those actions can be guaranteed by ICANN. Future registry transition is inherently uncertain, and cannot cure the irreparable harm that is demonstrably likely to result from delegation during pendency of this IRP.[227]

170. Claimants argue that ICANN does not address what would happen to all of the "hotel community" members who have purchased .HOTEL domains by the time of any proposed assignment and put them to use (e.g., for websites, email). The Transition Policy would require the successor registry operator to accept those legacy registrations. That would constitute certain, irreparable harm to the successor, who might have sold any or all of those registrations to different parties, for higher prices and/or longer registration terms, and without restrictions as to use. Claimants allege the successor would be forced to accept the legacy customers and

[225] Id., p. 5; Ex. RE-5 (Registry Transition Processes).
[226] Id., p. 6.
[227] Id., p. pp. 7-8. Claimants claim ICANN has recently been involved in an analogous dispute over the proposed assignment of the .ORG gTLD, operated on behalf of the non-profit organizational community. The non-profit operator sought to assign the gTLD to a private equity firm run by domain industry veterans (including a former ICANN CEO). Many in the non-profit community objected to the sale, and found support from the California Attorney General. That pressure caused ICANN to recently reject the assignment. Ex. I (ICANN's Board Resolution on the matter, including analysis of the factors considered in registry transition proposal). Claimants contend this is real evidence that ICANN cannot guarantee a smooth registry transition in this matter.

policies of HTLD.[228] Moreover, a community gTLD must operate with defined "community restrictions" intended to limit usage to the community.[229] If the disputed .HOTEL gTLD launches with restrictions, that is likely to create market stigma, poisoning the gTLD.[230] This is allegedly what has happened with several restricted gTLDs to-date, as their registry operators realized they needed to open their restricted registries to survive.[231]

171. Claimants allege, as to balance of hardships, that neither ICANN nor any third party has shown any harm from maintaining the *status quo*. ICANN refers to the so-called "hotel community" purportedly represented by HTLD and the alleged harm to HTLD and that community.[232] However, Claimants claim that ICANN provides no evidence as to any urgency or other potential hardship in this matter, which ICANN itself unilaterally delayed for years while it internally reviewed and reported on the CPE. This matter has been active since 2012 when Claimants filed their applications and each paid US$ 185,000 to ICANN to process those applications. Claimants are far more prejudiced than anyone else, as their respective investments (including consultants' fees, executive time and other resources) remain idle while this matter continues.[233] Claimants also allege that ICANN delegated the .HOTELES (Spanish/plural) gTLD in 2015, and it has not even launched yet. Similarly, ICANN delegated the .HOTELS (plural) gTLD in 2017, and it has also not launched.[234] Claimants contend these facts prove there are two available, nearly identical gTLDs already delegated by ICANN, with market demand apparently so weak that they have not been launched for any use at all.[235] Claimants also assert that HTLD has had an opportunity to attempt to intervene in this matter to aver that its rights might be prejudiced, but has done nothing. At best, ICANN is speculating without any evidence, and contrary to evidence presented by Claimants.

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[228] Id., p. 7.
[229] According to Claimants, this is one of the elements of the CPE that is at the core of this IRP case. Claimants argue that there is no legitimate hotel community, and instead .HOTEL domains should be made available to anyone without restriction – just like hundreds of other top-level domains including .HOTELES, .TRAVEL, .VOYAGE, .VIAJES, .VACATIONS, .TOURS, .HOLIDAY, .THEATER and .THEATRE.
[230] Claimants' Reply Brief, p. 7.
[231] Ex. J (2018 industry press article regarding .TRAVEL gTLD).
[232] Claimants' Reply Brief, p. 8 (citing ICANN's Opposition at ¶¶ 3, 5).
[233] Claimants' Reply Brief, pp. 8-9.
[234] Ex. K.
[235] Claimants' Reply Brief, p. 9.

172. In sum, Claimants contend that the balance of hardships weighs against ICANN, as Claimants would suffer demonstrable and irreparable market harm, as per the evidence Claimants have presented. Registry transition would be an uncertain and insufficient remedy, which ICANN has not guaranteed and cannot promise. Neither ICANN nor any other party has shown any evidence of potential harm from the *status quo*. Therefore, Claimants request that the Emergency Panelist must follow unanimous, binding IRP precedents and order ICANN to preserve that *status quo* until this IRP case is resolved.

173. At the June 3rd Hearing, Claimants added as to the issue of "harm," that if ICANN delegated .HOTEL to Claimants' competitor, "that harm is obvious." Claimants additionally referred to ICANN's Transition Policy, alleging it is complicated and that many factors go into the transition analysis; the ICANN Board resolution with respect to the potential transaction of .ORG from one registry operator to another, reflecting the complexity and uncertainty involved;[236] and concerns that there is no declaration from ICANN or Afilias as to any language that might be included in a registry contract if delegation occurred; and no declaration from Afilias alleging any harm.

174. Decision: The Emergency Panelist finds that this issue presents a close call. Claimants have cited to prior IRP precedents granting interim relief to maintain the *status quo* and involving similar facts and related concerns (i.e., ICANN moving to delegate a gTLD that was subject to a competing applicant's IRP). Claimants argue that these prior IRP cases must be respected as binding precedent. ICANN has attempted to distinguish those IRP cases and cited to a California Superior Court case denying a request for injunctive relief to enjoin ICANN from delegating the rights to the .AFRICA gTLD, in another case involving a competing applicant.

175. The Emergency Panelist observes that each of these prior decisions was decided under standards the differ from the express standard now codified in Rule 10 of the Interim Preliminary Procedures, discussed above. The prior IRP cases, although raising similar concerns to those now faced by Claimants and providing "persuasive precedent" in terms of their analysis of certain policies, interests and issues, relied on prior versions of the ICANN Bylaws, before the standard set forth in Rule 10 of the Supplementary Procedures was in effect.

[236] Ex. I (ICANN's Board Resolution on the matter, including analysis of the factors considered in registry transition proposal).

They also relied on the ICDR Rules, Article 6 (Emergency Measures of Protection) and general arbitration practice to identify standards for granting interim relief. While the ICDR Rules remain in effect, the Interim Supplementary Procedures provide, in Rule 2, that "[i]n the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern."

176. The California Superior Court did not reference ICANN's Bylaws and relied on standards drawn from California court precedent for the issuance of preliminary injunctions. One prong of that analysis was "likelihood of success on the merits"; however, the court did not include or consider the alternative standard of Rule 10, "sufficiently serious questions related to the merits," on which Claimants rely in this IRP. Moreover, the court found the plaintiff was unlikely to prevail on the merits in that case because, in accordance with the terms of its gTLD application – which included a covenant barring all court-based lawsuits against ICANN arising from ICANN's evaluation of new gTLD applications – the plaintiff was not supposed to be before the court in the first place.[237] This merits-based analysis by the court had nothing to do with any underlying claims by the plaintiff about whether or not the action or failure to act by ICANN Board might be in breach of ICANN's Article, Bylaws or other policies and commitments.

177. The Supplementary Procedures, Rule 10, which applies to Claimants' request for interim measures in this case, has articulated specific standards that supersede criteria considered by the panelists and the judge in those prior cases. Rule 10 requires that Claimants must establish *all* of the following factors:

> (i) A harm for which there will be no adequate remedy in the absence of such relief;
>
> (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
>
> (iii) A balance of hardships tipping decidedly toward the party seeking relief.

178. The Emergency Panelist has already addressed factor (ii) above ("finding there were sufficiently serious questions related to the merits), leaving factors (i) and (iii) to be considered here. In view of all of the submissions, evidence, and arguments made in this case, and in view

[237] *DCA Trust* Superior Court Decision, p. 6.

of the finding above that there are sufficiently serious questions related to the merits, the Emergency Panelist determines that Claimants have established "[a] harm for which there will be no adequate remedy in the absence of such relief" and that the "balance of hardships tip[] decidedly toward [Claimants] seeking relief."

179. Addressing the third (iii) factor first, given the long delays in this case that have already occurred (some due to processes convened by ICANN, which ICANN has acknowledged) and ICANN's further acknowledgement that the only harm to ICANN is "to not be able to continue its processes,"[238] the Emergency Panelist finds the balance of hardships tip decidedly toward Claimants. There is no evidence before the Emergency Panelist of harm to a "hotel community" caused by the additional delay in delegating .HOTEL until this IRP is decided. In addition, the non-party, HTLD (now Afilias), has not sought to intervene in this case (or submit a declaration) to assert that any of its rights might be prejudiced. Further, there is no evidence of a public interest in favor of delegation, as was found by the California Superior Court in the case involving the delegation of the .AFRICA gTLD. As stated well by the Emergency Panelist in the *Dot Registry* IRP:

> "While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012. ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.[239]

180. The closer question relates to factor (i), "[a] harm for which there will be no adequate remedy in the absence of such relief." ICANN has alleged that there is no technological, legal, or other barrier preventing the transfer of a registry agreement from one registry operator to another after a gTLD has been delegated; that it can contractually preserve the option of cancelling the registry agreement with HTLD pending the outcome this IRP; and that Claimants have not submitted sufficient evidence supporting their claim that they face the requisite harm if .HOTEL proceeds to contracting and delegation.

[238] June 3rd Hearing, audio transcript (1:01:45 – 1:02:20).
[239] *Dot Registry* Interim Decision, ¶ 54.

181. The Emergency Panelist determines that Claimants have provided sufficient evidence, in part in view of the prior IRP interim decisions decided on similar issues, that the harm Claimants faces is one for which there will be no adequate remedy in the absence of such relief. Claimants have raised concerns as to the impact on the market for .HOTEL domain names if it is initially delegated as a "community" gTLD; the legacy concerns associated with domain name registrations subject to use restrictions intended to limit use to a community and potential conflicts with domain names registered by a new operator; and transition concerns involving uncertainty and the complexity of attempting to effectuate the transition from one registry operator to another, particularly if the incumbent registry operator is being forced to involuntarily relinquish its operation of the .HOTEL gTLD to a competitor. Although the Emergency Panelist does not question ICANN's undertaking that it would seek to include a new contract clause in its registry agreement with Afilias requiring transfer in the specific situation where a decision in this IRP is issued in favor of Claimants, there is no specific language as to the scope of this clause in evidence and there are uncertainties associated with Afilias willingness (or unwillingness) to agree to such a restriction. Concerns between potential registry operators as competitors accentuate all of these points.

182. For all of the above reasons, and in view of all of the matters considered in this Decision, the Emergency Panelist decides to grant Claimants' request that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set (i.e., do not enter into a registry contract with Afilias and do not enter into the delegation phase for .HOTEL) during the pendency of this IRP.[240]

183. In determining that interim relief is appropriate at this time with respect to maintaining the *status quo* as to the .HOTEL Contention Set, the Emergency Panelist makes clear that this decision does not finally resolve this issue. As discussed in paragraph 78 above, the decision of the Emergency Panelist concerning interim relief on this point ca be reconsidered, modified or vacated by the IRP Panel, and does not resolve the merits to be fully addressed by the Panel.

[240] The Emergency Panelist notes that, to the extent it is relevant to distinguish between prohibitory and mandatory injunctions and the corresponding degree of scrutiny for each, this order to maintain the *status quo* is prohibitory. Cf. Ex. RELA-1: Emergency Panelist's Decision on Claimant's Request for Interim Measures of Protection, *Namecheap, Inc. v. ICANN*, ICDR Case No. 01-20-0000-6787 (Mar. 20, 2020), ¶ 97.

2) Claimants' request that ICANN be required to preserve, and direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP

184. Claimants request an order requiring ICANN to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP. Although Claimants indicated that they would "shortly will make a detailed request to ICANN pursuant to its so-called Document Disclosure Policy ("DIDP"), and incorporate[] that DIDP request by reference herein," no such DIDP request was submitted to the Emergency Panelist.[241]

185. Claimants have provided in their IM Request some detailed information about the documents sought and indicate that many of those categories of documents were required to be disclosed by ICANN to the *Dot Registry* IRP panel, even after ICANN's alleged repeated denial as to the existence of some of them.[242] Claimants contend they are entitled to a preservation order so that the IRP Panel in this case will have the same documents available to it from ICANN, the EIU and FTI, as the IRP panel forced ICANN to disclose in the *Dot Registry* IRP case involving nearly identical facts, parties and documents. Claimants also seek additional documents from HTLD and Afilias in this matter, that were not relevant in the *Dot Registry* IRP case, and thus seek a preservation order as to those parties as well.[243]

186. Claimants contend that such an order is needed; otherwise, there would be no way for Claimants to have necessary documents that could be destroyed before this matter proceeds to discovery and adjudication. Claimants assert that ICANN offers no reasoning against imposition of such an order, but instead claims that it might be ineffective for various reasons. To the extent ICANN claims such documents are not relevant, Claimants vigorously dispute this claim and again refer to the *Dot Registry* IRP case, where such documents were allegedly hidden by ICANN, but the IRP panel forced their disclosure and found them to be relevant. Claimants and IRP panel in this case must have available all of the pertinent documents already produced in that highly analogous case involving many of the very same core issues.[244]

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[241] Claimants' IM Request, pp. 12-13.
[242] Claimants' Brief, p. 11.
[243] Id., p. 12.
[244] Claimants' Reply, pp. 16-17.

187. ICANN states that it will comply with its obligations to preserve documents in its possession, custody, or control.[245] ICANN contends, however, that Claimants' requests are more properly raised as discovery requests during the course of the main IRP proceedings, not as a request for interim relief. The Interim Supplementary Procedures provide for certain types of document discovery, and ICANN states that Claimants will have a full opportunity to request documents during the course of the IRP; they do not need interim relief for this purpose.[246]

188. During the hearing on June 3rd, counsel for ICANN, as noted above, provided an undertaking that he had already sent letters to the EIU and FTI requesting that they preserve relevant documents related to this IRP. The Emergency Panelist requested that ICANN supply copies of these letters, and on June 4, 2020, ICANN submitted copies of the letters, each dated May 22, 2020. In the letter to EIU, ICANN asked EIU "to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application and relating to any gTLD applications for .HOTEL." In the letter to FTI, ICANN "instruct[ed] FTI to retain any notes, drafts, and other work product in its possession, custody, or control relating to the Community Priority Evaluation ("CPE") of HTLD's .HOTEL application, the CPE Process Review conducted by FTI, and any gTLD applications for .HOTEL.

189. ICANN also indicated, however, that its contractual relationship with the EIU does not give ICANN control over documents in the EIU's possession, and the EIU was only required to retain documents for five years. The EIU completed the HTLD CPE Evaluation more than five years before Claimants initiated this IRP.[247] Further, ICANN states that Afilias and HTLD are third parties with no duty to ICANN to preserve or provide documents. ICANN lacks the "right, authority, or practical ability to obtain…documents" from them or force them to preserve material.[248] ICANN notes that Claimants offered to "propose a list of specific categories of documents" that they would like preserved, but (despite having raised this issue in the IRP Request more than five months ago) have not identified those categories.[249]

[245] ICANN's Opposition, ¶ 47.
[246] Id.
[247] Id., ¶¶ 47-48.
[248] Id., ¶ 61.
[249] Id., ¶ 46.

190. Although Claimants cite procedural orders from prior IRPs in support of this request for emergency measures, ICANN claims those orders concerned ICANN's production of documents – they were not preservation orders, did not grant interim relief, and did not extend to third parties. Finally, ICANN contends that Claimants do not even attempt to argue that the balance of hardships tips decidedly in their favor. Claimants must establish this element to obtain interim relief, and they have not even tried to do so.[250]

191. In view of all of the above circumstances, including (i) ICANN's undertaking that it will comply with its obligations to preserve documents in its possession, custody, or control; (ii) ICANN's letters to the EIU and FTI, (iii) that Afilias and HTLD are non-parties to this IRP, and (iv) that Claimants did not provide a copy of any DIDP request, the Emergency Panelist determines that Claimants have failed to establish "[a] harm for which there will be no adequate remedy in the absence of such relief" and that the "balance of hardships" tip decidedly toward Claimants.

192. In determining that interim relief is not appropriate at this time with respect to the requested interim order to preserve documents, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel.

193. For all of these reasons, Claimants' request for interim relief that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IR, is hereby denied.

3) Claimants' request that ICANN be required to appoint an Ombudsman to review the BAMC's decisions in RFRs 16-11 and 18-6

194. This request was addressed above in Part VI, Sections B(1)[5] and [6].

4) Claimants' request that ICANN be required to appoint and train a Standing Panel of at least seven members as defined in the Bylaws and Interim Supplementary Procedures, from which an IRP Panel shall be selected and to which Claimants might appeal, *en banc*, any IRP Panel decision per Rule 14 of the Interim Supplementary Procedures

[250] Id., ¶¶ 49-51.

195. Claimants contend that ICANN has continued to violate its Bylaws by failing to make any real progress to adopt an IRP Standing Panel of specially trained panelists, chosen with broad community input – for some eight years – and through several iterations of ICANN Bylaws and a prior IRP declaration requiring them to do so.[251]

196. Claimants state that ICANN's Bylaws expressly have required the creation of a Standing Panel since 2013,[252] as follows:

> "There shall be an omnibus standing panel of at least seven members (the 'Standing Panel') each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN's Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet's unique identifiers and other appropriate training…."[253]

197. Claimants assert that ICANN's own Interim Supplementary Procedures, Rule 3 (since 2016) begins "[t]he IRP Panel will comprise three panelists selected from the Standing Panel." Moreover, Rule 10 provides that the Emergency Panel shall be selected from the Standing Panel, and Rule 14 provides for the right of appeal of IRP panel decisions to the Standing Panel, *en banc*.

198. Claimants contend that they are deprived of these important procedural rights because of ICANN's willful inaction, refusing to create a Standing Panel for some eight years now, and refusing to make much progress towards even beginning to establish one.[254] Claimants argue this is particularly outrageous because ICANN was admonished by a previous IRP Panel for exactly this same reason, more than five years ago, in the *DCA Trust v. ICANN*[255] case:

> "29. First, the Panel is of the view that this IRP could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel [with] "knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

[251] Claimants IM Request, p. 10.
[252] Id.
[253] ICANN Bylaws dated April 11, 2013, Art. IV, § 3.6.
[254] Id., p. 11.
[255] Decision on Interim Measures of Protection, *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13, dated May 12, 2014.

> 30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust."

199. Claimants contend ICANN has "thumbed its nose" at the *DCA Trust* IRP decision for five years, despite the purposes of the IRP to provide binding decisions and guide ICANN actions to remedy Bylaws violations.[256] Claimants request that ICANN be deemed to have violated its Bylaws by failing to implement the Standing Panel despite a long passage of time; indeed, by failing to make any substantial progress over that time. Claimants further request that such a Standing Panel be implemented to adjudicate this case, and to provide Claimants their critical right to appeal – per the Bylaws – that they otherwise will be deprived of for so long as ICANN refuses to implement the Standing Panel.[257]

200. Claimants contend it has also directly benefited ICANN's finances, saving perhaps more than US$ 1 million per year on fees paid by IRP claimants, which ICANN should be paying to maintain a Standing Panel, as clearly required by its Bylaws since 2013.[258] Claimants contend that it harms them to not have the benefit of appointments from a Standing Panel with the specialized training, resultant expertise, and community backing that the Bylaws required ICANN to provide to all IRP claimants, more than six years ago. And Claimants will be denied the basic *en banc* appeal mechanism provided by ICANN's Interim Supplementary Rules, which ICANN purportedly implemented more than three years ago. Claimants allege that ICANN has violated its Bylaws by taking so long to implement the Standing Panel, causing direct harm to Claimants and to all parties who would seek independent review of ICANN conduct.[259] At the June 3rd Hearing, Claimants indicated that they are being denied a trained panel selected by community, denied an option to have a mediator from the IRP Standing Panel, and denied rights of an *en banc* appeal, probably most important right; and that Claimants are forced to pay fees up front, whereas the Bylaws require that IRP Panel should be in place and paid by ICANN.

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[256] Id.
[257] Claimants' Brief, p. 3.
[258] Claimants' IM Request, p. 12.
[259] Claimants' IM Request, p. 12.

201. ICANN contends that the establishment of the Standing Panel is a process that is driven, in the first instance, by ICANN's "community," and ICANN does not control their progress.[260] ICANN contends that Claimants argument of harm is speculative and premature: the panelists for this IRP have not been selected; and pursuant to the Bylaws, Claimants may nominate one of the panelists, and that panelist will be involved in selecting (along with the panelist that ICANN chooses) the chair.[261] Claimants may select a panelist with as much specialized experience and expertise as they wish, and this process is set forth in the Bylaws, which were subject to public comment. [262]

202. ICANN contends that as to Claimants' purported right to an appeal mechanism, the concern is premature and not appropriate for emergency relief.[263] ICANN states that Claimants can only possibly be harmed if this IRP concludes; if the IRP Panel (which has not yet been selected) makes a final determination against Claimants; Claimants decide to appeal the decision; and, at that point, the Standing Panel has not been established. Until then, there is no risk of harm – much less irreparable harm – associated with this argument.[264]

203. ICANN states that even if it were appropriate to order ICANN to implement the Standing Panel, ICANN cannot "snap its proverbial fingers and do this."[265] The establishment of the Standing Panel depends on contributions and work from across ICANN's community, including the IRP Implementation Oversight Team ("IRP-IOT"), representatives of ICANN's Supporting Organizations ("SOs") and Advisory Committees ("ACs"), and others. ICANN cannot unilaterally complete these processes. An order that ICANN do so before this IRP may proceed could halt the IRP for six months or more, while the community, ICANN, and the Board work to complete the processes.[266] The process for establishing a Standing Panel is set forth in the Bylaws. The Bylaws require ICANN to work with SOs, ACs, and the Board to identify, solicit, and vet applications for Standing Panel membership. This process has begun: on March 31, 2020, ICANN opened a call for expressions of interest for panelists to serve on the Standing

[260] ICANN's Opposition, ¶ 42.
[261] Id., ¶ 43.
[262] Id.
[263] Id, ¶ 44.
[264] Id., ¶ 44.
[265] ICANN's Opposition, ¶ 54.
[266] Id.

Panel and published a "Summary of Comments Received from Supporting Organizations and Advisory Committees on qualifications for Standing Panelists, and Next Steps."[267] Once they are received, SOs and ACs – not ICANN's Staff or Board – are responsible for nominating a slate of Standing Panel members, which the ICANN Board will then consider. ICANN cannot mandate the speed at which the community process will occur.[268] If the Board has questions on that proposal, it will need time to seek clarification. The selected Standing Panel members will also need training.[269]

204. ICANN argues that with respect to Claimants reference to the 2014 *DCA Trust* IRP – which stated that "[h]ad ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014" – this was not a determination that ICANN violated its Articles, Bylaws, policies or procedures, and it does not apply to the current circumstances because the process for selecting a Standing Panel changed when ICANN enacted its new Bylaws in October 2016. Under the current Bylaws,[270] ICANN does not have the power to complete the Standing Panel process on its own because of the roles of the SOs and ACs. Since the Bylaws were amended to provide for a process for establishing the Standing Panel, ICANN (with the SOs and ACs) has worked toward establishing a Standing Panel, including most recently by opening a call for expressions of interest for Standing Panel membership. Accordingly, the *DCA Trust* decision should not provide guidance, and is not binding precedent here.[271]

205. Claimant in their Reply Brief claim that ICANN admits that implementation of the Standing Panel will take no more than six to twelve months longer than if it does not implement the Standing Panel. Claimants aver that this is a minimal, additional wait period given there is no evidence of ongoing harm to anyone from the delay in processing the .HOTEL applications submitted in 2012. Moreover, Claimants argue that ICANN offers no excuse for its willful failure to implement the Standing Panel, which it required itself to implement – at behest of its

[267] Expressions of Interest were due in July 2020, but the deadline has been extended to the end of August 2020.
[268] Id., ¶ 55.
[269] Id., ¶ 56.
[270] Bylaws, Art. 4, § 4.3(j).
[271] Id., ¶¶ 57-58.

broader Community – more than six years ago. ICANN offers no evidence of any effort to implement its Bylaws in that respect prior to March 31, 2020.[272]

206. Claimants contend that ICANN falsely claims the implementation of the Standing Panel is beyond its control. Claimants state ICANN controls the work of its constituent bodies, and has control over those bodies' staff support and budgets, and regularly imposes timelines on work.[273] There is no reason why ICANN could not prioritize the IRP-IOT work with more staffing and a Board-requested timeline. Claimants argue that it is not important to ICANN, especially since ICANN benefits from bottom line benefits from the *status quo* – claimants paying hundreds of thousands of dollars in fees that ICANN has promised in its Bylaws to pay, for more than six years. Claimants argue that neither Claimants nor the Emergency Panelist, nor the broader ICANN Community, can have confidence that ICANN will fulfill its Bylaws obligations with any diligence, unless ordered to do so.[274] ICANN says that the process for selecting the Standing Panel changed in 2016; however, that does not excuse their inaction up to that date, or since. Claimants allege ICANN has provided no evidence of any real effort to appoint a Standing Panel, under any process, until just two months ago. Claimants request that ICANN needs a clear order to implement the safeguards guaranteed by Bylaws to these Claimants and to the entire ICANN community. Only then can this dispute be resolved fairly, in accord with ICANN's 2013 Bylaws. Only then will Claimants have their ICANN-given right to a specially trained Standing Panel, including Claimants' right to *en banc* appeal of any decision of the panel.

207. The Emergency Panelist finds that Claimants have raised serious concerns about the delays associated with implementation of the Standing Panel, first recognized by the Emergency Panelist in the *DCA Trust v. ICANN* case. ICANN's Bylaws from 2013, as noted above, provide that "[t]here shall be an omnibus standing panel of at least seven members (the 'Standing Panel') each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration." Although this Bylaw is expressed in the future tense ("*there shall be*"), more than seven years have passed since enactment of that Bylaw.

[272] Claimants' Reply Brief, p. 13.
[273] Id., pp. 13-14.
[274] Id.

Moreover, ICANN's October 2016 Bylaws, referenced by ICANN above, provide identical language in Article 4, § 4.3(j)(i), and more than three years have passed since the enactment of the 2016 Bylaws. These delays raise the prospect that ICANN, by not moving forward for such a long period, has risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws.

208. Claimants have also pointed to important procedural rights, including in particular the right to an appeal before an *en banc* panel comprised of members of the Standing Panel, as set forth in the Interim Supplementary Procedures, Rule 14, and the Bylaws, Article 4, §4.3(x)(i).[275] Moreover, Claimants have pointed to the costs imposed on Claimants and on other claimants, given ICANN's position that it does not pay for IRP panelist fees and the ICDR's fees when the **S**tanding Panel has not yet been established. As to this last point, the Emergency Panelist has addressed separately Claimants' request that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists in Section VI.C(6) below, noting that ICANN has now changed its position and has committed to pay IRP panelist and emergency panelist fees, in accordance with the Bylaws, Article 4, § 4.3(r).[276]

209. Even in view of the legitimate concerns raised above, the Emergency Panelist nonetheless finds that Claimants' interim relief request – that ICANN be required to appoint immediately the Standing Panel – is premature. As noted by ICANN, Claimants, through the appointment process for the IRP panel in this case, have the opportunity to nominate a panelist with the relevant expertise, and ICANN can do the same. Accordingly, on the present record, Claimants have limited, if any, immediate risk of harm during the course of this IRP.

210. Moreover, the formal process for appointing the IRP Standing Panel is now underway with the solicitation of expressions of interest for panel members. Thus, the risk of harm to Claimants ("for which there will be no adequate remedy in the absence of such relief") – which is *not* zero – is dependent upon not only (i) the assumption that ICANN's will not continue with the new-

[275] Rule 14 of the Interim Supplementary Procedures provides in relevant part: "An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting *en banc* within 60 days of the issuance of such decision. The *en banc* STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard…."

[276] Art. 4, § 4.3(r) provides that: "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members".

found momentum to get the Standing Panel constituted, but also on (ii) the possibility that the IRP Panel in this case makes a final determination *against* Claimants, that Claimants decide to appeal the decision; and that, at that point, the Standing Panel has not yet been established. Given the process involved in constituting the Standing Panel, including involvement of committees and the ICANN community, as described by ICANN above, the balance of hardships, on the whole and as of the time of this Decision, do not tip decidedly toward Claimants on this request.

211. In determining that interim relief is not appropriate at this time with respect to the appointment of the Standing Panel, the Emergency Panelist makes clear that this decision does not finally resolve this issue, which can be fully addressed by the IRP Panel. The Emergency Panelist leaves Claimants to reassert this relief in the main IRP proceedings, in order to preserve rights under the Bylaws to an appeal to the Standing Panel, sitting *en banc,* should Claimants need (and wish) to do so.

212. For all of these reasons, Claimants request for interim relief that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.

5) Claimants request that ICANN be required to adopt final Rules of Procedure

213. Claimants contend that ICANN has failed to adopt final IRP rules of procedure – for some six years – despite the Bylaws that have clearly required ICANN to do so; instead, Claimants argue that "we have incomplete, improper 'Interim' rules in place for more than three years now, with no apparent timeline or plan to complete the actual Rules."[277] Claimants state that ICANN has failed to come close to finalizing the Interim Supplementary Rules imposed more than three years ago, promised by the Bylaws six years ago. That failure in adopting final rules, which should have been a priority for ICANN, likely will cause much to be argued by the parties and decided by the Panel – which should have been the focus of ICANN-driven community consensus, and set in the rules by now.[278]

214. ICANN contends that just as in the case of the Standing Panel, the development of updated procedural rules is a process that is driven by ICANN's community and ICANN does not

[277] Claimants' IM Request, p. 10.
[278] Id., pp. 11-12.

control the progress.[279] Further, the Bylaws specifically contemplate that, while these community driven processes move forward, there are operative rules that will govern this IRP proceeding – the ICDR's International Arbitration Rules (which will continue to control once updated procedures are implemented), the Interim Supplementary Procedures, which apply in this case and about which the Claimants make no complaints, and the Bylaws provisions for selecting panelists in the absence of a Standing Panel. Claimants have not even argued that they will suffer irreparable harm if the Interim Supplementary Procedures are used, just as they are being used in other IRPs currently pending.[280]

215. ICANN argues that Claimants' request that the IRP be delayed until ICANN has finalized the procedures rules is unreasonable. ICANN has already adopted interim procedures – the Interim Supplementary Procedures – that govern this proceeding, and Claimants have used those procedures, as have claimants in two other IRPs that are currently proceeding. The Bylaws delegate responsibility for developing updated procedures to the IRP-IOT "comprised of members of the global Internet community."[281] As Claimants know (because Claimants' counsel is on the IRP-IOT), the IRP-IOT is actively working to finalize updated procedures, but was stalled because the membership was unable to commit the necessary time. The ICANN Board, when it was clear that the IRP-IOT was stalled, coordinated with the ICANN community and re-comprised the IRP-IOT so that updated procedures can be finalized. The re-comprised IRP-IOT is meeting regularly. Additionally, consistent with the Bylaws' commitment to seeking broad, informed participation from the public, the IRP-IOT has invited multiple rounds of public comment in the course of developing updated procedures, and further public comment will be needed prior to Board consideration of a finalized set of procedures.[282] Ordering ICANN to complete these processes before the IRP proceeds will pause the IRP for an extended time.

216. The Emergency Panelist, having reviewed the arguments present by the parties, finds that Claimants have failed to establish "[a] harm for which there will be no adequate remedy in the absence of such relief" and the a "balance of hardships tipping decidedly toward [Claimants] seeking relief." Claimants have provided no evidence, nor argument, to suggest that they are

[279] ICANN's Opposition, ¶ 42.
[280] Id., ¶ 42.
[281] ICANN Opposition, ¶ 59.
[282] Id.

harmed by having to proceed in this case under the Interim Supplementary Procedures. For all of these reasons, Claimants' request for interim relief that ICANN be ordered to adopt final rules of procedure is denied.

6) Claimants request that ICANN be required to pay all costs of the Emergency Panelist and IRP Panelists

217. Claimants IM Request includes a demand that ICANN be required to pay all of the costs of the Emergency Panelist in this IRP, and the costs of the other IRP panelists to be appointed in this matter, because this approach is required by ICANN's Bylaws. In particular, the Bylaws, Article 4, § 4.3(r), provide that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members."

218. Claimants allege that "ICANN has intentionally refused to implement the Standing Panel, as it then would be required to pay millions of dollars in fees annually to the Standing Panel members, much of which is paid by Claimants to the ICDR now – and for the past six-plus years since the Standing Panel was to be implemented."[283] Claimants argue ICANN cannot be allowed to ignore its Bylaws and concomitant financial obligations for so long and at such great cost to the broader community and to Claimants.[284] In particular, Claimants contend there is no basis for ICDR to require Claimants to pay 100% of the Emergency Panel fees, rather than an equal split of Emergency Panel fees, as is the case for the other IRP panelist fees. Claimants state the Emergency Panelist has the ability to apportion all fees to-date to ICANN, which is in accord with the Bylaws, so that costs are placed where ICANN's Bylaws require them to be placed – with ICANN.[285]

219. ICANN in its Opposition Brief initially contended that Claimants' request – that ICANN be required to pay Claimants' portion of IRP and panelist fees now, rather than allow the IRP Panel to apportion fees at the conclusion of the IRP – is by definition not irreparable harm. ICANN states Claimants' demand will be redressed by the IRP Panel in conjunction with its final award, where the Panel may allocate fees based on the outcome of the IRP.[286]

[283] Claimants' Brief, p. 20.
[284] Id.
[285] Claimants' Reply, p. 16.
[286] ICANN's Opposition, ¶ 45.

220. ICANN in its letter of June 11, 2020 to the Emergency Panelist subsequently amended its position on these issues. In its letter, ICANN stated as follows:

> "In light of your question during the hearing, ICANN has further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016. As a result, ICANN has decided to revise its response to your question as follows: ICANN will pay 100% of IRP panelists' deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel. Although ICANN maintains that this issue is not properly raised in a request for interim relief (because there is an adequate remedy for any harm through the IRP Panel's re-apportionment of costs at the conclusion of the proceeding (see Bylaws Art. 4, § 4.3(p)(i))), ICANN has decided to reimburse Claimants … for the Emergency Panelist's initial deposit. Additionally, ICANN will bear 100% of the full Panel's fees, when the Panel is selected. We note, however, that apportionment of these fees may be adjusted by the IRP Panel pursuant to Section 4.3(r), which provides: "the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.
>
> We understand that the only other costs that Claimants have paid to date is the filing fee charged by the ICDR to commence an IRP. ICANN does not interpret Bylaws Section 4.3(r) to require ICANN to pay the ICDR's filing fees. As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel."

221. On June 16, 2020, Claimants submitted an email in which they responded to ICANN's June 11th letter and stated their position on the issue of the IRP administrative costs. Claimants indicated they appreciated ICANN's revised position to pay 100% of IRP panelists deposits upon appointment, including those of the Emergency Panelist and members of the full IRP Panel. However, Claimants also state in relevant part that:

> "ICANN must also pay the ICDR filing fees. The Bylaws require ICANN to pay all administrative costs of the IRP. So there is no justification for forcing claimants to pay a … filing fee for ICDR administrative costs. We ask that ICANN reconsider and explain why it feels justified in forcing claimants to make that payment, else also reimburse Claimants in this case their ICDR filing fee….
>
> Also, what is ICANN's position as to past ICDR fees paid by claimants since enactment of the Bylaws re the Standing Panel, including some of these Claimants? By ICANN's own reasoning (at last, and at least), all of those fees also should be reimbursed by ICANN, including [amount omitted] to the claimants in the previous .Hotel IRP (*Despegar*, including these Claimants)."

222. On June 18, 2020, ICANN sent a letter to Claimant, while copying the Emergency Panelist, in which ICANN responded to the questions in Claimant's email of June 16th concerning the IRP administrative costs. ICANN's June 18th letter states in relevant part that:

> "Second, you ask ICANN to "explain" why ICANN does not interpret Bylaws Article 4, Section 4.3(r) to require ICANN to pay the ICDR's filing fees. I provided that explanation in my 11 June 2020 letter to Mr. Gibson: "As I noted during the hearing, the IRP Provider will continue to play a critical role in the IRP process even after the Standing Panel is established. (Bylaws Art. 4, § 4.3(i).) Thus, ICANN does not anticipate that the IRP Provider filing fees will be eliminated with the establishment of the Standing Panel." Furthermore, the ICDR filing fees are for the initiation of an IRP (not its administration) and do not fall within the definition of Section 4.3(r).
>
> Third, you ask about "ICANN's position as to past ICDR fees paid by claimants" in prior IRPs, and specifically about the *Despegar et al. v. ICANN* IRP claimants. You, of course, are well aware that the Bylaws were amended substantially in October 2016, and Section 4.3(r) was added at that time. As a result, ICANN has now agreed that it will reimburse/pay the administrative fees, including panelist fees, for IRPs adjudicated under the Bylaws in effect on 1 October 2016 or later. As you also know, there are currently only three such IRPs.
>
> The Despegar claimants plainly have no basis to even suggest they meet these requirements because Despegar et al. v. ICANN was filed and decided well before the 1 October 2016 Bylaws took effect. Neither the Bylaws in effect when the Despegar IRP Request was filed, nor the Bylaws that were in effect when the Despegar Final Declaration was issued, directed ICANN to bear the administrative costs of the IRP under any circumstances. Instead, those Bylaws provided that:
>
> > 'The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances.'
>
> The Despegar claimants were the "part[ies] not prevailing" in that IRP, and the Panel ordered them to bear 50% of the IRP panelists' fees, consistent with the relevant Bylaws."

223. The Emergency Panelist refers to ICANN's statement in its June 11th letter that it has "further analyzed Article 4, Section 4.3(r), taking into consideration the spirit of the Bylaws as a whole since they were significantly revised in 2016." Further, the Emergency Panelist acknowledges ICANN's undertaking, stated in its letter, that

> "ICANN will pay 100% of IRP panelists' deposits upon appointment. This applies to Emergency Panelists and to the members of the full IRP Panel."

224. In view of these undertakings, the Emergency Panelist determines that there is no longer a concern that Claimants, in connection with the administrative costs for this IRP case and in the

absence of interim relief, face a "harm for which there will be no adequate remedy in the absence of such relief." Claimants, by virtue of ICANN's undertakings, will received most of the relief demanded in their IM Request on this point. As to the additional question, raised by Claimants in their June 16th letter, concerning whether ICANN should reimburse them for their payment of the ICDR initial filing fee,[287] Claimants have not shown that they will incur harm or decided hardship as to the requirement to pay this fee.

225. Claimants' request for interim measures of protection that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN's amended position on these issues. As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, Claimants' request for interim relief is denied, but this issue can be fully addressed by the IRP Panel in the main IRP proceedings. As stated previously, in determining that interim relief is not appropriate at this time, the Emergency Panelist makes clear that this decision does not finally resolve this issue (or the other issues decided), which can be fully addressed by the IRP Panel.

VII. DECISION

226. For the reasons stated above, the Emergency Panelist decides as follows:

A. Claimants' request that the ICDR be ordered to recuse itself from this IRP is denied.

B. Claimants have raised sufficiently serious questions related to the merits in relation to the Board's decision to deny Request 16-11.

C. Claimants have failed to raise sufficiently serious questions related to the merits in relation to the Board's decision to deny Request 18-6.

D. Claimants' request for interim measures that ICANN be required to maintain the *status quo* as to the .HOTEL Contention Set during the pendency of this IRP is granted.

[287] The Emergency Panelist understands that the ICDR's Initial Filing Fee, under the ICDR's standard International Arbitration Fee Schedule, is set at US$ 3750.00 for cases like this IRP involving Non-Monetary claims. The ICDR administrator for this case referenced the ICDR's fee schedule in his email to the parties dated March 20, 2020. See Ex. E. Claimants refer to this amount in their IM Request, p. 7.

E. Claimants' request for interim measures that ICANN be required to preserve, and to direct HTLD, EIU, FTI and Afilias to preserve, all potentially relevant information for review in this IRP is denied.

F. Claimants' request for interim measures that an Ombudsman be appointed with respect to Request 16-11 and Request 18-6 is denied.

G. Claimants request for interim measures that ICANN be ordered to immediately appoint the IRP Standing Panel is denied.

H. Claimants' request for interim measures that ICANN be ordered to adopt final rules of procedure is denied.

I. Claimants' request for interim measures that ICANN be required to pay all costs of the Emergency Panel and of the IRP Panelists is largely moot in view of ICANN's amended position on these issues (discussed above). As to Claimants request that ICANN should be required to reimburse Claimants for the ICDR initial filing fee, that request is denied.

227. In accordance with Rule 15 (Costs) of the Interim Supplementary Procedures, each party shall bear its own legal expenses. The Emergency Panelist makes no order to award any administrative costs and fees at this time, leaving that question to be decided by the IRP Panel.

This Decision is an Interim Order and does not constitute an IRP Final Declaration or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.

Christopher S. Gibson
Emergency Panelist

August 7, 2020

Date

LEGAL AUTHORITY AA-85

529 U.S. 120, 146 L.Ed.2d 121

[120]**FOOD AND DRUG ADMINISTRATION, et al., Petitioners,**

v.

BROWN & WILLIAMSON TOBACCO CORPORATION, et al.

No. 98–1152.

Argued Dec. 1, 1999.

Decided March 21, 2000.

Tobacco manufacturers, retailers, and advertisers brought action challenging Food and Drug Administration (FDA) regulation of tobacco products. The United States District Court for the Middle District of North Carolina, William L. Osteen, Sr., J., 966 F.Supp. 1374, granted in part and denied in part plaintiffs' motion for summary judgment, and appeals were taken. The Court of Appeals for the Fourth Circuit, 153 F.3d 155, reversed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that FDA lacks authority to regulate tobacco products as customarily marketed.

Court of Appeals affirmed.

Justice Breyer filed dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined.

1. Administrative Law and Procedure ⚿305

Regardless of how serious the problem an administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.

2. Statutes ⚿219(2)

Although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

3. Statutes ⚿219(2, 4)

When reviewing administrative agency's construction of a statute that it administers, reviewing court must first ask whether Congress has directly spoken to the precise question at issue, and, if Congress has done so, the inquiry is at an end, and the court must give effect to the unambiguously expressed intent of Congress, but, if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.

4. Constitutional Law ⚿72
Statutes ⚿219(4)

Judicial deference to agency's permissible construction of a statute, when Congress has not specifically addressed the question at issue, is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.

5. Statutes ⚿219(2)

In determining whether Congress has specifically addressed the question at issue, for purposes of reviewing administrative agency's construction of a statute that it administers, a reviewing court should not confine itself to examining a particular statutory provision in isolation, as the meaning, or ambiguity, of certain words or phrases may only become evident when placed in context.

6. Statutes ⚿208, 223.1

Words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

7. Statutes ⚿205, 206

Court must interpret statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

8. Statutes ⚿223.1, 223.4

The meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

9. Drugs and Narcotics ⚿3

In determining whether Food and Drug Administration (FDA) had authority under Food, Drug, and Cosmetic Act (FDCA) to regulate tobacco products, Supreme Court was guided to a degree by common sense as to the manner in which Congress was likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Federal Food, Drug, and Cosmetic Act, § 1 et seq., as amended, 21 U.S.C.A. § 301 et seq.

10. Drugs and Narcotics ⚿3

Food and Drug Administration (FDA) regulation of tobacco products would be inconsistent with Food, Drug, and Cosmetic Act's (FDCA) core objective of ensuring that every drug or device is safe and effective, given FDA's findings that tobacco products were dangerous and unsafe; FDA's findings logically implied that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market in view of FDCA's misbranding and device classification provisions. Federal Food, Drug, and Cosmetic Act, §§ 301(a), 513(b)(1), 520(e), 903(b)(2), as amended, 21 U.S.C.A. §§ 331(a), 360c(b)(1), 360j(e), 393(b)(2).

11. Drugs and Narcotics ⚿2.1

Food, Drug, and Cosmetic Act (FDCA) generally requires Food and Drug Administration (FDA) to prevent the marketing of any drug or device where the potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit. Federal Food, Drug, and Cosmetic Act, §§ 520(e), 903(b)(2), as amended, 21 U.S.C.A. §§ 360j(e), 393(b)(2).

12. Drugs and Narcotics ⚿3

Any ban of tobacco products by Food and Drug Administration (FDA) would contradict congressional policy; Congress' decisions to regulate labeling and advertising of tobacco products and to adopt the express policy of protecting commerce and the national economy to the maximum extent reveal its intent that tobacco products remain on the market. Agricultural Adjustment Act of 1938, § 311(a), 7 U.S.C.A. § 1311(a); Federal Cigarette Labeling and Advertising Act, § 2, 15 U.S.C.A. § 1331.

13. Drugs and Narcotics ⚿3

Finding that a ban on tobacco products would likely be dangerous, because of the high level of addiction among tobacco users, did not support finding that tobacco products themselves were "safe" within meaning of Food, Drug, and Cosmetic Act (FDCA); Food and Drug Administration (FDA) was required to determine that the product itself was safe as used by consumers, i.e., that the product's probable therapeutic benefits outweighed its risk of harm. Federal Food, Drug, and Cosmetic Act, §§502(j), 520(a)(2), 903(b)(2), as amended, 21 U.S.C.A. §§ 352(j), 360c(a)(2), 393(b)(2).

14. Drugs and Narcotics ⚿3

The Food and Drug Administration (FDA) may, consistent with the Food, Drug, and Cosmetic Act (FDCA), regulate many "dangerous" products without banning them, but the FDA may not conclude that a drug or device cannot be used safely for any therapeutic purpose and yet, at the same time, allow that product to remain on the market, as such regulation is incompatible with the FDCA's core objective of ensuring that every drug or device is safe and effective. Federal Food, Drug, and Cosmetic Act, §§502(j), 520, 903(b)(2), as amended, 21 U.S.C.A. §§ 352(j), 360c, 393(b)(2).

15. Drugs and Narcotics ⚿3

Food and Drug Administration (FDA) does not have authority to regulate tobacco

products as customarily marketed, without manufacturer claims of therapeutic benefits, as such authority is inconsistent with the intent that Congress has expressed in the Food, Drug, and Cosmetic Act's (FDCA) overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. Federal Food, Drug, and Cosmetic Act, §§ 201, 503(g)(1), 513, 520(e), 903(b)(2), as amended, 21 U.S.C.A. §§ 321, 353(g)(1), 360c, 360j(e), 393(b)(2).

16. Drugs and Narcotics ⚿2.1

A fundamental precept of the Food, Drug, and Cosmetic Act (FDCA) is that any product regulated by the Food and Drug Administration (FDA), but not banned, must be safe for its intended use, and this refers to the safety of using the product to obtain its intended effects, not the public health ramifications of alternative administrative actions by the FDA; in other words, FDA must determine that there is a reasonable assurance that the product's therapeutic benefits outweigh the risk of harm to the consumer. Federal Food, Drug, and Cosmetic Act, §§ 513, 903(b)(2), as amended, 21 U.S.C.A. §§ 360c, 393(b)(2).

17. Statutes ⚿223.1, 223.4

Classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute, and this is particularly so where scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.

18. Statutes ⚿223.4

A specific policy embodied in a later federal statute should control court's construction of the earlier statute, even though it has not been expressly amended.

19. Drugs and Narcotics ⚿3

Congress' tobacco-specific legislation effectively ratified Food and Drug Administration's (FDA) previous position that it lacked jurisdiction to regulate tobacco. Federal Cigarette Labeling and Advertising Act, §5(a), 15 U.S.C.A. § 1334(a); Comprehensive Smokeless Tobacco Health Education Act of 1986, § 7(a), 15 U.S.C.A. § 4406(a).

20. Statutes ⚿219(1)

Agency's initial interpretation of a statute that it is charged with administering is not "carved in stone," and agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.

21. Statutes ⚿219(2)

Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.

22. Drugs and Narcotics ⚿3

Supreme Court would not defer to Food and Drug Administration's (FDA) construction of Food, Drug, and Cosmetic Act (FDCA) as giving FDA jurisdiction over tobacco products, where Congress had created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Federal Food, Drug, and Cosmetic Act, § 1 et seq., as amended, 21 U.S.C.A. § 301 et seq.

23. Administrative Law and Procedure ⚿305

No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.

Syllabus

The Food, Drug, and Cosmetic Act (FDCA or Act), 21 U.S.C. § 301 *et seq.*, grants the Food and Drug Administration (FDA), as the designee of the Secretary of Health and Human Services (HHS), the authority to regulate, among other items, "drugs" and "devices," §§ 321(g)–(h), 393. In 1996, the FDA asserted jurisdiction to regulate tobacco products, concluding that, under the FDCA, nicotine is a "drug" and cigarettes and smokeless tobacco are "devices" that deliver nicotine to the body. Pursuant to this authority, the FDA promulgated regulations governing tobacco products' promotion, labeling, and accessibility to children and adolescents. The FDA found that tobacco use is the Nation's leading cause of premature death, resulting in more than 400,000 deaths annually, and that most adult smokers begin when they are minors. The regulations therefore aim to reduce tobacco use by minors so as to substantially reduce the prevalence of addiction in future generations, and thus the incidence of tobacco-related death and disease. Respondents, a group of tobacco manufacturers, retailers, and advertisers, filed this suit challenging the FDA's regulations. They moved for summary judgment on the ground, *inter alia*, that the FDA lacked jurisdiction to regulate tobacco products as customarily marketed, that is, without manufacturer claims of therapeutic benefit. The District Court upheld the FDA's authority, but the Fourth Circuit reversed, holding that Congress has not granted the FDA jurisdiction to regulate tobacco products. The court concluded that construing the FDCA to include tobacco products would lead to several internal inconsistencies in the Act. It also found that evidence external to the FDCA—that the FDA consistently stated before 1995 that it lacked jurisdiction over tobacco, that Congress has enacted several tobacco-specific statutes fully cognizant of the FDA's position, and that Congress has considered and rejected many bills that would have given the agency such authority—confirms this conclusion.

Held: Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority to regulate tobacco products as customarily marketed. Pp. 1300–1316.

[121](a) Because this case involves an agency's construction of a statute it administers, the Court's analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, under which a reviewing court must first ask whether Congress has directly spoken to the precise question at issue, *id.*, at 842, 104 S.Ct. 2778. If so, the court must give effect to Congress' unambiguously expressed intent. *E.g., id.*, at 843, 104 S.Ct. 2778. If not, the court must defer to the agency's construction of the statute so long as it is permissible. See, *e.g., INS v. Aguirre Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590. In determining whether Congress has specifically addressed the question at issue, the court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1. In addition, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. See, *e.g., United States v. Estate of Romani*, 523 U.S. 517, 530–531, 118 S.Ct. 1478, 140 L.Ed.2d 710. Finally, the court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

political magnitude to an administrative agency. Cf. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182. Pp. 1300–1301.

(b) Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA that remains on the market must be safe and effective for its intended use. See, *e.g.,* § 393(b)(2). That is, the potential for inflicting death or physical injury must be offset by the possibility of therapeutic benefit. *United States v. Rutherford,* 442 U.S. 544, 556, 99 S.Ct. 2470, 61 L.Ed.2d 68. In its rulemaking proceeding, the FDA quite exhaustively documented that tobacco products are unsafe, dangerous, and cause great pain and suffering from illness. These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market under the FDCA's misbranding, see, *e.g.,* § 331(a), and device classification, see, *e.g.,* § 360e(d)(2)(A), provisions. In fact, based on such provisions, the FDA itself has previously asserted that if tobacco products were within its jurisdiction, they would have to be removed from the market because it would be impossible to prove they were safe for their intended use. Congress, however, has foreclosed a ban of such products, choosing instead to create a distinct regulatory scheme focusing on the labeling and advertising of cigarettes and smokeless tobacco. Its express policy is to protect commerce and the national economy while informing consumers about any adverse health effects. [122]See 15 U.S.C. § 1331. Thus, an FDA ban would plainly contradict congressional intent. Apparently recognizing this dilemma, the FDA has concluded that tobacco products are actually "safe" under the FDCA because banning them would cause a greater harm to public health than leaving them on the market. But this safety determination—focusing on the relative harms caused by alternative remedial measures—is not a substitute for those required by the FDCA. Various provisions in the Act require the agency to determine that, at least for some consumers, the product's therapeutic benefits outweigh the risks of illness or serious injury. This the FDA cannot do, because tobacco products are unsafe for obtaining any therapeutic benefit. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit. Pp. 1301–1306.

(c) The history of tobacco-specific legislation also demonstrates that Congress has spoken directly to the FDA's authority to regulate tobacco products. Since 1965, Congress has enacted six separate statutes addressing the problem of tobacco use and human health. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, see 15 U.S.C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through any electronic communication medium regulated by the Federal Communications Commission, see §§ 1335, 4402(f); require the Secretary of HHS to report every three years to Congress on research findings concerning tobacco's addictive property, 42 U.S.C. § 290aa–2(b)(2); and make States' receipt of certain federal block grants contingent on their prohibiting any tobacco product manufacturer, retailer, or distributor from selling or distributing any such product to individuals under age 18, § 300x–26(a)(1). This tobacco-specific legislation has created a specific regulatory scheme for addressing the problem of tobacco and health. And it was adopted against the backdrop of the FDA consistently and resolutely stating that it was without authority under the FDCA to regulate tobacco products as customarily marketed. In fact, Congress several times

considered and rejected bills that would have given the FDA such authority. Indeed, Congress' actions in this area have evidenced a clear intent to preclude a meaningful policymaking role for any administrative agency. Further, Congress' tobacco legislation prohibits any additional regulation of tobacco product labeling with respect to tobacco's health consequences, a central aspect of regulation under the FDCA. Under these circumstances, it is evident that Congress has ratified the FDA's previous, long-held position that it lacks jurisdiction to regulate tobacco products as customarily marketed. Congress has [123]created a distinct scheme for addressing the subject, and that scheme excludes any role for FDA regulation. Pp. 1306–1314.

(d) Finally, the Court's inquiry is shaped, at least in some measure, by the nature of the question presented. *Chevron* deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. See 467 U.S., at 844, 104 S.Ct. 2778. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is hardly an ordinary case. Contrary to the agency's position from its inception until 1995, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. It is highly unlikely that Congress would leave the determination as to whether the sale of tobacco products would be regulated, or even banned, to the FDA's discretion in so cryptic a fashion. See *MCI Telecommunications, supra,* at 231, 114 S.Ct. 2223. Given tobacco's unique political history, as well as the breadth of the authority that the FDA has asserted, the Court is obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power. Pp. 1314–1315.

(e) No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop. *E.g., United States v. Article of Drug ... Bacto Unidisk,* 394 U.S. 784, 800, 89 S.Ct. 1410, 22 L.Ed.2d 726. Pp. 1315–1316.

153 F.3d 155, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 1316.

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For U.S. Supreme Court briefs, see:

1999 WL 503874 (Pet.Brief)

1999 WL 712524 (Resp.Brief)

1999 WL 712566 (Resp.Brief)

1999 WL 712548 (Resp.Brief)

1999 WL 712561 (Resp.Brief)

1999 WL 712572 (Resp.Brief)

[125]Justice O'CONNOR delivered the opinion of the Court.

This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. In 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since

its inception, asserted jurisdiction to regulate tobacco products. See 61 Fed.Reg. 44619–45318. The FDA concluded that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA or Act), 52 Stat. 1040, as amended, 21 U.S.C. § 301 *et seq.*, and that cigarettes and smokeless tobacco are "combination products" that deliver nicotine to the body. 61 Fed.Reg. 44397 (1996). Pursuant to this authority, it promulgated regulations intended to reduce tobacco consumption among children and adolescents. *Id.*, at 44615–44618. The agency believed that, because most tobacco consumers begin their use before reaching the age of 18, curbing tobacco use by minors could substantially reduce the prevalence of addiction in future generations and thus the incidence of tobacco-related death and disease. *Id.*, at 44398–44399.

[1, 2] Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously[126] expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

I

The FDCA grants the FDA, as the designee of the Secretary of Health and Human Services (HHS), the authority to regulate, among other items, "drugs" and "devices." See 21 U.S.C. §§ 321(g)–(h), 393 (1994 ed. and Supp. III). The Act defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, ... or other similar or related article, including any component, part, or accessory, which is ... intended to affect the structure or any function of the body." § 321(h). The Act also grants the FDA the authority to regulate so-called "combination products," which "constitute a combination of a drug, device, or biological product." § 353(g)(1). The FDA has construed this provision as giving it the discretion to regulate combination products as drugs, as devices, or as both. See 61 Fed.Reg. 44400 (1996).

On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents. 60 Fed.Reg. 41314–41787. The rule, which included several restrictions on the sale, distribution, and advertisement of tobacco products, was designed to reduce the availability and attractiveness of tobacco products to young people. *Id.*, at 41314. A public comment period followed, during which the FDA received over 700,000 submissions,[127] more than "at any other time in its history on any other subject." 61 Fed.Reg. 44418 (1996).

On August 28, 1996, the FDA issued a final rule entitled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents." *Id.*, at 44396. The FDA determined that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices," and therefore it had jurisdiction under the FDCA to regulate tobacco products as customarily

marketed—that is, without manufacturer claims of therapeutic benefit. *Id.,* at 44397, 44402. First, the FDA found that tobacco products " 'affect the structure or any function of the body' " because nicotine "has significant pharmacological effects." *Id.,* at 44631. Specifically, nicotine "exerts psychoactive, or mood-altering, effects on the brain" that cause and sustain addiction, have both tranquilizing and stimulating effects, and control weight. *Id.,* at 44631–44632. Second, the FDA determined that these effects were "intended" under the FDCA because they "are so widely known and foreseeable that [they] may be deemed to have been intended by the manufacturers," *id.,* at 44687; consumers use tobacco products "predominantly or nearly exclusively" to obtain these effects, *id.,* at 44807; and the statements, research, and actions of manufacturers revealed that they "have 'designed' cigarettes to provide pharmacologically active doses of nicotine to consumers," *id.,* at 44849. Finally, the agency concluded that cigarettes and smokeless tobacco are "combination products" because, in addition to containing nicotine, they include device components that deliver a controlled amount of nicotine to the body, *id.,* at 45208–45216.

Having resolved the jurisdictional question, the FDA next explained the policy justifications for its regulations, detailing the deleterious health effects associated with tobacco use. It found that tobacco consumption was "the single leading cause of preventable death in the United States." *Id.,* at 44398. According to the FDA, "[m]ore than 400,000 [128]people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease." *Ibid.* The agency also determined that the only way to reduce the amount of tobacco-related illness and mortality was to reduce the level of addiction, a goal that could be accomplished only by preventing children and adolescents from starting to use tobacco. *Id.,* at 44398–44399. The FDA found that 82% of adult smokers had their first cigarette before the age of 18, and more than half had already become regular smokers by that age. *Id.,* at 44398. It also found that children were beginning to smoke at a younger age, that the prevalence of youth smoking had recently increased, and that similar problems existed with respect to smokeless tobacco. *Id.,* at 44398–44399. The FDA accordingly concluded that if "the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely ever to begin." *Id.,* at 44399.

Based on these findings, the FDA promulgated regulations concerning tobacco products' promotion, labeling, and accessibility to children and adolescents. See *id.,* at 44615–44618. The access regulations prohibit the sale of cigarettes or smokeless tobacco to persons younger than 18; require retailers to verify through photo identification the age of all purchasers younger than 27; prohibit the sale of cigarettes in quantities smaller than 20; prohibit the distribution of free samples; and prohibit sales through self-service displays and vending machines except in adult-only locations. *Id.,* at 44616–44617. The promotion regulations require that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit outdoor advertising within 1,000 feet of any public playground or school; prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and prohibit a [129]manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its brand name. *Id.,* at 44617–44618. The labeling regulation requires that the statement, "A Nicotine–Delivery Device for Persons 18 or Older," appear on all tobacco product packages. *Id.,* at 44617.

The FDA promulgated these regulations pursuant to its authority to regulate "restricted devices." See 21 U.S.C. § 360j(e). The FDA construed § 353(g)(1) as giving it the discretion to regulate "combination products" using the Act's drug authorities, device authorities, or both, depending on "how the public health goals of the act can be best accomplished." 61 Fed.Reg. 44403 (1996). Given the greater flexibility in the FDCA for the regulation of devices, the FDA determined that "the device authorities provide the most appropriate basis for regulating cigarettes and smokeless tobacco." *Id.,* at 44404. Under 21 U.S.C. § 360j(e), the agency may "require that a device be restricted to sale, distribution, or use . . . upon such other conditions as [the FDA] may prescribe in such regulation, if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness." The FDA reasoned that its regulations fell within the authority granted by § 360j(e) because they related to the sale or distribution of tobacco products and were necessary for providing a reasonable assurance of safety. 61 Fed.Reg. 44405–44407 (1996).

Respondents, a group of tobacco manufacturers, retailers, and advertisers, filed suit in United States District Court for the Middle District of North Carolina challenging the regulations. See *Coyne Beahm, Inc. v. FDA,* 966 F.Supp. 1374 (1997). They moved for summary judgment on the grounds that the FDA lacked jurisdiction to regulate tobacco products as customarily marketed, the regulations exceeded the FDA's authority under 21 U.S.C. § 360j(e), and the advertising[130] restrictions violated the First Amendment. Second Brief in Support of Plaintiffs' Motion for Summary Judgment in No. 2:95CV00591 (MDNC), in 3 Rec. in No. 97–1604(CA4), Tab No. 40; Third Brief in Support of Plaintiffs' Motion for Summary Judgment in No. 2:95CV00591 (MDNC), in 3 Rec. in No. 97–1604(CA4), Tab No. 42. The District Court granted respondents' motion in part and denied it in part. 966 F.Supp., at 1400. The court held that the FDCA authorizes the FDA to regulate tobacco products as customarily marketed and that the FDA's access and labeling regulations are permissible, but it also found that the agency's advertising and promotion restrictions exceed its authority under § 360j(e). *Id.,* at 1380–1400. The court stayed implementation of the regulations it found valid (except the prohibition on the sale of tobacco products to minors) and certified its order for immediate interlocutory appeal. *Id.,* at 1400–1401.

The Court of Appeals for the Fourth Circuit reversed, holding that Congress has not granted the FDA jurisdiction to regulate tobacco products. See 153 F.3d 155 (1998). Examining the FDCA as a whole, the court concluded that the FDA's regulation of tobacco products would create a number of internal inconsistencies. *Id.,* at 162–167. Various provisions of the Act require the agency to determine that any regulated product is "safe" before it can be sold or allowed to remain on the market, yet the FDA found in its rulemaking proceeding that tobacco products are "dangerous" and "unsafe." *Id.,* at 164–167. Thus, the FDA would apparently have to ban tobacco products, a result the court found clearly contrary to congressional intent. *Ibid.* This apparent anomaly, the Court of Appeals concluded, demonstrates that Congress did not intend to give the FDA authority to regulate tobacco. *Id.,* at 167. The court also found that evidence external to the FDCA confirms this conclusion. Importantly, the FDA consistently stated before 1995 that it lacked jurisdiction over tobacco, and Congress has enacted [131]several tobacco-specific statutes fully cognizant of the FDA's position. See *id.,* at 168–176. In fact, the court reasoned, Congress has considered and rejected many bills that would have given the agency such authority. See *id.,* at 170–171. This, along with the absence of any intent by the enacting Congress in

1938 to subject tobacco products to regulation under the FDCA, demonstrates that Congress intended to withhold such authority from the FDA. *Id.,* at 167–176. Having resolved the jurisdictional question against the agency, the Court of Appeals did not address whether the regulations exceed the FDA's authority under 21 U.S.C. § 360j(e) or violate the First Amendment. See 153 F.3d, at 176, n. 29.

We granted the federal parties' petition for certiorari, 526 U.S. 1086, 119 S.Ct. 1495, 143 L.Ed.2d 650 (1999), to determine whether the FDA has authority under the FDCA to regulate tobacco products as customarily marketed.

II

The FDA's assertion of jurisdiction to regulate tobacco products is founded on its conclusions that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices." Again, the FDA found that tobacco products are "intended" to deliver the pharmacological effects of satisfying addiction, stimulation and tranquilization, and weight control because those effects are foreseeable to any reasonable manufacturer, consumers use tobacco products to obtain those effects, and tobacco manufacturers have designed their products to produce those effects. 61 Fed. Reg. 44632–44633 (1996). As an initial matter, respondents take issue with the FDA's reading of "intended," arguing that it is a term of art that refers exclusively to claims made by the manufacturer or vendor about the product. See Brief for Respondent Brown & Williamson Tobacco Corp. 6. That is, a product is not a drug or device under the FDCA unless the manufacturer or vendor makes some express claim concerning the product's therapeutic benefits. See *id.,* at 6–7. We [132]need not resolve this question, however, because assuming, *arguendo,* that a product can be "intended to affect the structure or any function of the body" absent claims of therapeutic or medical benefit, the FDA's claim to jurisdiction contravenes the clear intent of Congress.

[3, 4] A threshold issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products. Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron,* a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Id.,* at 842, 104 S.Ct. 2778. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." *Id.,* at 843, 104 S.Ct. 2778; see also *United States v. Haggar Apparel Co.,* 526 U.S. 380, 392, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999); *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 398, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996). But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. See *INS v. Aguirre Aguirre,* 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); *Auer v. Robbins,* 519 U.S. 452, 457, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Such deference is justified because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," *Chevron, supra,* at 866, 104 S.Ct. 2778, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated, see *Rust v. Sullivan,* 500 U.S. 173, 187, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

[5–9] In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words

or phrases may only become evident when placed in context. See *Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory [133]context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959). Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. See *United States v. Estate of Romani,* 523 U.S. 517, 530–531, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998); *United States v. Fausto,* 484 U.S. 439, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988). In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Cf. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994).

With these principles in mind, we find that Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.

A

[10, 11] Viewing the FDCA as a whole, it is evident that one of the Act's core objectives is to ensure that any product regulated by the FDA is "safe" and "effective" for its intended use. See 21 U.S.C. § 393(b)(2) (1994 ed., Supp. III) (defining the FDA's mission); More Information for Better Patient Care: Hearing before the Senate Committee on Labor and Human Resources, 104th Cong., 2d Sess., 83 (1996) (statement of FDA Deputy Comm'r Schultz) ("A fundamental precept of drug and device regulation in this country is that these products must be proven safe and effective before they can be sold"). This essential purpose pervades the FDCA. For instance, 21 U.S.C. § 393(b)(2) (1994 ed., Supp. III) defines [134]the FDA's "[m]ission" to include "protect[ing] the public health by ensuring that ... drugs are safe and effective" and that "there is reasonable assurance of the safety and effectiveness of devices intended for human use." The FDCA requires premarket approval of any new drug, with some limited exceptions, and states that the FDA "shall issue an order refusing to approve the application" of a new drug if it is not safe and effective for its intended purpose. §§ 355(d)(1)–(2), (4)–(5). If the FDA discovers after approval that a drug is unsafe or ineffective, it "shall, after due notice and opportunity for hearing to the applicant, withdraw approval" of the drug. 21 U.S.C. §§ 355(e)(1)–(3). The Act also requires the FDA to classify all devices into one of three categories. § 360c(b)(1). Regardless of which category the FDA chooses, there must be a "reasonable assurance of the safety and effectiveness of the device." 21 U.S.C. §§ 360c(a)(1)(A)(i), (B), (C) (1994 ed. and Supp. III); 61 Fed.Reg. 44412 (1996). Even the "restricted device" provision pursuant to which the FDA promulgated the regulations at issue here authorizes the agency to place conditions on the sale or distribution of a device specifically when "there cannot otherwise be reasonable assurance of its safety and effectiveness." 21 U.S.C. § 360j(e). Thus, the Act generally requires the FDA to prevent the marketing of any drug or device where the "potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *United States v. Rutherford,* 442 U.S. 544, 556, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979).

In its rulemaking proceeding, the FDA quite exhaustively documented that "tobacco products are unsafe," "dangerous," and "cause great pain and suffering from illness." 61 Fed.Reg. 44412 (1996). It found that the consumption of tobacco products presents "extraordinary health risks," and that "tobacco use is the single leading cause of preventable death in the United States." *Id.,* at 44398. It stated that "[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and [135]heart disease, often suffering long and painful deaths," and that "[t]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *Ibid.* Indeed, the FDA characterized smoking as "a pediatric disease," *id.,* at 44421, because "one out of every three young people who become regular smokers ... will die prematurely as a result," *id.,* at 44399.

These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market. Consider, first, the FDCA's provisions concerning the misbranding of drugs or devices. The Act prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U.S.C. § 331(a). In light of the FDA's findings, two distinct FDCA provisions would render cigarettes and smokeless tobacco misbranded devices. First, § 352(j) deems a drug or device misbranded "[i]f it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." The FDA's findings make clear that tobacco products are "dangerous to health" when used in the manner prescribed. Second, a drug or device is misbranded under the Act "[u]nless its labeling bears ... adequate directions for use ... in such manner and form, as are necessary for the protection of users," except where such directions are "not necessary for the protection of the public health." § 352(f)(1). Given the FDA's conclusions concerning the health consequences of tobacco use, there are no directions that could adequately protect consumers. That is, there are no directions that could make tobacco products safe for obtaining their intended effects. Thus, were tobacco products within the FDA's jurisdiction, the Act would deem them misbranded devices that could not be introduced into interstate [136]commerce. Contrary to the dissent's contention, the Act admits no remedial discretion once it is evident that the device is misbranded.

Second, the FDCA requires the FDA to place all devices that it regulates into one of three classifications. See § 360c(b)(1). The agency relies on a device's classification in determining the degree of control and regulation necessary to ensure that there is "a reasonable assurance of safety and effectiveness." 61 Fed.Reg. 44412 (1996). The FDA has yet to classify tobacco products. Instead, the regulations at issue here represent so-called "general controls," which the Act entitles the agency to impose in advance of classification. See *id.,* at 44404–44405. Although the FDCA prescribes no deadline for device classification, the FDA has stated that it will classify tobacco products "in a future rulemaking" as required by the Act. *Id.,* at 44412. Given the FDA's findings regarding the health consequences of tobacco use, the agency would have to place cigarettes and smokeless tobacco in Class III because, even after the application of the Act's available controls, they would "presen[t] a potential unreasonable risk of illness or injury." 21 U.S.C. § 360c(a)(1)(C). As Class III devices, tobacco products would be subject to the FDCA's premarket approval process. See 21 U.S.C. § 360c(a)(1)(C) (1994 ed., Supp. III); 21 U.S.C. § 360e; 61 Fed.Reg. 44412 (1996). Under these provisions, the FDA would be

prohibited from approving an application for premarket approval without "a showing of reasonable assurance that such device is safe under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof." 21 U.S.C. § 360e(d)(2)(A). In view of the FDA's conclusions regarding the health effects of tobacco use, the agency would have no basis for finding any such reasonable assurance of safety. Thus, once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow them to be marketed.

[137]The FDCA's misbranding and device classification provisions therefore make evident that were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them. In fact, based on these provisions, the FDA itself has previously taken the position that if tobacco products were within its jurisdiction, "they would have to be removed from the market because it would be impossible to prove they were safe for their intended us[e]." Public Health Cigarette Amendments of 1971: Hearings before the Commerce Subcommittee on S. 1454, 92d Cong., 2d Sess., 239 (1972) (hereinafter 1972 Hearings) (statement of FDA Comm'r Charles Edwards). See also Cigarette Labeling and Advertising: Hearings before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., 18 (1964) (hereinafter 1964 Hearings) (statement of Dept. of Health, Education, and Welfare (HEW) Secretary Anthony Celebrezze that proposed amendments to the FDCA that would have given the FDA jurisdiction over "smoking product[s]" "might well completely outlaw at least cigarettes").

[12] Congress, however, has foreclosed the removal of tobacco products from the market. A provision of the United States Code currently in force states that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U.S.C. § 1311(a). More importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. See Federal Cigarette Labeling and Advertising Act (FCLAA), Pub.L. 89–92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub.L. 91–222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub.L. 98–24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub.L. 98–474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub.L. 99–252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental [138]Health Administration Reorganization Act, Pub.L. 102–321, § 202, 106 Stat. 394. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. See, *e.g.,* U.S. Dept. of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 25–40, 69–75 (1964) (hereinafter 1964 Surgeon General's Report) (concluding that cigarette smoking causes lung cancer, coronary artery disease, and chronic bronchitis and emphysema, and that nicotine has various pharmacological effects, including stimulation, tranquilization, and appetite suppression); U.S. Dept. of Health and Human Services, Public Health Service, Health Consequences of Smoking for Women 7–12 (1980) (finding that mortality rates for lung cancer, chronic lung disease, and coronary heart disease are increased for both women and men smokers, and that smoking during pregnancy is associated with significant adverse health effects on the unborn fetus and newborn child); U.S. Dept. of Health and Human Services, Public Health Service, Why People Smoke Cigarettes (1983), in Smoking Prevention Education Act, Hearings on H.R. 1824 before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 98th Cong., 1st

Sess., 32–37 (1983) (hereinafter 1983 House Hearings) (stating that smoking is "the most widespread example of drug dependence in our country," and that cigarettes "affect the chemistry of the brain and nervous system"); U.S. Dept. of Health and Human Services, Public Health Service, The Health Consequences of Smoking: Nicotine Addiction 6–9, 145–239 (1988) (hereinafter 1988 Surgeon General's Report) (concluding that tobacco products are addicting in much the same way as heroin and cocaine, and that nicotine is the drug that causes addiction). Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that "commerce and the national [139]economy may be . . . protected to the maximum extent consistent with" consumers "be[ing] adequately informed about any adverse health effects." 15 U.S.C. § 1331. Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

[13] The FDA apparently recognized this dilemma and concluded, somewhat ironically, that tobacco products are actually "safe" within the meaning of the FDCA. In promulgating its regulations, the agency conceded that "tobacco products are unsafe, as that term is conventionally understood." 61 Fed.Reg. 44412 (1996). Nonetheless, the FDA reasoned that, in determining whether a device is safe under the Act, it must consider "not only the risks presented by a product but also any of the countervailing effects of use of that product, including the consequences of not permitting the product to be marketed." *Id.*, at 44412–44413. Applying this standard, the FDA found that, because of the high level of addiction among tobacco users, a ban would likely be "dangerous." *Id.*, at 44413. In particular, current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop. *Ibid.* The FDA therefore concluded that, "while taking cigarettes and smokeless tobacco off the market could prevent some people from becoming addicted and reduce death and disease for others, the record does not establish that such a ban is the appropriate public health response under the act." *Id.*, at 44398.

[140]It may well be, as the FDA asserts, that "these factors must be considered when developing a regulatory scheme that achieves the best public health result for these products." *Id.*, at 44413. But the FDA's judgment that leaving tobacco products on the market "is more effective in achieving public health goals than a ban," *ibid.*, is no substitute for the specific safety determinations required by the FDCA's various operative provisions. Several provisions in the Act require the FDA to determine that the *product itself* is safe as used by consumers. That is, the product's probable therapeutic benefits must outweigh its risk of harm. See *United States v. Rutherford*, 442 U.S., at 555, 99 S.Ct. 2470 ("[T]he Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use"). In contrast, the FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. Thus, although the FDA has concluded that a ban would be "dangerous," it

has *not* concluded that tobacco products are "safe" as that term is used throughout the Act.

Consider 21 U.S.C. § 360c(a)(2), which specifies those factors that the FDA may consider in determining the safety and effectiveness of a device for purposes of classification, performance standards, and premarket approval. For all devices regulated by the FDA, there must at least be a "reasonable assurance of the safety and effectiveness of the device." See 21 U.S.C. §§ 360c(a)(1)(A)(i), (B), (C) (1994 ed. and Supp. III); 61 Fed.Reg. 44412 (1996). Title 21 U.S.C. § 360c(a)(2) provides that

> "the safety and effectiveness of a device are to be determined—
>
> "(A) with respect to the persons for whose use the device is represented or intended,
>
> [141]"(B) with respect to the conditions of use prescribed, recommended, or suggested in the labeling of the device, and
>
> "(C) weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use."

A straightforward reading of this provision dictates that the FDA must weigh the probable therapeutic benefits of the device to the consumer against the probable risk of injury. Applied to tobacco products, the inquiry is whether their purported benefits—satisfying addiction, stimulation and sedation, and weight control—outweigh the risks to health from their use. To accommodate the FDA's conception of safety, however, one must read "any probable benefit to health" to include the benefit to public health stemming from adult consumers' continued use of tobacco products, even though the *reduction* of tobacco use is the *raison d'être* of the regulations. In other words, the FDA is forced to contend that the very evil it seeks to combat is a "benefit to health." This is implausible.

The FDA's conception of safety is also incompatible with the FDCA's misbranding provision. Again, § 352(j) provides that a product is "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." According to the FDA's understanding, a product would be "dangerous to health," and therefore misbranded under § 352(j), when, in comparison to leaving the product on the market, a ban would not produce "adverse health consequences" in aggregate. Quite simply, these are different inquiries. Although banning a particular product might be detrimental to public health in aggregate, the product could still be "dangerous to health" when used as directed. Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

[142]Consequently, the analogy made by the FDA and the dissent to highly toxic drugs used in the treatment of various cancers is unpersuasive. See 61 Fed.Reg. 44413 (1996); *post,* at 1323–1324 (opinion of BREYER, J.). Although "dangerous" in some sense, these drugs are safe within the meaning of the Act because, for certain patients, the therapeutic benefits outweigh the risk of harm. Accordingly, such drugs cannot properly be described as "dangerous to health" under 21 U.S.C. § 352(j). The same is not true for tobacco products. As the FDA has documented in great detail, cigarettes and smokeless tobacco are an unsafe means to obtaining *any* pharmacological effect.

[14] The dissent contends that our conclusion means that "the FDCA requires the FDA to ban outright 'dangerous' drugs or devices," *post,* at 1322, and that this is a "perverse" reading of the statute, *post,* at 1322, 1325. This misunderstands our holding. The FDA, consistent with the FDCA, may clearly regulate many "dangerous" products without banning them. Indeed, virtually every drug or device poses dangers under certain conditions. What the

FDA may not do is conclude that a drug or device cannot be used safely for any therapeutic purpose and yet, at the same time, allow that product to remain on the market. Such regulation is incompatible with the FDCA's core objective of ensuring that every drug or device is safe and effective.

[15, 16] Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA—but not banned—must be safe for its intended use. Various provisions of the Act make clear that this refers to the safety of using the product to obtain its intended effects, not the public health ramifications of alternative administrative actions by the FDA. That is, the FDA must determine that there is a reasonable assurance that the product's therapeutic benefits outweigh the risk of harm to the consumer. According to this standard,[143] the FDA has concluded that, although tobacco products might be effective in delivering certain pharmacological effects, they are "unsafe" and "dangerous" when used for these purposes. Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.

B

[17, 18] In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto,* 484 U.S., at 453, 108 S.Ct. 668. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani,* "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." 523 U.S., at 530–531, 118 S.Ct. 1478.

Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health. See *supra,* at 1303–1304. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, see [144]15 U.S.C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through "any medium of electronic communication" subject to regulation by the Federal Communications Commission (FCC), see §§ 1335, 4402(f); require the Secretary of HHS to report every three years to Congress on research findings concerning "the addictive property of tobacco," 42 U.S.C. § 290aa–2(b)(2); and make States' receipt of certain federal block grants contingent on their making it unlawful "for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," § 300x–26(a)(1).

In adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic

benefit by the manufacturer. In fact, on several occasions over this period, and after the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction. Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.

On January 11, 1964, the Surgeon General released the report of the Advisory Committee on Smoking and Health. That report documented the deleterious health effects of smoking in great detail, concluding, in relevant part, "that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate." 1964 Surgeon General's Report 31. It also identified the pharmacological effects of nicotine, including "stimulation," "tranquilization," and "suppression of appetite." *Id.*, at 74–75. Seven days after the report's release, the Federal Trade [145]Commission (FTC) issued a notice of proposed rulemaking, see 29 Fed. Reg. 530–532 (1964), and in June 1964, the FTC promulgated a final rule requiring cigarette manufacturers "to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container ... that cigarette smoking is dangerous to health and may cause death from cancer and other diseases," *id.*, at 8325. The rule was to become effective January 1, 1965, but, on a request from Congress, the FTC postponed enforcement for six months. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513–514, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

In response to the Surgeon General's report and the FTC's proposed rule, Congress convened hearings to consider legislation addressing "the tobacco problem." 1964 Hearings 1. During those deliberations, FDA representatives testified before Congress that the agency lacked jurisdiction under the FDCA to regulate tobacco products. Surgeon General Terry was asked during hearings in 1964 whether HEW had the "authority to brand or label the packages of cigarettes or to control the advertising there." *Id.*, at 56. The Surgeon General stated that "we do not have such authority in existing laws governing the ... Food and Drug Administration." *Ibid.* Similarly, FDA Deputy Commissioner Rankin testified in 1965 that "[t]he Food and Drug Administration has no jurisdiction under the Food, Drug, and Cosmetic Act over tobacco, unless it bears drug claims." Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248 before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., 193 (hereinafter 1965 Hearings). See also Letter to Directors of Bureaus, Divisions and Directors of Districts from FDA Bureau of Enforcement (May 24, 1963), in 1972 Hearings 240 ("[T]obacco marketed for chewing or smoking without accompanying therapeutic claims, does not meet the definitions in the Food, Drug, and Cosmetic Act for food, drug, device or cosmetic"). In fact, HEW Secretary Celebrezze urged Congress *not* to amend the FDCA to cover [146]"smoking products" because, in light of the findings in the Surgeon General's report, such a "provision might well completely outlaw at least cigarettes. This would be contrary to what, we understand, is intended or what, in the light of our experience with the 18th amendment, would be acceptable to the American people." 1964 Hearings 18.

The FDA's disavowal of jurisdiction was consistent with the position that it had taken since the agency's inception. As the FDA concedes, it never asserted authority to regulate tobacco products as customarily marketed until it promulgated the regulations at issue here. See Brief for Petitioners 37; see also Brief for Appellee (FDA) in *Action on Smoking and Health*

v. Harris, 655 F.2d 236 (C.A.D.C.1980), in 9 Rec. in No. 97–1604(CA4), Tab No. 4, pp. 14–15 ("In the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act, the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute absent health claims establishing a therapeutic intent on behalf of the manufacturer or vendor").

The FDA's position was also consistent with Congress' specific intent when it enacted the FDCA. Before the Act's adoption in 1938, the FDA's predecessor agency, the Bureau of Chemistry, announced that it lacked authority to regulate tobacco products under the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, unless they were marketed with therapeutic claims. See U.S. Dept. of Agriculture, Bureau of Chemistry, 13 Service and Regulatory Announcements 24 (Apr.1914) (Feb.1914 Announcements ¶ 13, Opinion of Chief of Bureau C.L. Alsberg). In 1929, Congress considered and rejected a bill "[t]o amend the Food and Drugs Act of June 30, 1906, by extending its provisions to tobacco and tobacco products." S. 1468, 71st Cong., 1st Sess., 1. See also 71 Cong. Rec. 2589 (1929) (remarks of Sen. Smoot). And, as the FDA admits, there is no evidence in the text of the FDCA or its legislative history that Congress in 1938 even considered [147]the applicability of the Act to tobacco products. See Brief for Petitioners 22, n. 4. Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter. Of course, whether the Congress that enacted the FDCA specifically intended the Act to cover tobacco products is not determinative; "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); see also *TVA v. Hill,* 437 U.S. 153, 185, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated"). Nonetheless, this intent is certainly relevant to understanding the basis for the FDA's representations to Congress and the background against which Congress enacted subsequent tobacco-specific legislation.

Moreover, before enacting the FCLAA in 1965, Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco. In April 1963, Representative Udall introduced a bill "[t]o amend the Federal Food, Drug, and Cosmetic Act so as to make that Act applicable to smoking products." H.R. 5973, 88th Cong., 1st Sess., 1. Two months later, Senator Moss introduced an identical bill in the Senate. S. 1682, 88th Cong., 1st Sess. (1963). In discussing his proposal on the Senate floor, Senator Moss explained that "this amendment simply places smoking products under FDA jurisdiction, along with foods, drugs, and cosmetics." 109 Cong. Rec. 10322 (1963). In December 1963, Representative Rhodes introduced another bill that would have amended the FDCA "by striking out 'food, drug, device, or cosmetic,' each place where it appears therein and inserting in lieu thereof 'food, drug, device, cosmetic, or smoking product.'" H.R. 9512, 88th Cong., 1st Sess., § 3 (1963). And in January 1965, five months before passage of [148]the FCLAA, Representative Udall again introduced a bill to amend the FDCA "to make that Act applicable to smoking products." H.R. 2248, 89th Cong., 1st Sess., 1. None of these proposals became law.

Congress ultimately decided in 1965 to subject tobacco products to the less extensive regulatory scheme of the FCLAA, which created a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health."

Pub.L. 89–92, § 2, 79 Stat. 282. The FCLAA rejected any regulation of advertising, but it required the warning, "Caution: Cigarette Smoking May Be Hazardous to Your Health," to appear on all cigarette packages. *Id.*, § 4, 79 Stat. 283. In the FCLAA's "Declaration of Policy," Congress stated that its objective was to balance the goals of ensuring that "the public may be adequately informed that cigarette smoking may be hazardous to health" and protecting "commerce and the national economy ... to the maximum extent." *Id.*, § 2, 79 Stat. 282 (codified at 15 U.S.C. § 1331).

Not only did Congress reject the proposals to grant the FDA jurisdiction, but it explicitly pre-empted any other regulation of cigarette labeling: "No statement relating to smoking and health, other than the statement required by ... this Act, shall be required on any cigarette package." Pub. L. 89–92, § 5(a), 79 Stat. 283. The regulation of product labeling, however, is an integral aspect of the FDCA, both as it existed in 1965 and today. The labeling requirements currently imposed by the FDCA, which are essentially identical to those in force in 1965, require the FDA to regulate the labeling of drugs and devices to protect the safety of consumers. See 21 U.S.C. § 352; 21 U.S.C. § 352 (1964 ed. and Supp. IV). As discussed earlier, the Act requires that all products bear "adequate directions for use ... as are necessary for the protection of users," 21 U.S.C. § 352(f)(1); 21 U.S.C. § 352(f)(1) (1964 ed.); requires that all products provide "adequate warnings against use in those pathological [149]conditions or by children where its use may be dangerous to health," 21 U.S.C. § 352(f)(2); 21 U.S.C. § 352(f)(2) (1964 ed.); and deems a product misbranded "[i]f it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof," 21 U.S.C. § 352(j); 21 U.S.C. § 352(j) (1964 ed.). In this sense, the FCLAA was—and remains—incompatible with FDA regulation of tobacco products. This is not to say that the FCLAA's preemption provision by itself necessarily foreclosed FDA jurisdiction. See *Cipollone v. Liggett Group, Inc.*, 505 U.S., at 518–519, 112 S.Ct. 2608. But it is an important factor in assessing whether Congress ratified the agency's position—that is, whether Congress adopted a regulatory approach to the problem of tobacco and health that contemplated no role for the FDA.

Further, the FCLAA evidences Congress' intent to preclude *any* administrative agency from exercising significant policymaking authority on the subject of smoking and health. In addition to prohibiting any additional requirements for cigarette labeling, the FCLAA provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub.L. 89–92, § 5(b), 79 Stat. 283. Thus, in reaction to the FTC's attempt to regulate cigarette labeling and advertising, Congress enacted a statute reserving exclusive control over both subjects to itself.

Subsequent tobacco-specific legislation followed a similar pattern. By the FCLAA's own terms, the prohibition on any additional cigarette labeling or advertising regulations relating to smoking and health was to expire July 1, 1969. See § 10, 79 Stat. 284. In anticipation of the provision's expiration, both the FCC and the FTC proposed rules governing the advertisement of cigarettes. See 34 Fed. Reg. 1959 (1969) (FCC proposed rule to "ban the broadcast of cigarette commercials by radio and television stations"); *id.*, at 7917 [150](FTC proposed rule requiring manufacturers to disclose on all packaging and in all print advertising " 'that cigarette smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema, and other diseases' "). After debating the proper role for administrative

agencies in the regulation of tobacco, see generally Cigarette Labeling and Advertising—1969: Hearings before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., pt. 2 (1969), Congress amended the FCLAA by banning cigarette advertisements "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission" and strengthening the warning required to appear on cigarette packages. Public Health Cigarette Smoking Act of 1969, Pub.L. 91–222, §§ 4, 6, 84 Stat. 88–89. Importantly, Congress extended indefinitely the prohibition on any other regulation of cigarette labeling with respect to smoking and health (again despite the importance of labeling regulation under the FDCA). § 5(a), 84 Stat. 88 (codified at 15 U.S.C. § 1334(a)). Moreover, it expressly forbade the FTC from taking any action on its pending rule until July 1, 1971, and it required the FTC, if it decided to proceed with its rule thereafter, to notify Congress at least six months in advance of the rule's becoming effective. § 7(a), 84 Stat. 89. As the chairman of the House committee in which the bill originated stated, "the Congress—the body elected by the people—must make the policy determinations involved in this legislation—and not some agency made up of appointed officials." 116 Cong. Rec. 7920 (1970) (remarks of Rep. Staggers).

Four years later, after Congress had transferred the authority to regulate substances covered by the Hazardous Substances Act (HSA) from the FDA to the Consumer Products Safety Commission (CPSC), the American Public Health Association, joined by Senator Moss, petitioned the CPSC to regulate cigarettes yielding more than 21 milligrams of tar. See *Action on Smoking and Health v. Harris*, 655 F.2d 236, [151]241 (C.A.D.C. 1980); R. Kluger, Ashes to Ashes 375–376 (1996). After the CPSC determined that it lacked authority under the HSA to regulate cigarettes, a District Court held that the HSA did, in fact, grant the CPSC such jurisdiction and ordered it to reexamine the petition. See *American Public Health Association v. Consumer Product Safety Commission*, [1972–1975 Transfer Binder] CCH Consumer Prod. Safety Guide ¶ 75,081 (DC 1975), vacated as moot, No. 75–1863 (CADC 1976). Before the CPSC could take any action, however, Congress mooted the issue by adopting legislation that eliminated the agency's authority to regulate "tobacco and tobacco products." Consumer Product Safety Commission Improvements Act of 1976, Pub.L. 94–284, § 3(c), 90 Stat. 503 (codified at 15 U.S.C. § 1261(f)(2)). Senator Moss acknowledged that the "legislation, in effect, reverse[d]" the District Court's decision, 121 Cong. Rec. 23563 (1975), and the FDA later observed that the episode was "particularly" "indicative of the policy of Congress to limit the regulatory authority over cigarettes by Federal Agencies," Letter to Action on Smoking and Health (ASH) Executive Director Banzhaf from FDA Comm'r Goyan (Nov. 25, 1980), App. 59. A separate statement in the Senate Report underscored that the legislation's purpose was to "unmistakably reaffirm the clear mandate of the Congress that the basic regulation of tobacco and tobacco products is governed by the legislation dealing with the subject, . . . and that any further regulation in this sensitive and complex area must be reserved for specific Congressional action." S.Rep. No. 94–251, p. 43 (1975) (additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall).

Meanwhile, the FDA continued to maintain that it lacked jurisdiction under the FDCA to regulate tobacco products as customarily marketed. In 1972, FDA Commissioner Edwards testified before Congress that "cigarettes recommended for smoking pleasure are beyond the Federal Food, Drug, and Cosmetic Act." 1972 Hearings 239, 242. He further[152] stated that the FDA believed that the Public Health Cigarette Smoking Act "demonstrates that the regulation of cigarettes is

to be the domain of Congress," and that "labeling or banning cigarettes is a step that can be take[n] only by the Congress. Any such move by FDA would be inconsistent with the clear congressional intent." *Ibid.*

In 1977, ASH filed a citizen petition requesting that the FDA regulate cigarettes, citing many of the same grounds that motivated the FDA's rulemaking here. See Citizen Petition, No. 77P–0185 (May 26, 1977), 10 Rec. in No. 97–1604(CA4), Tab No. 22, pp. 1–10. ASH asserted that nicotine was highly addictive and had strong physiological effects on the body; that those effects were "intended" because consumers use tobacco products precisely to obtain those effects; and that tobacco causes thousands of premature deaths annually. *Ibid.* In denying ASH's petition, FDA Commissioner Kennedy stated that "[t]he interpretation of the Act by FDA consistently has been that cigarettes are not a drug unless health claims are made by the vendors." Letter to ASH Executive Director Banzhaf (Dec. 5, 1977), App. 47. After the matter proceeded to litigation, the FDA argued in its brief to the Court of Appeals that "cigarettes are not comprehended within the statutory definition of the term 'drug' absent objective evidence that vendors represent or intend that their products be used as a drug." Brief for Appellee in *Action on Smoking and Health v. Harris,* 655 F.2d 236 (C.A.D.C.1980), 9 Rec. in No. 97–1604(CA4), Tab No. 4, at 27–28. The FDA also contended that Congress had "long been aware that the FDA does not consider cigarettes to be within its regulatory authority in the absence of health claims made on behalf of the manufacturer or vendor," and that, because "Congress has never acted to disturb the agency's interpretation," it had "acquiesced in the FDA's interpretation of the statutory limits on its authority to regulate cigarettes." *Id.,* at 23, 27, n. 23. The Court of Appeals upheld the FDA's position, concluding that "[i]f the statute [153]requires expansion, that is the job of Congress." *Action on Smoking and Health v. Harris,* 655 F.2d, at 243. In 1980, the FDA also denied a request by ASH to commence rulemaking proceedings to establish the agency's jurisdiction to regulate cigarettes as devices. See Letter to ASH Executive Director Banzhaf from FDA Comm'r Goyan (Nov. 25, 1980), App. 50–51. The agency stated that "[i]nsofar as rulemaking would relate to cigarettes or attached filters as customarily marketed, we have concluded that FDA has no jurisdiction under section 201(h) of the Act [21 U.S.C. § 321(h)]." *Id.,* at 67.

In 1983, Congress again considered legislation on the subject of smoking and health. HHS Assistant Secretary Brandt testified that, in addition to being "a major cause of cancer," smoking is a "major cause of heart disease" and other serious illnesses, and can result in "unfavorable pregnancy outcomes." 1983 House Hearings 19–20. He also stated that it was "well-established that cigarette smoking is a drug dependence, and that smoking is addictive for many people." *Id.,* at 20. Nonetheless, Assistant Secretary Brandt maintained that "the issue of regulation of tobacco ... is something that Congress has reserved to itself, and we do not within the Department have the authority to regulate nor are we seeking such authority." *Id.,* at 74. He also testified before the Senate, stating that, despite the evidence of tobacco's health effects and addictiveness, the Department's view was that "Congress has assumed the responsibility of regulating ... cigarettes." Smoking Prevention and Education Act: Hearings on S. 772 before the Senate Committee on Labor and Human Resources, 98th Cong., 1st Sess., 56 (1983) (hereinafter 1983 Senate Hearings).

Against this backdrop, Congress enacted three additional tobacco-specific statutes over the next four years that incrementally expanded its regulatory scheme for tobacco products. In 1983, Congress adopted the Alcohol and Drug Abuse Amendments, Pub.L. 98–24, 97 Stat. 175 (codified at [154]42 U.S.C. § 290aa *et seq.*), which require

the Secretary of HHS to report to Congress every three years on the "addictive property of tobacco" and to include recommendations for action that the Secretary may deem appropriate. A year later, Congress enacted the Comprehensive Smoking Education Act, Pub.L. 98–474, 98 Stat. 2200, which amended the FCLAA by again modifying the prescribed warning. Notably, during debate on the Senate floor, Senator Hawkins argued that the FCLAA was necessary in part because "[u]nder the Food, Drug and Cosmetic Act, the Congress exempted tobacco products." 130 Cong. Rec. 26953 (1984). And in 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act of 1986 (CSTHEA), Pub.L. 99–252, 100 Stat. 30 (codified at 15 U.S.C. § 4401 *et seq.*), which essentially extended the regulatory provisions of the FCLAA to smokeless tobacco products. Like the FCLAA, the CSTHEA provided that "[n]o statement relating to the use of smokeless tobacco products and health, other than the statements required by [the Act], shall be required by any Federal agency to appear on any package . . . of a smokeless tobacco product." § 7(a), 100 Stat. 34 (codified at 15 U.S.C. § 4406(a)). Thus, as with cigarettes, Congress reserved for itself an aspect of smokeless tobacco regulation that is particularly important to the FDCA's regulatory scheme.

In 1988, the Surgeon General released a report summarizing the abundant scientific literature demonstrating that "[c]igarettes and other forms of tobacco are addicting," and that "nicotine is psychoactive" and "causes physical dependence characterized by a withdrawal syndrome that usually accompanies nicotine abstinence." 1988 Surgeon General's Report 14. The report further concluded that the "pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." *Id.*, at 15. In the same year, FDA Commissioner Young stated before Congress that "it doesn't look like it is possible to regulate [tobacco] under the [155]Food, Drug and Cosmetic Act even though smoking, I think, has been widely recognized as being harmful to human health." Rural Development, Agriculture, and Related Agencies Appropriations for 1989: Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., 409 (1988). At the same hearing, the FDA's General Counsel testified that "what is fairly important in FDA law is whether a product has a therapeutic purpose," and "[c]igarettes themselves are not used for a therapeutic purpose as that concept is ordinarily understood." *Id.*, at 410. Between 1987 and 1989, Congress considered three more bills that would have amended the FDCA to grant the FDA jurisdiction to regulate tobacco products. See H.R. 3294, 100th Cong., 1st Sess. (1987); H.R. 1494, 101st Cong., 1st Sess. (1989); S. 769, 101st Cong., 1st Sess. (1989). As before, Congress rejected the proposals. In 1992, Congress instead adopted the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub.L. 102–321, § 202, 106 Stat. 394 (codified at 42 U.S.C. § 300x *et seq.*), which creates incentives for States to regulate the retail sale of tobacco products by making States' receipt of certain block grants contingent on their prohibiting the sale of tobacco products to minors.

Taken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position. To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for

cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco's health hazards and its pharmacological effects. It has also enacted this legislation[156] against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health. Moreover, the substance of Congress' regulatory scheme is, in an important respect, incompatible with FDA jurisdiction. Although the supervision of product labeling to protect consumer health is a substantial component of the FDA's regulation of drugs and devices, see 21 U.S.C. § 352 (1994 ed. and Supp. III), the FCLAA and the CSTHEA explicitly prohibit any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products, see 15 U.S.C. §§ 1334(a), 4406(a).

[19] Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco. As in *Bob Jones Univ. v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), "[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on." *Id.,* at 600–601, 103 S.Ct. 2017. Congress has affirmatively acted to address the issue of tobacco and health, relying on the representations of the FDA that it had no authority to regulate tobacco. It has created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA. As a result, Congress' tobacco-specific statutes preclude the FDA from regulating tobacco products as customarily marketed.

[20] Although the dissent takes issue with our discussion of the FDA's change in position, *post,* at 1328–1330, our conclusion does not rely on the fact that the FDA's assertion of jurisdiction represents a sharp break with its prior interpretation of the FDCA. Certainly, an agency's initial interpretation of a statute that it is charged with administering is not "carved [157]in stone." *Chevron,* 467 U.S., at 863, 104 S.Ct. 2778; see also *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). As we recognized in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' " *Id.,* at 42, 103 S.Ct. 2856 (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968)). The consistency of the FDA's prior position is significant in this case for a different reason: It provides important context to Congress' enactment of its tobacco-specific legislation. When the FDA repeatedly informed Congress that the FDCA does not grant it the authority to regulate tobacco products, its statements were consistent with the agency's unwavering position since its inception, and with the position that its predecessor agency had first taken in 1914. Although not crucial, the consistency of the FDA's prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.

The dissent also argues that the proper inference to be drawn from Congress' tobacco-specific legislation is "critically ambivalent." *Post,* at 1326. We disagree. In that series of statutes, Congress crafted a specific legislative response to the problem of tobacco and health, and it did so with the understanding, based on repeated assertions by the FDA, that the agency

has no authority under the FDCA to regulate tobacco products. Moreover, Congress expressly pre-empted any other regulation of the labeling of tobacco products concerning their health consequences, even though the oversight of labeling is central to the FDCA's regulatory scheme. And in addressing the subject, Congress consistently evidenced its intent to preclude any federal agency from exercising significant policymaking authority in the area. Under these circumstances, we believe the appropriate[158] inference—that Congress intended to ratify the FDA's prior position that it lacks jurisdiction—is unmistakable.

The dissent alternatively argues that, even if Congress' subsequent tobacco-specific legislation did, in fact, ratify the FDA's position, that position was merely a contingent disavowal of jurisdiction. Specifically, the dissent contends that "the FDA's traditional view was largely premised on a perceived inability to prove the necessary statutory 'intent' requirement." *Post,* at 1330. A fair reading of the FDA's representations prior to 1995, however, demonstrates that the agency's position was essentially unconditional. See, *e.g.,* 1972 Hearings 239, 242 (statement of Comm'r Edwards) ("[R]egulation of cigarettes is to be the domain of Congress," and "[a]ny such move by FDA would be inconsistent with the clear congressional intent"); 1983 House Hearings 74 (statement of Assistant Secretary Brandt) ("[T]he issue of regulation of tobacco . . . is something that Congress has reserved to itself"); 1983 Senate Hearings 56 (statement of Assistant Secretary Brandt) ("Congress has assumed the responsibility of regulating . . . cigarettes"); Brief for Appellee in *Action on Smoking and Health v. Harris,* 655 F.2d 236 (C.A.D.C. 1980), 9 Rec. in No. 97–1604(CA4), Tab No. 4, at 27, n. 23 (because "Congress has never acted to disturb the agency's interpretation," it "acquiesced in the FDA's interpretation"). To the extent the agency's position could be characterized as equivocal, it was only with respect to the well-established exception of when the manufacturer makes express claims of therapeutic benefit. See, *e.g.,* 1965 Hearings 193 (statement of Deputy Comm'r Rankin) ("The Food and Drug Administration has no jurisdiction under the Food, Drug, and Cosmetic Act over tobacco, unless it bears drug claims"); Letter to ASH Executive Director Banzhaf from FDA Comm'r Kennedy (Dec. 5, 1977), App. 47 ("The interpretation of the Act by FDA consistently has been that cigarettes are not a drug unless health claims are made by the vendors"); Letter to ASH Executive Director Banzhaf from [159]FDA Comm'r Goyan (Nov. 25, 1980), *id.,* at 67 ("Insofar as rulemaking would relate to cigarettes or attached filters as customarily marketed, we have concluded that FDA has no jurisdiction"). Thus, what Congress ratified was the FDA's plain and resolute position that the FDCA gives the agency no authority to regulate tobacco products as customarily marketed.

C

[21] Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. See *Chevron, supra,* at 844, 104 S.Ct. 2778. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. Cf. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L.Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

[22] This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. See Brief for Petitioners 35–36; Reply Brief for Petitioners 14. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to [160]give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Our decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994), is instructive. That case involved the proper construction of the term "modify" in § 203(b) of the Communications Act of 1934. The FCC contended that, because the Act gave it the discretion to "modify any requirement" imposed under the statute, it therefore possessed the authority to render voluntary the otherwise mandatory requirement that long distance carriers file their rates. *Id.,* at 225, 114 S.Ct. 2223. We rejected the FCC's construction, finding "not the slightest doubt" that Congress had directly spoken to the question. *Id.,* at 228, 114 S.Ct. 2223. In reasoning even more apt here, we concluded that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.,* at 231, 114 S.Ct. 2223.

As in *MCI,* we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act—a concept central to the FDCA's regulatory scheme—but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the [161]question at issue and precluded the FDA from regulating tobacco products.

* * *

[23] By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, *post,* at 1331, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And " '[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.' " *United States v. Article of Drug ... Bacto Unidisk,* 394 U.S. 784, 800, 89 S.Ct. 1410, 22 L.Ed.2d 726 (1969) (quoting *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 600, 71 S.Ct. 515, 95 L.Ed. 566 (1951)).

Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here. For these reasons, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

The Food and Drug Administration (FDA) has the authority to regulate "articles (other than food) intended to affect the structure or any function of the body . . . ." Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 321(g)(1)(C). Unlike the majority, I believe that tobacco products fit within this statutory language.

[162]In its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally. Cigarettes achieve their mood-stabilizing effects through the interaction of the chemical nicotine and the cells of the central nervous system. Both cigarette manufacturers and smokers alike know of, and desire, that chemically induced result. Hence, cigarettes are "intended to affect" the body's "structure" and "function," in the literal sense of these words.

Second, the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope. See *United States v. Article of Drug . . . Bacto Unidisk*, 394 U.S. 784, 798, 89 S.Ct. 1410, 22 L.Ed.2d 726 (1969) (FDCA "is to be given *a liberal construction consistent with [its] overriding purpose to protect the public health*" (emphasis added)). Unregulated tobacco use causes "[m]ore than 400,000 people [to] die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease." 61 Fed.Reg. 44398 (1996). Indeed, tobacco products kill more people in this country every year "than . . . AIDS . . ., car accidents, alcohol, homicides, illegal drugs, suicides, and fires, *combined*." *Ibid.* (emphasis added).

Despite the FDCA's literal language and general purpose (both of which support the FDA's finding that cigarettes come within its statutory authority), the majority nonetheless reads the statute as *excluding* tobacco products for two basic reasons:

(1) the FDCA does not "fit" the case of tobacco because the statute requires the FDA to prohibit dangerous drugs or devices (like cigarettes) outright, and the agency concedes that simply banning the sale of cigarettes is not a proper remedy, *ante,* at 1304–1305; and

(2) Congress has enacted other statutes, which, when viewed in light of the FDA's long history of denying [163]tobacco-related jurisdiction and considered together with Congress' failure explicitly to grant the agency tobacco-specific authority, demonstrate that Congress did not intend for the FDA to exercise jurisdiction over tobacco, *ante,* at 1312–1313.

In my view, neither of these propositions is valid. Rather, the FDCA does not significantly limit the FDA's remedial alternatives. See *infra,* at 1322–1326. And the later statutes do not tell the FDA it cannot exercise jurisdiction, but simply leave FDA jurisdictional law where Congress found it. See *infra,* at 1326–1328; cf. Food and Drug Administration Modernization Act of 1997, 111 Stat. 2380 (codified at note following 21 U.S.C. § 321 (1994 ed., Supp. III)) (statute "shall" *not* "be construed to affect the question of whether" the FDA "has any authority to regulate any tobacco product").

The bulk of the opinion that follows will explain the basis for these latter conclusions. In short, I believe that the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history (described

briefly in Part I) are sufficient to establish that the FDA has authority to regulate tobacco. The statute-specific arguments against jurisdiction that the tobacco companies and the majority rely upon (discussed in Part II) are based on erroneous assumptions and, thus, do not defeat the jurisdiction-supporting thrust of the FDCA's language and purpose. The inferences that the majority draws from later legislative history are not persuasive, since (as I point out in Part III) one can just as easily infer from the later laws that Congress did not intend to affect the FDA's tobacco-related authority at all. And the fact that the FDA changed its mind about the scope of its own jurisdiction is legally insignificant because (as Part IV establishes) the agency's reasons for changing course are fully justified. Finally, as I explain in Part V, the degree of accountability that likely will attach to the FDA's action in this case should alleviate any concern [164]that Congress, rather than an administrative agency, ought to make this important regulatory decision.

I

Before 1938, the federal Pure Food and Drug Act contained only two jurisdictional definitions of "drug":

> "[1] medicines and preparations recognized in the United States Pharmacopoeia or National Formulary ... and [2] any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease." Act of June 30, 1906, ch. 3915, § 6, 34 Stat. 769.

In 1938, Congress added a third definition, relevant here:

> "(3) articles (other than food) intended to affect the structure or any function of the body ...." Act of June 25, 1938, ch. 675, § 201(g), 52 Stat. 1041 (codified at 21 U.S.C. § 321(g)(1)(C)).

It also added a similar definition in respect to a "device." See § 201(h), 52 Stat. 1041 (codified at 21 U.S.C. § 321(h)). As I have mentioned, the literal language of the third definition and the FDCA's general purpose both strongly support a projurisdiction reading of the statute. See *supra*, at 1316.

The statute's history offers further support. The FDA drafted the new language, and it testified before Congress that the third definition would expand the FDCA's jurisdictional scope significantly. See Hearings on S.1944 before a Subcommittee of the Senate Committee on Commerce, 73d Cong., 2d Sess., 15–16 (1933), reprinted in 1 FDA, Legislative History of the Federal Food, Drug, and Cosmetic Act and Its Amendments 107–108 (1979) (hereinafter Leg. Hist.). Indeed, "[t]he purpose" of the new definition was to "make possible the regulation of a great many products that have been found on the market that cannot be alleged to be treatments for diseased conditions." *Id.*, at 108. While the drafters focused specifically upon the need to give the FDA jurisdiction [165]over "slenderizing" products such as "antifat remedies," *ibid.*, they were aware that, in doing so, they had created what was "admittedly an inclusive, a wide definition," *id.*, at 107. And that broad language was included *deliberately*, so that jurisdiction could be had over "*all* substances and preparations, other than food, and *all* devices intended to affect the structure or any function of the body ...." *Ibid.* (emphasis added); see also Hearings on S. 2800 before the Senate Committee on Commerce, 73d Cong., 2d Sess., 516 (1934), reprinted in 2 Leg. Hist. 519 (statement of then-FDA Chief Walter Campbell acknowledging that "[t]his definition of 'drugs' is all-inclusive").

After studying the FDCA's history, experts have written that the statute "is a purposefully broad delegation of discretionary powers by Congress," 1 J. O'Reilly, Food and Drug Administration § 6.01, p. 6–1 (2d ed.1995) (hereinafter O'Reilly), and that, in a sense, the FDCA "must be regarded as a *constitution*" that "establish[es] general principles" and "permit[s] implementation within broad parameters"

so that the FDA can "implement these objectives through the most effective and efficient controls that can be devised." Hutt, Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act, 28 Food Drug Cosm. L.J. 177, 178–179 (1973) (emphasis added). This Court, too, has said that the

> "historical expansion of the definition of drug, and the creation of a parallel concept of devices, clearly show . . . that Congress fully intended that the Act's coverage be as broad as its literal language indicates—and equally clearly, broader than any strict medical definition might otherwise allow." *Bacto Unidisk*, 394 U.S., at 798, 89 S.Ct. 1410.

That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely—a view embodied in much Second New [166]Deal legislation. Cf. *Gray v. Powell*, 314 U.S. 402, 411–412, 62 S.Ct. 326, 86 L.Ed. 301 (1941) (Congress "could have legislated specifically" but decided "to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable" determination). Thus, at around the same time that it added the relevant language to the FDCA, Congress enacted laws granting other administrative agencies even broader powers to regulate much of the Nation's transportation and communication. See, *e.g.*, Civil Aeronautics Act of 1938, ch. 601, § 401(d)(1), 52 Stat. 987 (Civil Aeronautics Board to regulate airlines within confines of highly general "public convenience and necessity" standard); Motor Carrier Act of 1935, ch. 498, § 204(a)(1), 49 Stat. 546 (Interstate Commerce Commission to establish "reasonable requirements" for trucking); Communications Act of 1934, ch. 652, § 201(a), 48 Stat. 1070 (Federal Communications Commission (FCC) to regulate radio, later television, within confines of even broader "public interest" standard). Why would the 1938 New Deal Congress suddenly have hesitated to delegate to so well established an agency as the FDA all of the discretionary authority that a straightforward reading of the relevant statutory language implies?

Nor is it surprising that such a statutory delegation of power could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected. Such a possibility is inherent in the very nature of a broad delegation. In 1938, it may well have seemed unlikely that the FDA would ever bring cigarette manufacturers within the FDCA's statutory language by proving that cigarettes produce chemical changes in the body and that the makers "intended" their product chemically to affect the body's "structure" or "function." Or, back then, it may have seemed unlikely that, even assuming such proof, the FDA actually would exercise its discretion to regulate so popular a product. See R. Kluger, Ashes to Ashes 105 (1997) (in the 1930's "Americans were in love with smoking . . .").

[167]But it should not have seemed unlikely that, assuming the FDA decided to regulate and proved the particular jurisdictional prerequisites, the courts would rule such a jurisdictional assertion fully authorized. Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968) (reading Communications Act of 1934 as authorizing FCC jurisdiction to regulate cable systems while noting that "Congress could not in 1934 have foreseen the development of" advanced communications systems). After all, this Court has read more narrowly phrased statutes to grant what might have seemed even more unlikely assertions of agency jurisdiction. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 774–777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (statutory authority to regulate interstate "transportation" of natural gas includes authority to regulate "prices" charged by field producers); *Phillips Petroleum Co. v.*

Wisconsin, 347 U.S. 672, 677–684, 74 S.Ct. 794, 98 L.Ed. 1035 (1954) (independent gas producer subject to regulation despite Natural Gas Act's express exemption of gathering and production facilities).

I shall not pursue these general matters further, for neither the companies nor the majority denies that the FDCA's literal language, its general purpose, and its particular legislative history favor the FDA's present jurisdictional view. Rather, they have made several specific arguments in support of one basic contention: Even if the statutory delegation is broad, it is not broad *enough* to include tobacco. I now turn to each of those arguments.

II

A

The tobacco companies contend that the FDCA's words cannot possibly be read to mean what they literally say. The statute defines "device," for example, as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article . . . intended to affect the structure or any function of the body . . . ." 21 [168]U.S.C. § 321(h). Taken literally, this definition might include everything from room air conditioners to thermal pajamas. The companies argue that, to avoid such a result, the meaning of "drug" or "device" should be confined to *medical* or *therapeutic* products, narrowly defined. See Brief for Respondent United States Tobacco Co. 8–9.

The companies may well be right that the statute should not be read to cover room air conditioners and winter underwear. But I do not agree that we must accept their proposed limitation. For one thing, such a cramped reading contravenes the established purpose of the statutory language. See *Bacto Unidisk,* 394 U.S., at 798, 89 S.Ct. 1410 (third definition is "clearly, broader than any strict medical definition"); 1 Leg. Hist. 108 (definition covers products "that cannot be alleged to be treatments for diseased conditions"). For another, the companies' restriction would render the other two "drug" definitions superfluous. See 21 U.S.C. §§ 321(g)(1)(A), (g)(1)(B) (covering articles in the leading pharmacology compendia and those "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease").

Most importantly, the statute's language itself supplies a different, more suitable, limitation: that a "drug" must be a *chemical* agent. The FDCA's "device" definition states that an article which affects the structure or function of the body is a "device" only if it "does *not* achieve its primary intended purposes through chemical action within . . . the body," and "is *not* dependent upon being metabolized for the achievement of its primary intended purposes." § 321(h) (emphasis added). One can readily infer from this language that at least an article that *does* achieve its primary purpose through chemical action within the body and that *is* dependent upon being metabolized is a "drug," provided that it otherwise falls within the scope of the "drug" definition. And one need not hypothesize about air conditioners or thermal [169]pajamas to recognize that the chemical nicotine, an important tobacco ingredient, meets this test.

Although I now oversimplify, the FDA has determined that once nicotine enters the body, the blood carries it almost immediately to the brain. See 61 Fed.Reg. 44698–44699 (1966). Nicotine then binds to receptors on the surface of brain cells, setting off a series of chemical reactions that alter one's mood and produce feelings of sedation and stimulation. See *id.,* at 44699, 44739. Nicotine also increases the number of nicotinic receptors on the brain's surface, and alters its normal electrical activity. See *id.,* at 44739. And nicotine stimulates the transmission of a natural chemical that "rewards" the body with pleasurable sensations (dopamine), causing nicotine addiction. See *id.,* at 44700, 44721–44722. The upshot is that

nicotine stabilizes mood, suppresses appetite, tranquilizes, and satisfies a physical craving that nicotine itself has helped to create—all through chemical action within the body after being metabolized.

This physiology—and not simply smoker psychology—helps to explain why as many as 75% of adult smokers believe that smoking "reduce[s] nervous irritation," 60 Fed.Reg. 41579 (1995); why 73% of young people (10– to 22–year–olds) who begin smoking say they do so for "relaxation," 61 Fed.Reg. 44814 (1996); and why less than 3% of smokers succeed in quitting each year, although 70% want to quit, *id.,* at 44704. That chemistry also helps to explain the Surgeon General's findings that smokers believe "smoking [makes them] feel better" and smoke more "in situations involving negative mood." *Id.,* at 44814. And, for present purposes, that chemistry demonstrates that nicotine affects the "structure" and "function" of the body in a manner that is quite similar to the effects of other regulated substances. See *id.,* at 44667 (FDA regulates Valium, NoDoz, weight-loss products). Indeed, addiction, sedation, stimulation, and weight loss are *precisely* the kinds of product effects that the FDA typically reviews and controls. And, since the nicotine in cigarettes [170]plainly is not a "food," its chemical effects suffice to establish that it is as a "drug" (and the cigarette that delivers it a drug-delivery "device") for the purpose of the FDCA.

B

The tobacco companies' principal definitional argument focuses upon the statutory word "intended." See 21 U.S.C. § 321(g)(1)(C). The companies say that "intended" in this context is a term of art. See Brief for Respondent Brown & Williamson Tobacco Corp. 2. They assert that the statutory word "intended" means that the product's maker has made an *express claim* about the effect that its product will have on the body. *Ibid.* Indeed, according to the companies, the FDA's inability to prove that cigarette manufacturers make such claims is precisely why that agency historically has said it lacked the statutory power to regulate tobacco. See *id.,* at 19–20.

The FDCA, however, does not use the word "claimed"; it uses the word "intended." And the FDA long ago issued regulations that say the relevant "intent" can be shown not only by a manufacturer's "expressions," *but also* "by the circumstances surrounding the distribution of the article." 41 Fed.Reg. 6896 (1976) (codified at 21 CFR § 801.4 (1999)); see also 41 Fed. Reg. 6896 (1976) ("objective intent" shown if "article is, with the knowledge [of its makers], offered and used" for a particular purpose). Thus, even in the absence of express claims, the FDA has regulated products that affect the body if the manufacturer wants, and knows, that consumers so use the product. See, *e.g.,* 60 Fed.Reg. 41527–41531 (1995) (describing agency's regulation of topical hormones, sunscreens, fluoride, tanning lamps, thyroid in food supplements, novelty condoms—all marketed without express claims); see also 1 O'Reilly § 13.04, at 13–15 ("Sometimes the very nature of the material makes it a drug . . .").

Courts ordinarily reverse an agency interpretation of this kind only if Congress has clearly answered the interpretive [171]question or if the agency's interpretation is unreasonable. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The companies, in an effort to argue the former, point to language in the legislative history tying the word "intended" to a technical concept called "intended use." But nothing in Congress' discussion either of "intended" or "intended use" suggests that an express claim (which *often* shows intent) is *always* necessary. Indeed, the primary statement to which the companies direct our attention says only that a manufacturer can determine what kind of regulation ap-

plies—"food" or "drug"—because, "through his representations in connection with its sale, [the manufacturer] can determine" whether an article is to be used as a "food," as a "drug," or as "both." S.Rep. No. 361, 74th Cong., 1st Sess., 4 (1935), reprinted in 3 Leg. Hist. 696.

Nor is the FDA's "objective intent" interpretation unreasonable. It falls well within the established scope of the ordinary meaning of the word "intended." See *Agnew v. United States,* 165 U.S. 36, 53, 17 S.Ct. 235, 41 L.Ed. 624 (1897) (intent encompasses the known consequences of an act). And the companies acknowledge that the FDA can regulate a drug-like substance in the ordinary circumstance, *i.e.,* where the manufacturer makes an express claim, so it is not unreasonable to conclude that the agency retains such power where a product's effects on the body are so well known (say, like those of aspirin or calamine lotion), that there is no *need* for express representations because the product speaks for itself.

The companies also cannot deny that the evidence of their intent is sufficient to satisfy the statutory word "intended" as the FDA long has interpreted it. In the first place, there was once a time when they actually *did* make express advertising claims regarding tobacco's mood-stabilizing and weight-reducing properties—and historical representations can portend present expectations. In the late 1920's, for example, the American Tobacco Company urged weight-conscious smokers to " 'Reach for a Lucky instead of a [172]sweet.' " Kluger, Ashes to Ashes, at 77–78. The advertisements of R J Reynolds (RJR) emphasized mood stability by depicting a pilot remarking that " 'It Takes Steady Nerves to Fly the Mail at Night . . . . That's why I smoke Camels. And I smoke plenty!' " *Id.,* at 86. RJR also advertised the stimulating quality of cigarettes, stating in one instance that " 'You get a Lift with a Camel,' " and, in another, that Camels are " 'A Harmless Restoration of the Flow of Natural Body Energy.' " *Id.,* at 87. And claims of medical proof of mildness (and of other beneficial effects) once were commonplace. See, *e.g., id.,* at 93 (Brown & Williamson advertised Kool-brand mentholated cigarettes as "a tonic to hot, tired throats"); *id.,* at 101, 131 (Philip Morris contended that " '[r]ecognized laboratory tests have conclusively proven the advantage of Phillip *[sic]* Morris' "); *id.,* at 88 (RJR proclaimed " 'For Digestion's sake, smoke Camels! . . . Camels make mealtime more pleasant—digestion is stimulated—alkalinity increased' "). Although in recent decades cigarette manufacturers have stopped making express health claims in their advertising, consumers have come to understand what the companies no longer need to express—that through chemical action cigarettes stabilize mood, sedate, stimulate, and help suppress appetite.

Second, even though the companies refused to acknowledge publicly (until only very recently) that the nicotine in cigarettes has chemically induced, and habit-forming, effects, see, *e.g.,* Regulation of Tobacco Products (Part 1): Hearings before the House Subcommittee on Health and the Environment, 103d Cong., 2d Sess., 628 (1994) (hereinafter 1994 Hearings) (heads of seven major tobacco companies testified under oath that they believed "nicotine is *not* addictive" (emphasis added)), the FDA recently has gained access to solid, documentary evidence proving that cigarette manufacturers have long *known* tobacco produces these effects within the body through the metabolizing of chemicals, and that they [173]have long *wanted* their products to produce those effects in this way.

For example, in 1972, a tobacco-industry scientist explained that " '[s]moke is beyond question the most optimized vehicle of nicotine,' " and " 'the cigarette is the most optimized dispenser of smoke.' " 61 Fed.Reg. 44856 (1996) (emphasis deleted). That same scientist urged company executives to

" '[t]hink of the cigarette pack as a storage container for a day's supply of nico-

> tine.... Think of the cigarette as a dispenser for a dose unit of nicotine [and][t]hink of a puff of smoke as the vehicle of nicotine.' " *Ibid.* (Philip Morris) (emphasis deleted).

That same year, other tobacco industry researchers told their superiors that

> " 'in different situations and at different dose levels, nicotine appears to act as a stimulant, depressant, tranquilizer, psychic energizer, appetite reducer, antifatigue agent, or energizer.... Therefore, [tobacco] products may, in a sense, compete with a variety of other products with certain types of drug action.' " *Id.,* at 44669 (RJR) (emphasis deleted).

A draft report prepared by authorities at Philip Morris said that nicotine

> " 'is a physiologically active, nitrogen containing substance [similar to] quinine, cocaine, atropine and morphine. [And] [w]hile each of these [other] substances can be used to affect human physiology, nicotine has a particularly broad range of influence.' " *Id.,* at 44668–44669.

And a 1980 manufacturer's study stated that

> " 'the pharmacological response of smokers to nicotine is believed to be responsible for an individual's smoking [174]behaviour, providing the motivation for and the degree of satisfaction required by the smoker.' " *Id.,* at 44936 (Brown & Williamson).

With such evidence, the FDA has more than sufficiently established that the companies "intend" their products to "affect" the body within the meaning of the FDCA.

C

The majority nonetheless reaches the "inescapable conclusion" that the language and structure of the FDCA as a whole "simply do not fit" the kind of public health problem that tobacco creates. *Ante,* at 1306. That is because, in the majority's view, the FDCA requires the FDA to ban outright "dangerous" drugs or devices (such as cigarettes); yet, the FDA concedes that an immediate and total cigarette-sale ban is inappropriate. *Ibid.*

This argument is curious because it leads with similarly "inescapable" force to precisely the opposite conclusion, namely, that the FDA *does* have jurisdiction but that it must ban cigarettes. More importantly, the argument fails to take into account the fact that a statute interpreted as requiring the FDA to pick a more dangerous over a less dangerous remedy would be a perverse statute, *causing,* rather than preventing, unnecessary harm whenever a total ban is likely the more dangerous response. And one can at least imagine such circumstances.

Suppose, for example, that a commonly used, mildly addictive sleeping pill (or, say, a kind of popular contact lens), plainly within the FDA's jurisdiction, turned out to pose serious health risks for certain consumers. Suppose further that many of those addicted consumers would ignore an immediate total ban, turning to a potentially more dangerous black-market substitute, while a less draconian remedy (say, adequate notice) would wean them gradually away to a safer product. Would the FDCA still *force* the FDA to impose [175]the more dangerous remedy? For the following reasons, I think not.

First, the statute's language does not restrict the FDA's remedial powers in this way. The FDCA permits the FDA to regulate a "combination product"—*i.e.,* a "device" (such as a cigarette) that contains a "drug" (such as nicotine)—under its "device" provisions. 21 U.S.C. § 353(g)(1). And the FDCA's "device" provisions explicitly grant the FDA wide remedial discretion. For example, where the FDA cannot "otherwise" obtain "reasonable assurance" of a device's "safety and effectiveness," the agency may restrict by regulation a product's "sale, distribution, or use" upon "*such ... conditions as the Secretary may prescribe.* § 360j(e)(1) (emphasis added). And the statutory section that most clearly addresses the FDA's

power to ban (entitled "Banned devices") says that, where a device presents "an unreasonable and substantial risk of illness or injury," the Secretary "*may*"—not *must*—"initiate a proceeding . . . to make such device a banned device." § 360f(a) (emphasis added).

The Court points to other statutory subsections which it believes require the FDA to ban a drug or device entirely, even where an outright ban risks more harm than other regulatory responses. See *ante,* at 1302–1303. But the cited provisions do no such thing. It is true, as the majority contends, that "the FDCA requires the FDA to place all devices" in "one of three classifications" and that Class III devices require "premarket approval." *Ante,* at 1302. But it is not the case that the FDA *must* place cigarettes in Class III because tobacco itself "presents a potential unreasonable risk of illness or injury." 21 U.S.C. § 360c(a)(1)(C). In fact, Class III applies *only* where *regulation* cannot otherwise "provide reasonable assurance of . . . safety. §§ 360c(a)(1)(A), (B) (placing a device in Class I or Class II when regulation can provide that assurance). Thus, the statute plainly allows the FDA to consider the relative, overall "safety" of [176]a device in light of its regulatory alternatives, and where the FDA has chosen the least dangerous path, *i.e.,* the safest path, then it can—and does—provide a "reasonable assurance" of "safety" within the meaning of the statute. A good football helmet provides a reasonable assurance of safety for the player even if the sport itself is still dangerous. And the safest regulatory choice by definition offers a "reasonable" assurance of safety in a world where the other alternatives are yet more dangerous.

In any event, it is not entirely clear from the statute's text that a Class III categorization would require the FDA affirmatively to *withdraw* from the market dangerous devices, such as cigarettes, which are already widely distributed. See, *e.g.,* § 360f(a) (when a device presents an "unreasonable and substantial risk of illness or injury," the Secretary "may" make it "a banned device"); § 360h(a) (when a device "presents an unreasonable risk of substantial harm to the public health," the Secretary "may" require "notification"); § 360h(b) (when a defective device creates an "unreasonable risk" of harm, the Secretary "may" order "[r]epair, replacement, or refund"); cf. 2 O'Reilly § 18.08, at 18–29 (point of Class III "premarket approval" is to allow "careful scientific review" of each "truly new" device "*before* it is exposed" to users (emphasis added)).

Noting that the FDCA requires banning a "misbranded" drug, the majority also points to 21 U.S.C. § 352(j), which deems a drug or device "misbranded" if "it is dangerous to health when used" as "prescribed, recommended, or suggested in the labeling." See *ante,* at 1302. In addition, the majority mentions § 352(f)(1), which calls a drug or device "misbranded" unless "its labeling bears . . . adequate directions for use" as "are necessary for the protection of users." *Ibid.* But this "misbranding" language is not determinative, for it permits the FDA to conclude that a drug or device is *not* "dangerous to health" and that it *does* have "adequate" [177]directions *when regulated so as to render it as harmless as possible.* And surely the agency can determine that a substance is comparatively "safe" (*not* "dangerous") whenever it would be *less* dangerous to make the product available (subject to regulatory requirements) than suddenly to withdraw it from the market. Any other interpretation risks substantial harm of the sort that my sleeping pill example illustrates. See *supra,* at 1322 and this page. And nothing in the statute prevents the agency from adopting a view of "safety" that would avoid such harm. Indeed, the FDA already seems to have taken this position when permitting distribution of toxic drugs, such as poisons used for chemotherapy, that are dangerous for the user but

are not deemed "dangerous to health" in the relevant sense. See 61 Fed.Reg. 44413 (1996).

The tobacco companies point to another statutory provision which says that if a device "would cause serious, adverse health consequences or death, the Secretary *shall* issue" a cease distribution order. 21 U.S.C. § 360h(e)(1) (emphasis added). But that word "shall" in this context cannot mean that the Secretary must resort to the recall remedy *whenever* a device would have serious, adverse health effects. Rather, that language must mean that the Secretary "shall issue" a cease distribution order in compliance with the section's procedural requirements *if* the Secretary chooses *in her discretion* to use that particular subsection's recall remedy. Otherwise, the subsection would trump and make meaningless the same section's provision of other lesser remedies such as simple "notice" (which the Secretary similarly can impose if, but only if, she finds that the device "presents an unreasonable risk of substantial harm to the public"). § 360h(a)(1). And reading the statute to compel the FDA to "recall" every dangerous device likewise would conflict with that same subsection's statement that the recall remedy "shall be *in addition to* [the other] remedies provided" in the statute. § 360h(e)(3) (emphasis added).

[178]The statute's language, then, permits the agency to choose remedies consistent with its basic purpose—the overall protection of public health.

The second reason the FDCA does not require the FDA to select the more dangerous remedy, see *supra,* at 1322–1323, is that, despite the majority's assertions to the contrary, the statute does not distinguish among the kinds of health effects that the agency may take into account when assessing safety. The Court insists that the statute only permits the agency to take into account the health risks and benefits of the "*product itself*" as used by individual consumers, *ante,* at 1304, and, thus, that the FDA is prohibited from considering that a ban on smoking would lead many smokers to suffer severe withdrawal symptoms or to buy possibly stronger, more dangerous, black market cigarettes—considerations that the majority calls "the aggregate health effects of alternative administrative actions." *Ibid.* But the FDCA expressly *permits* the FDA to take account of comparative safety in precisely this manner. See, *e.g.,* 21 U.S.C. § 360h(e)(2)(B)(i)(II) (no device recall if "risk of recal[l]" presents "a greater health risk than" no recall); § 360h(a) (notification "unless" notification "would present a greater danger" than "no such notification").

Moreover, one cannot distinguish in this context between a "specific" health risk incurred by an individual and an "aggregate" risk to a group. *All* relevant risk is, at bottom, risk to an individual; *all* relevant risk attaches to "the product itself"; and *all* relevant risk is "aggregate" in the sense that the agency aggregates health effects in order to determine risk to the individual consumer. If unregulated smoking will kill 4 individuals out of a typical group of 1,000 people, if regulated smoking will kill 1 out of 1,000, and if a smoking ban (because of the black market) will kill 2 out of 1,000; then these three possibilities mean that in each group four, one, and two individuals, on average, will die respectively. And the risk to each individual consumer is 4/1,000, [179]1/1,000, and 2/1,000 respectively. A "specific" risk to an individual consumer and "aggregate" risks are two sides of the same coin; each calls attention to the same set of facts. While there may be a theoretical distinction between the risk of the product itself and the risk related to the presence or absence of an intervening voluntary act (*e.g.,* the search for a replacement on the black market), the majority does not rely upon any such distinction, and the FDA's history of regulating "replacement" drugs such as methadone shows that it has long

taken likely actual alternative consumer behavior into account.

I concede that, as a matter of logic, one could consider the FDA's "safety" evaluation to be different from its choice of remedies. But to read the statute to forbid the agency from taking account of the realities of consumer behavior either in assessing safety or in choosing a remedy could increase the risks of harm—doubling the risk of death to each "individual user" in my example above. Why would Congress insist that the FDA ignore such realities, even if the consequent harm would occur only unusually, say, where the FDA evaluates a product (a sleeping pill; a cigarette; a contact lens) that is already on the market, potentially habit forming, or popular? I can find no satisfactory answer to this question. And that, I imagine, is why the statute itself says nothing about any of the distinctions that the Court has tried to draw. See 21 U.S.C. § 360c(a)(2) (instructing FDA to determine the safety and effectiveness of a "device" in part by weighing "*any* probable benefit to health . . . against *any* probable risk of injury or illness . . ." (emphasis added)).

Third, experience counsels against an overly rigid interpretation of the FDCA that is divorced from the statute's overall health-protecting purposes. A different set of words, added to the FDCA in 1958 by the Delaney Amendment, provides that "no [food] additive shall be deemed to be safe if it is found [after appropriate tests] to induce cancer when ingested by man or animal." § 348(c)(3). The FDA [180]once interpreted this language as requiring it to ban any food additive, no matter how small the amount, that appeared in any food product if that additive was ever found to induce cancer in any animal, no matter how large a dose needed to induce the appearance of a single carcinogenic cell. See H.R.Rep. No. 95–658, p. 7 (1977) (discussing agency's view). The FDA believed that the statute's ban mandate was absolute and prevented it from establishing a level of "safe use" or even to judge whether "the benefits of continued use outweigh the risks involved." *Id.,* at 5. This interpretation—which in principle could have required the ban of everything from herbal teas to mushrooms—actually led the FDA to ban saccharine, see 42 Fed.Reg. 19996 (1977), though this extremely controversial regulatory response never took effect because Congress enacted, and has continually renewed, a law postponing the ban. See Saccharin Study and Labeling Act, Pub.L. 95–203, § 3, 91 Stat. 1452; *e.g.,* Pub.L. 102–142, Tit. VI, 105 Stat. 910.

The Court's interpretation of the statutory language before us risks Delaney-type consequences with even less linguistic reason. Even worse, the view the Court advances undermines the FDCA's overall health-protecting purpose by placing the FDA in the strange dilemma of either banning completely a potentially dangerous drug or device or doing nothing at all. Saying that I have misunderstood its conclusion, the majority maintains that the FDA "may clearly regulate many 'dangerous' products without banning them." *Ante,* at 1305. But it then adds that the FDA *must* ban—rather than otherwise regulate—a drug or device that "cannot be used safely for any therapeutic purpose." *Ante,* at 1306. If I misunderstand, it is only because this linchpin of the majority's conclusion remains unexplained. *Why* must a widely used but unsafe device be withdrawn from the market when that particular remedy threatens the health of many and is thus more dangerous than another regulatory response? It is, indeed, a perverse interpretation that reads the FDCA [181]to require the ban of a device that has no "safe" therapeutic purpose where a ban is the most dangerous remedial alternative.

In my view, where linguistically permissible, we should interpret the FDCA in light of Congress' overall desire to protect health. That purpose requires a flexible interpretation that both permits the FDA to take into account the realities of human behavior and allows it, in appropriate

cases, to choose from its arsenal of statutory remedies. A statute so interpreted easily "fit[s]" this, and other, drug- and device-related health problems.

III

In the majority's view, laws enacted since 1965 require us to deny jurisdiction, whatever the FDCA might mean in their absence. But why? Do those laws contain language barring FDA jurisdiction? The majority must concede that they do not. Do they contain provisions that are inconsistent with the FDA's exercise of jurisdiction? With one exception, see *infra*, at 1327, the majority points to no such provision. Do they somehow repeal the principles of law (discussed in Part II, *supra*) that otherwise would lead to the conclusion that the FDA has jurisdiction in this area? The companies themselves deny making any such claim. See Tr. of Oral Arg. 27 (denying reliance on doctrine of "partial repeal"). Perhaps the later laws "shape" and "focus" what the 1938 Congress meant a generation earlier. *Ante*, at 1306. But this Court has warned against using the views of a later Congress to construe a statute enacted many years before. See *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (later history is a " 'hazardous basis for inferring the intent of an earlier' Congress" (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960))). And, while the majority suggests that the subsequent history "control[s] our construction" of the FDCA, see *ante*, at 1306 (citation and internal quotation marks omitted), this Court [182]expressly has held that such subsequent views are not "controlling." *Haynes v. United States*, 390 U.S. 85, 87–88, n. 4, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968); accord, *Southwestern Cable Co.*, 392 U.S., at 170, 88 S.Ct. 1994 (such views have " 'very little, if any, significance' "); see also *Sullivan v. Finkelstein*, 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (SCALIA, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

Regardless, the later statutes do not support the majority's conclusion. That is because, whatever individual Members of Congress after 1964 may have assumed about the FDA's jurisdiction, the laws they enacted did not embody any such "no jurisdiction" assumption. And one cannot automatically *infer* an antijurisdiction intent, as the majority does, for the later statutes are both (and similarly) consistent with quite a different congressional desire, namely, the intent to proceed without interfering with whatever authority the FDA otherwise may have possessed. See, *e.g.*, Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248 et al. before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., 19 (1965) (hereinafter 1965 Hearings) (statement of Rep. Fino that the proposed legislation would *not* "erode" agency authority). As I demonstrate below, the subsequent legislative history is critically ambivalent, for it can be read *either* as (a) "ratif[ying]" a no-jurisdiction assumption, see *ante*, at 1313, *or* as (b) leaving the jurisdictional question just where Congress found it. And the fact that both inferences are "equally tenable," *Pension Benefit Guaranty Corp., supra*, at 650, 110 S.Ct. 2668 (citation and internal quotation marks omitted); *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 672, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (SCALIA, J., dissenting), prevents the majority from drawing from the later statutes the firm, antijurisdiction implication that it needs.

Consider, for example, Congress' failure to provide the FDA with express authority to regulate tobacco—a circumstance[183] that the majority finds significant. See *ante*, at 1306–1307, 1308–1309, 1312–1313. But cf. *Southwestern Cable Co., supra*, at 170, 88 S.Ct. 1994 (failed requests do not prove agency "did not already possess" authori-

ty). In fact, Congress *both* failed to grant express authority to the FDA when the FDA denied it had jurisdiction over tobacco *and* failed to take that authority expressly away when the agency later asserted jurisdiction. See, *e.g.,* S. 1262, 104th Cong., 1st Sess., § 906 (1995) (failed bill seeking to amend FDCA to say that "[n]othing in this Act or any other Act shall provide the [FDA] with any authority to regulate in any manner tobacco or tobacco products"); see also H.R. 516, 105th Cong., 1st Sess., § 2 (1997) (similar); H.R. Res. 980, reprinted in 142 Cong. Rec. 5018 (1996) (Georgia legislators unsuccessfully requested that Congress "rescind any action giving the FDA authority" over tobacco); H.R. 2283, 104th Cong., 1st Sess. (1995) (failed bill "[t]o prohibit the [FDA] regulation of the sale or use of tobacco"); H.R. 2414, 104th Cong., 1st Sess., § 2(a) (1995) (similar). Consequently, the defeat of various different proposed jurisdictional changes proves nothing. This history shows only that Congress could not muster the votes necessary either to grant or to deny the FDA the relevant authority. It neither favors nor disfavors the majority's position.

The majority also mentions the speed with which Congress acted to take jurisdiction away from other agencies once they tried to assert it. See *ante,* at 1307, 1309–1310. But such a congressional response again proves nothing. On the one hand, the speedy reply might suggest that Congress somehow resented agency assertions of jurisdiction in an area it desired to reserve for itself—a consideration that supports the majority. On the other hand, Congress' quick reaction with respect to *other* agencies' regulatory efforts contrasts dramatically with its failure to enact any responsive law (at any speed) after the FDA asserted jurisdiction over tobacco more than three years ago. And that contrast supports the opposite conclusion.

[184]In addition, at least one post–1938 statute reveals quite a different congressional intent than the majority infers. See note following 21 U.S.C. § 321 (1994 ed., Supp. III) (FDA Modernization Act of 1997) (law "shall *[not]* be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product," and "[s]uch authority, if any, shall be exercised under the [FDCA] as in effect on the day before the date of [this] enactment"). Consequently, it appears that the only interpretation that can reconcile *all* of the subsequent statutes is the inference that Congress did not intend, either explicitly or implicitly, for its later laws to answer the question of the scope of the FDA's jurisdictional authority. See 143 Cong. Rec. S8860 (Sept. 5, 1997) (the Modernization Act will "not interfere or substantially negatively affect any of the FDA tobacco authority").

The majority's historical perspective also appears to be shaped by language in the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, 15 U.S.C. § 1331 *et seq.* See *ante,* at 1308–1309. The FCLAA requires manufacturers to place on cigarette packages, etc., health warnings such as the following:

> "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." 15 U.S.C. § 1333(a).

The FCLAA has an express pre-emption provision which says that "[n]o statement relating to smoking and health, other than the statement required by [this Act], shall be required on any cigarette package." § 1334(a). This pre-emption clause plainly prohibits the FDA from requiring on "any cigarette package" any other "statement relating to smoking and health," but no one contends that the FDA has failed to abide by this prohibition. See, *e.g.,* 61 Fed.Reg. 44399 (1996) (describing the other regulatory prescriptions). Rather, the question is whether the FCLAA's pre-emption [185]provision does *more.* Does it forbid the FDA to regulate at all?

This Court has already answered that question expressly and in the negative. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *Cipollone* held that the FCLAA's pre-emption provision does not bar state or federal regulation outside the provision's literal scope. *Id.*, at 518, 112 S.Ct. 2608. And it described the pre-emption provision as "merely prohibit[ing] state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels . . . ." *Ibid.*

This negative answer is fully consistent with Congress' intentions in regard to the pre-emption language. When Congress enacted the FCLAA, it focused upon the regulatory efforts of the Federal Trade Commission (FTC), not the FDA. See 1965 Hearings 1–2. And the Public Health Cigarette Smoking Act of 1969, Pub.L. 91–222, § 7(c), 84 Stat. 89, expressly amended the FCLAA to provide that "[n]othing in this Act shall be construed to affirm or deny the [FTC's] holding that it has the authority to issue trade regulation rules" for tobacco. See also H.R. Conf. Rep. No. 91–897, p. 7 (1970), U.S. CodeCong. & Admin.News 1970, pp. 2652, 2679 (statement of House Managers) (we have "no intention to resolve the question as to whether" the FTC could regulate tobacco in a different way); see also 116 Cong. Rec. 7921 (1970) (statement of Rep. Satterfield) (same). Why would one read the FCLAA's pre-emption clause—a provision that Congress intended to limit even in respect to the agency directly at issue—so broadly that it would bar a different agency from engaging in any other cigarette regulation at all? The answer is that the Court need not, and should not, do so. And, inasmuch as the Court already has declined to view the FCLAA as pre-empting the entire field of tobacco regulation, I cannot accept that that same law bars the FDA's regulatory efforts here.

When the FCLAA's narrow pre-emption provision is set aside, the majority's conclusion that Congress clearly intended for its tobacco-related statutes to be the exclusive [186]"response" to "the problem of tobacco and health," *ante,* at 1313, is based on legislative silence. Notwithstanding the views voiced by various legislators, Congress itself has addressed expressly the issue of the FDA's tobacco-related authority only once—and, as I have said, its statement was that the statute was *not* to "be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product." Note following 21 U.S.C. § 321 (1994 ed., Supp. III). The proper inference to be drawn from *all* of the post–1965 statutes, then, is one that interprets Congress' general legislative silence consistently with this statement.

IV

I now turn to the final historical fact that the majority views as a factor in its interpretation of the subsequent legislative history: the FDA's former denials of its tobacco-related authority.

Until the early 1990's, the FDA expressly maintained that the 1938 statute did not give it the power that it now seeks to assert. It then changed its mind. The majority agrees with me that the FDA's change of positions does not make a significant legal difference. See *ante,* at 1313–1314; see also *Chevron,* 467 U.S., at 863, 104 S.Ct. 2778 ("An initial agency interpretation is not instantly carved in stone"); accord, *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) ("[C]hange is not invalidating"). Nevertheless, it labels those denials "important context" for drawing an inference about Congress' intent. *Ante,* at 1313. In my view, the FDA's change of policy, like the subsequent statutes themselves, does nothing to advance the majority's position.

When it denied jurisdiction to regulate cigarettes, the FDA consistently stated *why* that was so. In 1963, for example, FDA administrators wrote that cigarettes did not satisfy the relevant FDCA defini-

tions—in particular, the "intent" requirement—because cigarette makers did not sell their product with accompanying "therapeutic claims." [187]Letter to Directors of Bureaus, Divisions and Directors of Districts from FDA Bureau of Enforcement (May 24, 1963), in Public Health Cigarette Amendments of 1971: Hearings on S. 1454 before the Consumer Subcommittee of the Senate Committee on Commerce, 92d Cong., 2d Sess., 240 (1972) (hereinafter FDA Enforcement Letter). And subsequent FDA Commissioners made roughly the same assertion. One pointed to the fact that the manufacturers only "recommended" cigarettes "for smoking pleasure." Two others reiterated the evidentiary need for "health claims." Yet another stressed the importance of proving "intent," adding that "[w]e have not had sufficient evidence" of "intent with regard to nicotine." See, respectively, *id.*, at 239 (Comm'r Edwards); Letter of Dec. 5, 1977, App. 47 (Comm'r Kennedy); 1965 Hearings 193 (Comm'r Rankin); 1994 Hearings 28 (Comm'r Kessler). Tobacco company counsel also testified that the FDA lacked jurisdiction because jurisdiction "depends on . . . intended use," which in turn "depends, *in general*, on the claims and representations made by the manufacturer." Health Consequences of Smoking: Nicotine Addiction, Hearing before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 100th Cong., 2d Sess., 288 (1988) (testimony of Richard Cooper) (emphasis added).

Other agency statements occasionally referred to additional problems. Commissioner Kessler, for example, said that the "enormous social consequences" flowing from a decision to regulate tobacco counseled in favor of obtaining specific congressional "guidance." 1994 Hearings 69; see also *ante*, at 1311 (quoting statement of Health and Human Services Secretary Brandt to the effect that Congress wanted to make the relevant jurisdictional decision). But a fair reading of the FDA's denials suggests that the overwhelming problem was one of proving the requisite manufacturer intent. See *Action on Smoking and Health v. Harris*, 655 F.2d 236, 238–239 (C.A.D.C.1980) (FDA "comments" reveal its "understanding"[188] that "the crux of FDA jurisdiction over drugs lay in manufacturers' representations as revelatory of their intent").

What changed? For one thing, the FDA obtained evidence sufficient to prove the necessary "intent" despite the absence of specific "claims." See *supra*, at 1321–1322. This evidence, which first became available in the early 1990's, permitted the agency to demonstrate that the tobacco companies *knew* nicotine achieved appetite-suppressing, mood-stabilizing, and habituating effects through chemical (not psychological) means, even at a time when the companies were publicly denying such knowledge.

Moreover, scientific evidence of adverse health effects mounted, until, in the late 1980's, a consensus on the seriousness of the matter became firm. That is not to say that concern about smoking's adverse health effects is a new phenomenon. See, *e.g.*, Higginson, A New Counterblast, in Out-door Papers 179, 194 (1863) (characterizing tobacco as " 'a narcotic poison of the most active class' "). It is to say, however, that convincing epidemiological evidence began to appear mid–20th century; that the first Surgeon General's Report documenting the adverse health effects appeared in 1964; and that the Surgeon General's Report establishing nicotine's addictive effects appeared in 1988. At each stage, the health conclusions were the subject of controversy, diminishing somewhat over time, until recently—and only recently—has it become clear that there is a wide consensus about the health problem. See 61 Fed. Reg. 44701–44706 (1996).

Finally, administration policy changed. Earlier administrations may have hesitated to assert jurisdiction for the reasons

prior Commissioners expressed. See *supra*, at 1328–1329. Commissioners of the current administration simply took a different regulatory attitude.

Nothing in the law prevents the FDA from changing its policy for such reasons. By the mid–1990's, the evidence [189] needed to prove objective intent—even without an express claim—had been found. The emerging scientific consensus about tobacco's adverse, chemically induced, health effects may have convinced the agency that it should spend its resources on this important regulatory effort. As for the change of administrations, I agree with then-Justice REHNQUIST's statement in a different case, where he wrote:

> "The agency's changed view ... seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 59, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (concurring in part and dissenting in part).

V

One might nonetheless claim that, even if my interpretation of the FDCA and later statutes gets the words right, it lacks a sense of their "music." See *Helvering v. Gregory,* 69 F.2d 809, 810–811 (C.A.2 1934) (L. Hand, J.) ("[T]he meaning of a [statute] may be more than that of the separate words, as a melody is more than the notes ..."). Such a claim might rest on either of two grounds.

First, one might claim that, despite the FDA's legal right to change its mind, its original statements played a critical part in the enactment of the later statutes and now should play a critical part in their interpretation. But the FDA's [190] traditional view was largely premised on a perceived inability to prove the necessary statutory "intent" requirement. See, *e.g.,* FDA Enforcement Letter 240 ("The statutory basis for the exclusion of tobacco products from FDA's jurisdiction is the fact that tobacco marketed for chewing or smoking without accompanying therapeutic claims, does not meet the definitions ... for food, drug, device or cosmetic"). The statement, "we cannot assert jurisdiction over substance X unless it is treated as a food," would not bar jurisdiction if the agency later establishes that substance X is, and is intended to be, eaten. The FDA's denials of tobacco-related authority sufficiently resemble this kind of statement that they should not make the critical interpretive difference.

Second, one might claim that courts, when interpreting statutes, should assume in close cases that a decision with "enormous social consequences," 1994 Hearings 69, should be made by democratically elected Members of Congress rather than by unelected agency administrators. Cf. *Kent v. Dulles,* 357 U.S. 116, 129, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) (assuming Congress did not want to delegate the power to make rules interfering with exercise of basic human liberties). If there is such a background canon of interpretation, however, I do not believe it controls the outcome here.

Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its

attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy.[191] And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.

* * *

According to the FDA, only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so. See 61 Fed.Reg. 44704 (1996) (citing Centers for Disease Control and Prevention, Cigarette Smoking Among Adults—United States, 1993; 43 Morbidity and Mortality Weekly Report 929 (Dec. 23, 1994)). The fact that only a handful of those who try to quit smoking actually succeed illustrates a certain reality—the reality that the nicotine in cigarettes creates a powerful physiological addiction flowing from chemically induced changes in the brain. The FDA has found that the makers of cigarettes "intend" these physical effects. Hence, nicotine is a "drug"; the cigarette that delivers nicotine to the body is a "device"; and the FDCA's language, read in light of its basic purpose, permits the FDA to assert the disease-preventing jurisdiction that the agency now claims.

The majority finds that cigarettes are so dangerous that the FDCA would require them to be banned (a result the majority believes Congress would not have desired); thus, it concludes that the FDA has no tobacco-related authority. I disagree that the statute would require a cigarette ban. But even if I am wrong about the ban, the statute would restrict only the agency's choice of remedies, not its jurisdiction.

The majority also believes that subsequently enacted statutes deprive the FDA of jurisdiction. But the later laws say next to nothing about the FDA's tobacco-related authority. Previous FDA disclaimers of jurisdiction may have helped to form the legislative atmosphere out of which Congress' own tobacco-specific statutes emerged. But a legislative atmosphere is not a law, unless it is embodied in a statutory word or phrase. And the relevant words and phrases here reveal [192]nothing more than an intent not to change the jurisdictional status quo.

The upshot is that the Court today holds that a regulatory statute aimed at unsafe drugs and devices does not authorize regulation of a drug (nicotine) and a device (a cigarette) that the Court itself finds unsafe. Far more than most, this particular drug and device risks the life-threatening harms that administrative regulation seeks to rectify. The majority's conclusion is counterintuitive. And, for the reasons set forth, I believe that the law does not require it.

Consequently, I dissent.

529 U.S. 193, 146 L.Ed.2d 171

[193]**CORTEZ BYRD CHIPS, INC., Petitioner,**

v.

BILL HARBERT CONSTRUCTION COMPANY, etc.

No. 98–1960.

Argued Jan. 10, 2000.

Decided March 21, 2000.

Contractor filed action to confirm arbitration award, and owner, which had pre-

LEGAL AUTHORITY AA-86

278 N.Y. 434

FOX FILM CORPORATION v. SPRINGER et al.

Court of Appeals of New York.

April 20, 1937.

1. Contracts ⇐175(1)

Parties who make contract are presumed to understand meaning of words used.

2. Appeal and error ⇐909(5)

Court of Appeals will accept meaning which parties agree that words in contract were intended to have.

3. Contracts ⇐147(1)

In construing contracts, courts endeavor to arrive at meaning intended by parties, and endeavor to apply definitions accepted by both parties, notwithstanding that such definitions may be unknown to lexicographers.

4. Appeal and error ⇐1177(7)

Appeal from judgment in motion picture distributor's action against motion picture exhibitors to recover money allegedly due under contract for exhibition of films would be reversed where controversy involved construction of contract clause containing language which conveyed no meaning to persons not familiar with motion picture industry, and cause would be remanded to give parties opportunity to inform court of meaning of language employed.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Fox Film Corporation against Jack W. Springer and another, individuals doing business under the firm name and style of Springer & Cocalis, and others. From a judgment of the Appellate Division (248 App.Div. 720, 290 N.Y.S. 133), affirming a judgment of the Trial Term dismissing the complaint, the plaintiff appeals.

Reversed, and new trial granted.

Louis Nizer and Robert S. Benjamin, both of New York City, for appellant.

William D. Whitney, Bruce Bromley, and Albert R. Connelly, all of New York City, and John H. Morse, of Brooklyn, for respondents.

LEHMAN, Judge.

The plaintiff corporation is engaged in business as a distributor of motion pictures. The defendants operate a circuit or chain of theaters. In 1934 the plaintiff entered into a written contract with the defendants whereby, among other things, the defendants agreed to display 58 films released by the plaintiff for distribution and to pay for each picture a fixed license fee. In addition, the contract provided: "On six pictures allocated by Fox, Fox is to received [sic] 50% overage after the theatre has received as 50% profit what Fox receives as film rental. Expenses are to be on the basis of 1/10 week days, 2/10 Saturday, and 3/10 Sunday. These 6 pictures are to be played 3 or 4 days for week ends depending on the house policy." The plaintiff has brought an action to recover moneys alleged to be due from the defendants upon two pictures "allocated" by the plaintiff, pursuant to this clause of the contract. The complaint has been dismissed on the ground that the contract requires "accountings upon six pictures as one group," and, consequently, no recovery can be had in this action, based upon failure to pay "overage" on separate pictures.

The plaintiff admits that the fixed license fee on each picture, denominated in the complaint as the "minimum guaranteed license fee," has been paid. The defendants do not dispute that they have paid to the plaintiff no part of the profits or of the "overage" derived from the display of any of the pictures "allocated" by the plaintiff. The controversy between the parties is upon the narrow question of whether "overage" is to be calculated upon all six pictures as a group so that the amount due can be determined only by an accounting, upon which losses sustained in the display of one picture might be offset against profits derived from display of another, or whether the plaintiff is entitled to a share of the profits derived from the display of each picture as soon as the display of that picture is completed.

[1,2] The contract between the parties consists, physically, of a printed form of the plaintiff company and typewritten clauses, in part inserted in the printed form and in part attached thereto. We have

quoted in full the clause upon which the plaintiff's claim is based. Though the parties disagree as to whether under that clause "overage" is payable upon each separate picture or upon the six pictures regarded as a group, they agree that the clause means that the defendants must pay to the plaintiff the excess of one-half of the gross receipts derived from exhibition of these pictures, either separately or as a group, after deducting the expenses of the production and one-half of the minimum guaranteed license fee upon those pictures. The parties who made the contract presumably understood the meaning of the words they used. In this clause, and, indeed, throughout the contract in both its typewritten and its printed clauses, words and phrases are used which may be understood by those engaged in the business or art of motion picture production, distribution and exhibition, but which convey no meaning to whose who are not initiated into the mysteries of the craft. We accept the meaning which the parties agree the words were intended to have. We are without guide in arriving at the construction of the words where there is disagreement between the parties as to the meaning they were intended to convey.

[3] Terms in common use in a business or art may acquire a definite meaning understood by those who use them in connection with that business or art. In construing contracts the courts endeavor to arrive at the meaning intended by the parties. The courts endeavor to apply the definitions accepted by both parties, though such definitions may be unknown to lexicographers. The parties may if they choose use their own special dictionaries, but when they ask the uninitiated to construe their contracts they must furnish them with the dictionaries they have used.

[4] They have not done so in this case. We are told by the appellant that clauses in the printed form must be read with the typewritten "overage" clause and that when these clauses are read together the conclusion is inevitable that the parties intended that "overage" should be calculated and paid on each motion picture separately. We are told by the respondent that the printed clauses apply only to payments of the fixed license fees and were never intended to refer to payments stipulated under the "overage" clause and that the construction placed upon that clause by the courts below is fair and equitable. The parties have used language understood, we must assume, by those cognizant of the special or technical meaning of words used in the profession or art of the parties. In that language we are illiterate. It may be that, after explanation of the meaning of the terms used throughout the contract, the contract would clearly show whether the parties intended that "overage" on each picture should be paid as soon as the display of that picture is completed, or intended that payment should await an accounting in regard to all six pictures. To find out that intent from the language used the court must place itself in the position of the parties when they made the contract. It must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business. It must be made literate in a language in which it is now unschooled.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

CRANE, C. J., and O'BRIEN, HUBBS, LOUGHRAN, FINCH, and RIPPEY, JJ., concur.

Judgments reversed, etc.

LEGAL AUTHORITY AA-87

208 Cal.App.3d 1250
Court of Appeal, First District, Division 3, California.

Tilly GAILLARD, Plaintiff and Appellant,
v.
NATOMAS COMPANY et al., Defendants and Respondents.
Vincent J. ASHTON, Plaintiff and Appellant,
v.
Dorman L. COMMONS et al., Defendants and Respondents.

No. A040647.
|
March 23, 1989.
|
Review Denied June 1, 1989.

Synopsis
Shareholder filed derivative suit challenging "golden parachute" agreements and other benefits provided for certain officers and directors of corporation as part of merger agreement. The Superior Court, City and County of San Francisco, Stewart R. Pollak, J., sustained defendants' demur and entered order of dismissal. Shareholder appealed. The Court of Appeal, 173 Cal.App.3d 410, 219 Cal.Rptr. 74, reversed with directions. On remand, the Superior Court, City and County of San Francisco, Lucy Kelly McCabe, J., entered summary judgment against shareholder. Shareholder appealed and appeal was consolidated with second shareholder's appeal, treated as petition for writ of mandate, from the Superior Court, City and County of San Francisco, which entered summary adjudication of issues against second shareholder in favor of corporate directors. The Court of Appeal, Strankman, J., held that: (1) conduct of inside directors was not governed by statute codifying business judgment rule; (2) material issue of fact existed as to whether inside directors breached fiduciary duty in seeking approval of golden parachute agreements or accepting benefits thereunder; (3) material issue of fact existed as to whether outside directors should have reviewed terms of golden parachutes; and (4) outside directors were not liable for recommendation to approve consulting agreement as part of merger.

Ordered accordingly.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (14)

[1] Corporations and Business Organizations
Business judgment rule in general

"Business judgment rule" refers to a judicial policy of deference to business judgment of corporate directors in exercise of their broad discretion in making corporate decisions.

16 Cases that cite this headnote

[2] Corporations and Business Organizations
Business judgment rule in general

Under business judgment rule, director is not liable for mistake in business judgment which is made in good faith and in what he or she believes to be best interest of corporation, where no conflict of interest exists.

28 Cases that cite this headnote

[3] Corporations and Business Organizations
Business judgment rule in general

Business judgment rule does not immunize corporate director from liability in case of his or her abdication of corporate responsibilities, notwithstanding deference to director's business judgment under rule.

24 Cases that cite this headnote

[4] Corporations and Business Organizations
Duty to inquire; knowledge or notice

Duty of "reasonable inquiry," imposed on corporate directors by statute codifying common-law business judgment rule, constitutes condition to directors' right to rely on information provided by committee of board upon which director does not serve; directors may not close their eyes to what is going on about them in corporate business, and must in appropriate circumstances make such reasonable inquiry as ordinarily prudent person under similar circumstances. West's Ann.Cal.Corp.Code § 309(b).

10 Cases that cite this headnote

[5] **Corporations and Business Organizations** Oversight

Term "under similar circumstances," within meaning of statute allowing corporate director to rely on information provided by committee board after reasonable inquiry, requires court to consider nature and extent of director's alleged oversight or mistake in judgment in context of such factors as size, complexity and location of activities involved, and to limit critical assessment of director's performance to time of action or nonaction and thereby avoid harsher judgments which could be made with benefit of hindsight. West's Ann.Cal.Corp.Code § 309(b).

2 Cases that cite this headnote

[6] **Corporations and Business Organizations** Duties of directors and officers in general; business judgment rule

Statute codifying business judgment rule governed review of conduct of outside directors in approving golden parachutes and consulting agreement in merger of corporation, because form and amount of executive compensation were fundamentally corporate decisions and golden parachutes often served valid corporate function. West's Ann.Cal.Corp.Code § 309.

6 Cases that cite this headnote

[7] **Corporations and Business Organizations** Golden parachutes

Statute codifying business judgment rule did not govern conduct of inside directors who, in securing payment of golden parachute benefits to themselves, were not performing duties of a director but were acting as officer employees of corporation; inside directors did not vote on approval of golden parachutes. West's Ann.Cal.Corp.Code § 309.

6 Cases that cite this headnote

[8] **Judgment** Stock and stockholders, cases involving

Material issues of fact as to whether adoption and implementation of golden parachute agreements and consulting agreement pursuant to corporate merger constituted waste or breach of fiduciary duty by inside directors of corporation precluded summary judgment in favor of directors in shareholder derivative actions.

1 Cases that cite this headnote

[9] **Judgment** Stock and stockholders, cases involving

Material issue of fact as to whether, pursuant to corporate merger, outside directors of corporation serving on compensation committee should have independently reviewed terms of golden parachutes to consider whether they were valid use of corporate funds or constituted executive overreaching precluded summary judgment in favor of outside directors in shareholder derivative actions alleging breach of fiduciary duty, waste and mismanagement, negligence, conversion, and abdication. West's

Ann.Cal.Corp.Code § 309.

4 Cases that cite this headnote

[10] Corporations and Business Organizations
Duties of directors and officers in general; business judgment rule

Under business judgment rule and statute codifying that rule, outside directors of corporation undergoing merger were not liable for recommendation to approve consulting agreement providing for $250,000 annual payment to president of corporate subsidiary for period of four years after effective date of merger; directors themselves raised issue of need for consulting agreement and perceived such arrangement would serve valid and necessary purpose for corporation. West's Ann.Cal.Corp.Code § 309.

[11] Judgment
Stock and stockholders, cases involving

Material issue of fact as to whether outside directors of corporation undergoing merger were entitled to rely upon recommendation of committee as to golden parachute agreements or whether some further, independent inquiry should have been made by such directors precluded summary judgment in favor of directors in shareholder derivative actions alleging abdication, breach of fiduciary duty, waste and mismanagement, negligence and conversion. West's Ann.Cal.Corp.Code § 309(b)(3).

6 Cases that cite this headnote

[12] Corporations and Business Organizations
Disclosure and ratification
Corporations and Business Organizations
Right to question or attack transaction; estoppel and acquiescence

Shareholder approval of contract otherwise automatically void or voidable under statute, on ground corporate director is party to contract, does not render such contract immune from attack on other grounds, such as corporate waste, and does not render directors immune from liability for breach of fiduciary duty as result of their approval of such contract. West's Ann.Cal.Corp.Code § 310(a)(1).

2 Cases that cite this headnote

[13] Corporations and Business Organizations
Estoppel of corporation by acts or declarations

Under doctrine of ratification, corporation is estopped from denying validity or enforceability of contract after accepting performance and making payment on account thereof.

2 Cases that cite this headnote

[14] Corporations and Business Organizations
Ratification and Repudiation

Doctrine of corporate ratification was not applicable to shareholder derivative actions in which shareholders, and not corporation directly, claimed wrong perpetrated on corporation by its directors; corporation was nominal party only.

Attorneys and Law Firms

***1255 **704** David B. Gold, Paul F. Bennett, Solomon B. Cera, San Francisco, Lowey, Dannenberg & Knapp, Stephen Lowey, Henry A. Brachtl, New York City, for plaintiff and appellant.

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****705** STRANKMAN, Associate Justice.

I

Statement of the Case

These shareholder derivative actions[1] arise from the merger of Natomas Company (Natomas) into Diamond Shamrock Corporation ***1256** Diamond), effective August 31, 1983. By their complaints, appellant Tilly Gaillard, a common stockholder of Natomas, and appellant Vincent J. Ashton, a common stockholder of Diamond, challenge the purported "golden parachute" agreements[2] and other benefits provided for five inside directors of Natomas as part of the merger.[3]

Golden parachutes are special termination agreements that shelter executives from the effects of a corporate takeover. Their emergence has been attributed to the dramatic increase in the size of corporate takeovers and the volume of hostile takeovers. (See Note, *Golden Parachutes: Untangling the Ripcords* (1987) 39 Stan.L.Rev. 955, 957–958, fn. 14 (hereafter *Ripcords*); Note, *Golden Parachutes: Executive Employment Contracts* (1983) 40 Wash. & Lee L.Rev. 1117, fn. 1.) Typically, golden parachutes provide senior executives who are dismissed or who, under certain circumstances, resign as a result of a takeover with either continued compensation for a specified period following the executives' departure or with a lump-sum payment. The legality and desirability of this form of executive compensation, which some view as a form of corporate looting, have been the subject of increasing controversy faced by courts and addressed by legal commentators. (Note, *Ripcords, op. cit. supra,* 39 Stan.L.Rev. 955; Note, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review* (1985) 94 Yale L.J. 909 (hereafter *Golden Parachutes*); Note, *Golden Parachutes—Executive Compensation or Executive Overreaching?* (1984) 9 J.Corp.L. 346; Comment, *Golden Parachutes: A Perk That Boards Should Scrutinize Carefully* (1984) 67 Marq.L.Rev. 293.)

Defendants and respondents, who consist of the five inside directors and the twelve outside directors of Natomas at the time of the merger,[4] contend that the golden parachute agreements and other benefits here are protected ***1257** by California's "business judgment rule," codified in Corporations Code section 309.[5] The trial court agreed ****706** with respondents, granted summary judgment in their favor (Code Civ.Proc., § 437c), and dismissed the actions.

We conclude that the business judgment rule does not apply to a judicial review of the conduct of the inside directors, and reverse as to these respondents. We further conclude that, while the business judgment rule applies to the outside directors, there are triable issues of fact as to whether the adoption of the golden parachute agreements constituted a proper exercise of these respondents' "business judgment," and reverse.

II

Facts

The following facts are derived from the extensive record on appeal, including the copies of transcripts of deposition testimony, deposition exhibits, and corporate minutes of directors' meetings. We consider not only this evidence but also all inferences reasonably deducible from such evidence. (Code Civ.Proc., § 437c, subd. (c).)

A. *Tender offer and merger negotiations.* In 1983, Natomas was a publicly held California corporation engaged in petroleum and geothermal exploration and production, domestic coal mining, shipping, and real estate. The bulk of its 1982 operating income derived from its Indonesia operations. Natomas's total gross revenues in 1982 were approximately $1.7 billion with assets valued at approximately $2.8 billion. Net income in 1982 was approximately $44 million.

At that time, the Natomas board of directors consisted of the twelve outside directors and Natomas's five principal

officers (see fn. 4, *ante.*) The five officers were respondent Commons, the chairman of the board and chief executive officer; respondent Lee, a vice-president; respondent Reed, the vice-chairman; respondent Seidl, a vice-president and president of Natomas's domestic oil production subsidiary; and respondent Seaton, president and chief operating officer.

Each of the 12 outside directors had a business career independent of Natomas. Most of them had served as a president, vice-president, director, or some similar position for corporate and banking institutions in the past, ***1258** and many continued to hold such positions.[6] In total, they owned or held an interest in approximately 15 percent of the Natomas common stock.

In May 1983, Diamond initiated a hostile tender offer to acquire 51 percent of Natomas's common stock at $23 per share. Diamond stated in the tender offer that it intended to acquire the remaining shares of Natomas common stock in a later merger in which Natomas stock would be converted into the stock of New Diamond Corporation (the holding company formed for the purpose of merger). After considering various alternative responses to the tender offer, Natomas representatives agreed to meet with Diamond representatives on May 29, 1983.

Prior to the meeting, Commons directed the Natomas compensation committee to meet on May 30 to review proposed amendments to executive employment agreements for key executives. At this time, Commons and Reed already were entitled to golden parachute benefits in the event of a takeover. For example, Commons's employment agreement provided that in the event of his termination by Natomas for any reason other than cause, he was entitled ****707** to payment of his annual salary of $450,000 for a three-year period. Reed's employment agreement provided that in the event of merger or takeover, he was entitled to payment of his base annual salary for the remainder of the three-year term of the agreement through December 31, 1985.[7] As discussed *infra,* that these officers already were protected by golden parachutes in the event of a takeover is significant in relation to respondents' contention that the golden parachute agreements under attack here were necessary to facilitate the merger.

At the group meeting on May 29, Commons, on behalf of Natomas, led a team that included Natomas's outside counsel, Joseph H. Flom, who specialized ***1259** in corporate takeovers and mergers, and Natomas's investment bankers. The Diamond team was led by William H. Bricker, its chairman and chief executive officer. Following the group meeting, Commons and Bricker met alone for further negotiations and reached agreement on the terms of a friendly merger which would result in the withdrawal of the tender offer and the execution of a plan of reorganization. The agreement included certain significant changes from the terms of the original tender offer: (1) the transaction would be changed from part cash to all stock; (2) Natomas's real estate and shipping subsidiaries, including American President Lines (APL), would be spun off as a separate public company, American President Companies (APC); (3) Natomas's shareholders would receive 1.05 New Diamond Corporation shares for each Natomas share instead of the previously offered .92.

Following this meeting between Bricker and Commons, Commons met with the Natomas group, including Flom, to discuss executive employment agreements. Commons suggested that he propose to Bricker severance arrangements for all employees, and the amendment of employment agreements for 17 key executives to include golden parachute provisions comparable to those provided to Diamond executives. Commons testified that he thereafter met with Bricker and discussed severance payments and the amendment of employment agreements. The minutes of a subsequent board of directors meeting state that "Natomas' management was extremely careful not to discuss any of these arrangements until the terms of the merger were developed and the consideration to be exchanged was fixed." Commons testified that Bricker consented to the proposed agreements on May 29.

In deposition, Bricker testified that he did not recall discussing employment agreements for Natomas senior management on May 29. He recalled Commons advised him on May 30 that the compensation committee was reviewing amended employment agreements for key executives, and Bricker stated he would be amenable to them, recognizing "the need for everyone to be enthusiastic and highly supportive of the deal."

Commons then returned to the Natomas group and instructed Flom to draft agreements with new golden parachute provisions for his review prior to the meeting of the compensation committee the following morning.

B. *Golden parachutes.* The following morning, Flom reviewed with Commons drafts of the employment agreements he had prepared. As to golden parachutes, the amended agreements ultimately provided that Commons and Reed *could terminate their employment within six months following the merger "for Good Reason," or for any reason following the six-month period,* ***1260** *and thereupon receive a lump-sum payment equal to five times their total annual compensation. The lump-sum payment*

would be reduced proportionate to the length of time they remained employees of Natomas following the six-month period.

Lee's agreement was similar to those of Commons and Reed, except that he was entitled to a lump-sum payment equal to ****708** his total annual compensation multiplied by the greater of the number of years remaining in the term of his employment contract (which was for seven years), or the number one.

Seidl's agreement was similar to the other three except that he was entitled to a lump-sum payment equal to three times his total annual compensation.

C. *Compensation committee meeting and board of directors meeting on May 30.* The compensation committee met at 10 a.m. on May 30. The committee was comprised of 5 of the 12 outside directors of Natomas—Macgregor, Manderbach, McCormack, Osment, and Shumway. Because Shumway, the committee's chairman, was absent, Macgregor chaired the meeting. Flom, Leskin (a Natomas vice-president), and Mandel (Natomas's general counsel) also attended. At the beginning of the meeting, Commons advised all present that a tentative merger agreement had been reached with Diamond and gave an outline of the agreement. He then stated that the matter of employee compensation would be addressed by Flom, and left the meeting. Flom proceeded to describe the course of the merger negotiations following the tender offer, and explained the proposed terms of the stock exchange.

Flom then discussed the substance of the proposed employment agreements, and Leskin distributed a summary of the material terms. Flom stated that a concern of the directors should be that "management is clearly in place" upon the consummation of the merger, and that the proposed agreements would ensure continuity in management. Flom also stated that the terms of the agreements, as summarized, were acceptable to Bricker of Diamond and that Bricker wanted Natomas's confirmation of the agreements.

The committee then discussed employment arrangements for Seaton, who at that time was president and chief operating executive of APL, a subsidiary of Natomas. Upon consummation of the merger, Seaton would become head of the newly spun-off entity of APC, and terminate his existing employment agreement with Natomas. Committee members commented that Seaton was the only executive fully cognizant of the problems peculiar to Natomas's Indonesia operations, and agreed that Natomas would not ***1261** "want to see that guy lost." They therefore agreed that, in addition to a new employment contract with APC, they would offer Seaton a "consulting agreement" with Natomas, operative upon consummation of the merger. The consulting agreement provided for payment to Seaton of $250,000 annually for a period of four years after the effective date of the merger. During the four-year consulting period, Seaton could engage in any other business or employment activities, on a full-time basis in any field, and continue to receive the $250,000 annual compensation.

The committee concluded by agreeing to recommend that the employment agreements and consulting agreement be entered into by Natomas. Macgregor, who chaired the meeting, stated that in so doing, "... the committee relied on Mr. Flom...." The compensation committee adjourned at 11:55 a.m.

The full board of directors, including Commons, then met. An investment advisor spoke on corporate takeovers in general, and the directors discussed the terms of the proposed merger. Macgregor then addressed the board concerning the amended employment agreements. In his deposition testimony, Macgregor stated that he did not "recall going into specific detail," but represented that the compensation committee understood that Diamond considered the agreements essential to the transaction and that the committee recommended the agreements. The Natomas officers present, including Commons, then left and Flom spoke to the board. He stated that in mergers, it was common to adopt arrangements to ensure continuity of management and provide economic protection for those key employees who might be affected. The board meeting minutes reflect that Flom represented that Diamond had agreed that the key Natomas employees should be provided employment arrangements to serve these purposes. Leskin then reviewed ****709** for the board the basic terms of the employment agreements.

At the conclusion of the meeting, the board approved the proposed plan and agreement of reorganization to implement the merger, and further approved the amended employment agreements as proposed.

D. *June 28 compensation committee meeting and board of directors meeting.* The record does not show that the amended employment agreements were considered further by the directors until the next compensation committee meeting on June 28. The committee's agenda reflects the meeting was called to "[a]pprove the final forms of proposed employment agreements...." Shumway opened the meeting by opining that the appropriateness of the agreements was primarily a concern of Diamond and that if Diamond acquiesced it was unlikely that the

committee would find it appropriate to dissent. Leskin then distributed a schedule summarizing the cost implications ***1262** of the proposed amended employment agreements, but the record reflects that the committee did not discuss the agreements further before voting to approve them.

Immediately after the compensation committee adjourned, the full board of directors convened. Shumway advised that Diamond had approved the golden parachutes. Without further discussion, the board, with the five inside directors present but abstaining from voting, then voted to follow the recommendation of the compensation committee and approved the amended agreements.

E. *Consummation of merger and resignation of respondent inside directors.* On August 2, 1983, Natomas distributed a proxy statement soliciting shareholder approval of the merger. The proxy statement fully described the terms of the amended employment agreements which constituted a component of the merger. On August 30, 1983, the Natomas shareholders voted to approve the merger.

Although the purported purpose of the golden parachutes was to encourage the retention of key executives for a transition period following the merger, all four key executives who were the beneficiaries of the agreements terminated their employment with Natomas shortly after the consummation of the merger. The record supports the inference that the executives themselves created, at least in part, the "good reason" for leaving Natomas which triggered the golden parachutes. According to Bricker, prior to the effective date of the merger, Diamond had reached an understanding with Natomas that a Diamond employee, McDoulett, would become the chief operating officer of Natomas. On August 30, however, at a Natomas board of directors meeting, Reed was installed as the president and chief operating officer of Natomas. In his deposition testimony, Bricker described Diamond's reaction to such action: "A. After the stockholders meeting whereby the Natomas shareholders approved this transaction, we had a—we, the management of Diamond Shamrock had a surprise, in that without prior consultation, indeed, different than the prior plans, Mr. Reed was designated president of Natomas, and that designation was contrary to and certainly a surprise to all of us, because Mr. McDoulett was to have been designated president of Natomas, and Mr. Reed was to have retained his position as vice chairman. [¶] This started a period of difficulties, in terms of philosophy, and culminated sometime later in an understanding that possibly our differences of operating philosophy are such that we can't work together."

In October and November 1983, Commons, Reed, Lee and Seidl gave notice of their voluntary termination of their employment with Natomas, ***1263** effective December 31, 1983. Shortly thereafter, they were paid approximately $10 million under the golden parachute provisions.

Seaton continued to be paid $250,000 per year through August 31, 1987, pursuant to his consulting agreement. The record establishes he provided minimal services only during this period. He participated in some telephone conversations and offered his opinion on the integrity of Indonesian governmental officials. The record indicates ****710** he devoted less than one full day during the total four-year period to consulting services.

F. *Allegations of complaints.* The first amended complaint of Tilly Gaillard for damages alleges that the adoption and implementation of the golden parachute agreements and the consulting agreement constituted a breach of fiduciary duty by all 19 directors of Natomas, waste and mismanagement, negligence, and conversion. The third amended complaint of Vincent J. Ashton for damages alleges an abdication and breach of the directors' fiduciary duties.

III

Business Judgment Rule

[1] [2] The common law "business judgment rule" refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The business judgment rule is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is one which is " '... helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes ...,' " and establishes a presumption that directors' decisions are based on sound business judgment. (*Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776, 230 Cal.Rptr. 815.) Under this rule, a director is not liable for a mistake in business judgment which is made in good faith and in what he or she believes to be the best interests of the corporation,

where no conflict of interest exists. (1 Marsh, Cal. Corporation Law (2d ed. 1988) § 10.3, p. 572; see *Fornaseri v. Cosmosart Realty etc. Corp.* (1929) 96 Cal.App. 549, 557, 274 P. 597.)

[3] Notwithstanding the deference to a director's business judgment, the rule does not immunize a director from liability in the case of his or her abdication of corporate responsibilities: " '... When courts say that they will not interfere in matters of business judgment, it is presupposed that judgment—reasonable diligence—has in fact been exercised. A director cannot close his eyes to what is going on about him in the conduct of the business of the ***1264** corporation and have it said that he is exercising business judgment. Courts have properly decided to give directors a wide latitude in the management of the affairs of a corporation provided always that judgment, and that means an honest, unbiased judgment, is reasonably exercised by them....' " (*Burt v. Irvine Co.* (1965) 237 Cal.App.2d 828, 852–853, 47 Cal.Rptr. 392.)

Section 309 (Stats.1975, ch. 682, § 7, pp. 1537–1538, eff. Jan. 1, 1977) codifies California's business judgment rule. (See 1 Marsh, *op. cit. supra,* § 10.3, pp. 573–574, 575.) Section 309 incorporates the concept of a director's immunity from liability for an honest mistake of business judgment with the concept of a director's obligation of reasonable diligence in the performance of his or her duties (*id.,* at pp. 574–575), and provides: "(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. [¶] (b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by: [¶] (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented. [¶] (2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence, or [¶] (3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as in any such case, the director acts in good faith, after ****711** reasonable inquiry when the need therefore is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted. [¶] (c) A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director."

[4] The provisions for a director's right to rely in subdivisions (a) and (b) of section 309 enlarge the right of reliance under prior law (former § 829). (Legis. committee com., 24 West's Ann.Corp.Code (1977 ed.) § 309, p. 186.) By the provision permitting reliance upon a committee of the board, the drafters of section 309 intended to permit reliance upon the work product of a board committee resulting from a more detailed investigation undertaken by that committee and which forms the basis for action taken by the board. (*Ibid.*) However, the duty of "reasonable inquiry" in subdivision (b) constitutes a condition to the right of reliance, such that directors ***1265** may not close their eyes to what is going on about them in corporate business, and must in appropriate circumstances make such reasonable inquiry as an ordinarily prudent person under similar circumstances. (*Ibid.*)

[5] The term "under similar circumstances" requires a court to consider the nature and extent of a director's alleged oversight or mistake in judgment in the context of such factors as the size, complexity and location of activities involved, and to limit the critical assessment of a director's performance to the time of the action or nonaction and thereby avoid harsher judgments which can be made with benefit of hindsight. (Legis. committee com., 24 West's Ann.Corp.Code, *supra,* § 309, p. 186.)

Our research reveals no judicial decision to date which has taken a definitive position on the application of the business judgment rule to golden parachute agreements. (See *Brown v. Ferro Corp.* (6th Cir.1985) 763 F.2d 798 [suit challenging corporation's enactment of golden parachutes dismissed as not ripe]; *Schreiber v. Burlington Northern, Inc.* (3d Cir.1984) 731 F.2d 163, 167 [question of management's breach of fiduciary duty in enacting golden parachutes not properly before the court], affd. (1985), 472 U.S. 1, 105 S.Ct. 2458, 86 L.Ed.2d 1.)[8]

[6] Because the form and amount of executive compensation are fundamentally corporate business decisions, and because, as discussed *infra,* golden parachutes often serve a valid corporate function, we determine that section 309 governs our review of the conduct of the outside directors in approving the golden parachutes and the consulting agreement.

[7] We further conclude, however, that, as a matter of law, our review of the conduct of the inside directors is not

governed by section 309. The inside directors did not vote on the approval of the golden parachutes or consulting agreement. In securing the payment of these benefits to themselves, they were not "perform[ing] the duties of a director" as specified in section 309, but were acting as officer employees of the corporation. The judicial deference afforded under the business judgment rule therefore should not apply. As stated by Marsh in his discussion of section 309: "[Section 309, subdivision (a)] does not relate to officers of the corporation, but only to directors.... [A]n officer-director might be liable for particular conduct because of his capacity of an officer, whereas the other directors would not." (1 Marsh, *op. cit. supra,* § 10.3, at p. 576.) This result is in accord with the premise of the business judgment rule that courts ***1266** should defer to the business judgment of *disinterested* directors who presumably are acting in the best interests of the corporation.

IV

Background on Golden Parachutes

We look at the recognized valid corporate functions served by golden parachutes as ****712** well as their recognized potential for executive selfdealing, so that we may review the actions of the directors in the context of these valid functions and the potential for abuse.

Corporate takeovers often threaten the financial and professional security of the managers of target companies.[9] The theoretical purpose of golden parachutes is to shelter senior executives from such threat. To this end, the two principal recognized functions of golden parachutes are (1) to foster executive objectivity toward merger and tender offers; and (2) to attract top executives to companies and industries where the odds of takeover are high. (Note, *Ripcords, op. cit. supra,* 39 Stan.L.Rev. at p. 958; Note, *Golden Parachutes, op. cit. supra,* 94 Yale L.J. at pp. 914–917.) As to the first function, a threatened takeover gives rise to the potential for conflict between executives' personal interests and the interests of shareholders. Golden parachutes align the interests of management more closely with those of shareholders by insuring executives against the possible pecuniary or nonpecuniary losses that may result from a change of control. A properly designed takeover will theoretically make its beneficiary indifferent between remaining in control of the corporation and supporting a takeover beneficial to the shareholders. (*Ibid.*)

As to the second function, golden parachutes provide long-term incentives for top quality management executives to enter industries and corporations in which the potential for takeover is above average. (Note, *Ripcords, op. cit. supra,* 39 Stan.L.Rev. at p. 959; Note, *Golden Parachutes, op. cit. supra,* 94 Yale L.J. at p. 917.)

Most commentators agree that, in view of these two functions of golden parachutes, a golden parachute should be negotiated as part of an executive's overall compensation package, and that parachutes enacted in the midst of takeover negotiations should be discouraged. A parachute conferred following a tender offer will likely have little value in creating executive ***1267** objectivity because the executives generally already will have taken an initial position on the takeover before the golden parachutes are adopted and may not be able to credibly take a different stance at a later time. Further, during a takeover battle, the target corporation has no need for the parachute's executive recruiting functions. For these reasons, parachutes that are adopted in response to actual takeover overtures have been viewed as last minute appropriations of corporate assets or, alternatively, attempts to discourage potential acquirers. (See *Bender v. Highway Truck Drivers & Helpers Local 107* (E.D.Pa.1984) 598 F.Supp. 178, 189, fn. 16, affd. (3d Cir.1985), 770 F.2d 1066; A.B.A. Subcommittee on Executive Compensation, *Executive Compensation: A Road Map for the Corporate Advisor* (1984) 40 Bus.Law 219, 349; Note, *Ripcords, op. cit. supra,* 39 Stan.L.Rev. at pp. 974–975.) One author recommends: "Prohibiting the implementation of golden parachutes during a takeover is probably desirable. During a takeover, executives will have significant bargaining power to demand excessive golden parachutes in return for not opposing the transaction. Moreover, since both the executives and the directors probably will soon be replaced, they will have little concern over how the stockholders may react to the golden parachutes.... Prohibiting the implementation of golden parachutes during takeovers creates an incentive for corporations to adopt golden parachutes prior to a takeover, thereby avoiding the above-mentioned problems." (Note, *Golden Parachutes, op. cit. supra,* 94 Yale L.J. at p. 921, fn. 58.)

In addition to the timing of the implementation of golden parachutes, their amounts have been challenged as excessive in relation to any possible benefit conferred upon the corporation. Congress's enactment of new tax laws responds in part to this concern. Under the Deficit

Reduction Act of 1984 (Int.Rev.Code, §§ 280G, 4999), golden parachutes that give executives ****713** payments greater than or equal to three times their total annual compensation are presumed excessive for tax purposes, resulting in the corporation's losing its deduction for the golden parachute payments as well as in the imposition of a 20 percent excise tax on the beneficiaries of the payments.

V

Appellate Standard of Review

The application of section 309 to the judicial review of a director's actions raises various issues of fact, e.g., whether a director acted as an ordinarily prudent person under similar circumstances, and in the best interests of a corporation; and whether he or she made a reasonable inquiry as indicated by the circumstances. Such questions generally should be left to a trier of ***1268** fact. However, on a motion for summary judgment, where the evidence establishes that there is no controverted material fact, such questions become ones of law. (Code Civ.Proc., § 437c, subd. (c).) The function of the trial court in ruling on respondents' motions for summary judgment was merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves. (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441, 116 P.2d 62.) Our function is the same as that of the trial court.

VI

Discussion—Application of Section 309 to Golden Parachutes and Consulting Agreement

[8] A. *Liability of inside directors.* The five inside directors who were the beneficiaries of the golden parachutes and the consulting agreement abstained from voting on their approval, and, accordingly, are not subject to liability on the ground of having approved the amended employment agreements.

As discussed *ante,* these inside directors were not performing the duties of a director in seeking approval of the agreements or accepting the benefits thereunder. Section 309's standard of care therefore does not apply to a determination of their liability on appellants' claims, and the trial court's reliance on section 309 in granting summary judgment in their favor constituted error.

The record discloses issues of fact on appellants' claims of, inter alia, breach of fiduciary duty and waste as to the five inside directors, which cannot be resolved as a matter of law on the basis of the record before us. As to Seaton, the record is unclear as to the nature and extent of his participation in the events which led to the proposal of the consulting agreement. Although the record shows that the consulting agreement, on its face, served a valid corporate purpose, and the outside directors are immune from liability as to this particular agreement under section 309 (see discussion, *infra*), the record is inadequate to determine as a matter of law that Seaton's conduct incident to the adoption of the agreement comported with his fiduciary duties. Although the fairness of the agreement to the corporation must be judged at the time of its adoption, the fact that Seaton provided, at the most, minimal services in return for his annual $250,000 salary raises at least the inference that the agreement was not in the best interests of Natomas at the time of its adoption. Summary judgment as to all five inside directors therefore must be reversed.

B. *Liability of outside directors.* We next look to whether the conduct of the outside directors in approving these benefits can withstand judicial scrutiny as a matter of law under section 309.

***1269** The record does not disclose that the outside directors had any personal interest in the benefits, and does not show any conflict of interest or evidence of bad faith on their part in approving the benefits.

Our inquiry, therefore, is whether the record discloses controverted issues of fact as to whether the outside directors acted in a manner they believed to be in the best interests of Natomas, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances (§ 309, subd. (a)); and whether, in relying ****714** upon various sources, they made reasonable inquiry if the need therefor was indicated by the circumstances (§ 309, subd. (b)). We reach a different conclusion as to the directors' approval of the golden parachutes than we reach as to

their approval of Seaton's consulting agreement.

[9] We turn first to the outside directors acting in their capacity as members of the compensation committee. The record shows the compensation committee was persuaded to approve the amended employment agreements for 17 key executives after the initial two-hour meeting on May 30. The record indicates that the committee members devoted less than two hours to the consideration of these employment agreements, five of which alone would provide for payment of approximately $11 million to executives following the consummation of the merger.

Flom stated that continuity in management should be a concern of the Natomas board and that the golden parachutes would serve that purpose. Flom did not explain, however, how the purported golden parachutes would serve such purpose, and the record does not indicate that any of the committee members requested further explanation of his conclusory opinion or analyzed among themselves how such purpose would be served by the amendments. The director who chaired the meeting indicated that the committee relied entirely upon Flom when agreeing to recommend the agreements.

We find that with the evidence before us, we cannot say *as a matter of law* that the compensation committee members were justified in relying to the extent that they did upon Flom in approving the golden parachutes, or that the circumstances did not warrant further reasonable inquiry under section 309, subdivision (b). We so conclude for the following reasons.

First, the golden parachutes, by their terms, would not serve the recognized valid functions of golden parachutes discussed *ante.* Because they were discussed after the terms of the merger had been negotiated and agreed upon, the function of executive objectivity would not be served. Bricker indeed indicated that he agreed to them primarily to keep the level of ***1270** enthusiasm for the merger high. In addition, because they were provided to existing executives, the function of attracting top-level management obviously was not served. Significantly, the existing employment agreements for Commons and Reed, of which the committee members should have been aware, already provided golden parachutes which served the desirable functions of these forms of compensation. The record provides no explanation why these executives needed to make their benefits more "golden."

Second, Flom asserted that the golden parachutes served the purpose of ensuring continuity of management. Certain respondents at one point therefore refer to the benefits as "golden handcuffs," rather than golden parachutes. The very terms of the amended agreements, however, indicate that the opposite purpose would be served, and that they in fact would encourage the executives to leave Natomas within the six-month period following the merger or shortly thereafter. The testimony of appellants' proposed expert witness explained that typically, a "golden handcuff" is a reward given to an executive for staying with the company in conjunction with a detriment for leaving, but that with the instant agreements, the executives were encouraged to leave as soon as possible.[10]

In deposition, Shumway testified that the purpose of the golden parachutes was to "buy" six months time which would "prevent a hell of a lot of chaos ... by keeping those key people on the job through the amalgamation of the two entities, learning what the problems are and the like.... [¶] ... [I]t's a small price to pay in a billion dollar deal when you look at the consequences ****715** that could result from a fumbled ball in Indonesia or a problem in the North Sea...."

We do not dispute that a trier of fact might find this explanation of the purpose of the golden parachutes to be reasonable, but we find that the evidence would reasonably support an inference to the contrary. Further, the "good reason" condition to leaving Natomas during the six-month period appears to be so broad as to provide the executives with a ready justification to terminate their employment and collect the benefits immediately after the effective date of the merger, before the expiration of the six-month period.

Third, the golden parachutes payable to Commons, Reed, and Lee exceeded the three-year annual salary lump-sum limit under the Deficit Reduction ***1271** Act, and therefore would be considered excessive for tax purposes under current law. Although these tax provisions, effective in 1984, apparently were not applicable to the 1983 merger, the compensation committee members arguably should have been aware of the pendency of such legislation affecting matters within their purview, and that the lump-sum payments in question would be excessive under the new tax laws.

Fourth, the compensation committee members should have been aware that Commons had proposed the amendment of the employment agreements and that Flom had been acting in accordance with Commons's instructions in preparing drafts of the employment agreements. Evidence of this close connection between Commons, a beneficiary of a golden parachute agreement, and Flom in formulating the terms of the agreements, would support the inference of self-dealing which should

have been investigated further by the compensation committee.

A trier of fact could reasonably find that the circumstances warranted a thorough review of the golden parachute agreements by the members of the compensation committee to determine whether they served the best interests of the corporation. Thus, although a trier of fact might conclude that the compensation committee's reliance upon Flom with no further inquiry was reasonable, it could also reasonably find that the members of the compensation committee should have, at the very least, independently reviewed the terms of the golden parachutes to consider whether they served a valid use of corporate funds or constituted executive overreaching.

[10] We reach a different conclusion as to the approval of the consulting agreement. The record indicates the compensation committee members themselves raised the issue of the need for the consulting agreement, and perceived that such agreement would serve a valid and necessary purpose for Natomas. Whether Seaton ultimately rendered $250,000 worth of services per year is irrelevant under the business judgment rule and section 309. We therefore conclude the compensation committee members are not liable as a matter of law for their recommendation to approve the consulting agreement.

[11] We finally turn to the conduct of the outside directors who were not on the compensation committee. Under section 309, these directors were entitled to rely upon the recommendation of the compensation committee, which they believed "to merit confidence" (§ 309, subd. (b)(3)) and were not required to initiate their own independent investigation. However, in this case, the nature of these particular golden parachute agreements and the timing of their proposal create a triable issue of fact as to whether *some* further inquiry should have been made by the board members who were not ***1272** on the compensation committee. Even as of the date of the merger, golden parachutes were highly controversial (see *Golden Rip-offs,* Industry Week (July 25, 1983) p. 46; *Those Executive Bailout Deals,* Fortune (Dec. 13, 1982) p. 82). The board members, who presumably were appointed to the board because of their business and financial acumen, likely had, or should have had, some knowledge of this controversy. The proposal of the golden parachutes here under somewhat suspicious circumstances, i.e., *after* the tender offer and in the midst of merger discussions, raises the question of whether ****716** these directors should have examined the golden parachutes more attentively.

We perceive that in most cases, directors should be allowed to rely largely upon the recommendation of a board committee as to matters delegated to that committee. Otherwise, the directors' right to rely under subdivision (b) of section 309 would be rendered meaningless, and special committees would be unable to serve any useful function for the board. However, there is a triable issue as to whether the directors' general knowledge of the questionable nature of golden parachutes within the context of takeovers would cause such total reliance to be unwarranted.

We recognize that the amount of benefits provided under the golden parachutes and paid to the executives is not overwhelming in proportion to the net worth of both Natomas and Diamond, and the multi-billion dollar values involved in the merger. Nevertheless, the use of corporate funds for purposes which are not in the best interests of the shareholders cannot be excused simply because the opportunity for such occurs in the course of a takeover or merger which results in an overall financial gain for the shareholders.

VII

Effect of Shareholder Approval of Merger Agreement and Ratification by Diamond

Although the trial court relied upon the business judgment rule in granting summary judgment, respondents contend that its decision can be sustained on two other grounds which they asserted below: shareholder approval of the merger agreement under section 310, subdivision (a)(1), and corporate ratification.

[12] Section 310 provides in part, as to a contract between a corporation and one of its directors: such contract is not void or voidable on the ground that the director is a party to the contract or was present at the meeting of the board which authorized, approved or ratified the contract, if (1) the material ***1273** facts as to the transaction are fully disclosed to the shareholders and then the contract is approved by them (§ 310, subd. (a)(1)); or (2) the material facts as to the transaction are fully disclosed to the board which then ratifies the contract by a vote sufficient without counting the vote of the interested director, and the contract is just and reasonable as to the corporation at the time it is authorized, approved or ratified (§ 310, subd.

(a)(2)).

If such contract is not so approved in one of these two manners, then the person asserting the validity of the contract sustains the burden of proving that the contract was just and reasonable as to the corporation at the time it was authorized, approved or ratified. (§ 310, subd. (a)(3).)

Respondents argue that all material facts concerning the employment agreements were disclosed to the shareholders in the proxy statement that solicited their approval of the merger, and that the shareholders thereafter voted to approve the merger, including the component of the employment agreements. Under section 310, subdivision (a)(1), respondents argue, the employment agreements are immune from attack.

Respondents' reliance on section 310, subdivision (a)(1), as a bar to these shareholder derivative actions is misplaced. Under section 310, subdivision (a), a contract is automatically void or voidable on the ground a director is a party to the contract, unless certain alternative requirements are met. If these requirements, including shareholder approval, are met, the contract is no longer void or voidable on the ground the director is a party thereto.

The satisfaction of section 310's requirements, however, does not render such contract immune from attack on other grounds, such as corporate waste, and does not render the directors immune from liability for breach of fiduciary duty as a result of their approval of such contract. Marsh is in accord: "[R]egardless of the provisions of Section 310, a transaction with an interested director which is found to be unjust and unreasonable to the corporation could not be legally sustained." (1 ****717** Marsh, *op. cit. supra,* § 9.4, at p. 490.)[11]

[13] Respondents also contend that the order granting summary judgment can be sustained on the ground that, following the consummation of the merger, Diamond ratified the new employment agreements. Under the doctrine of ratification, a corporation is estopped from denying the validity or enforceability of a contract, after accepting performance and ***1274** making payment on account thereof. (See *Berry v. Maywood Mut. W. Co. No. One* (1939) 13 Cal.2d 185, 190, 88 P.2d 705.)

[14] The doctrine of corporate ratification is not applicable to these shareholder derivative actions in which shareholders, and not the corporation directly, claim a wrong perpetrated on the corporation by its directors. As in any other shareholder derivative action, the corporation is a nominal party only.

We conclude these actions are not barred under section 310, subdivision (a)(1), or the doctrine of corporate ratification.

VIII

Disposition

Summary judgment on the Gaillard complaint and summary adjudication of issues on the Ashton complaint in favor of Seaton are reversed. Summary judgment and summary adjudication of issues in favor of the remaining inside directors are reversed. Summary judgment and summary adjudication of issues in favor of the outside directors are reversed, except as to the claim of liability for Seaton's consulting agreement. Appellants are awarded costs on appeal.

WHITE, P.J., and BARRY–DEAL, J., concur.

All Citations

208 Cal.App.3d 1250, 256 Cal.Rptr. 702, 57 USLW 2610, Fed. Sec. L. Rep. P 94,369

Footnotes

1 Appellant Ashton purportedly appeals from the order granting summary adjudication of issues, which resolves the shareholder derivative claim in *Ashton v. Commons.* Summary adjudication of an issue, however, is neither a final judgment nor an order from which an appeal can be taken. (Code Civ.Proc., § 904.1; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 56, 57, pp. 78–80.) Nevertheless, because the shareholder derivative claim in *Ashton v. Commons* is identical to the shareholder derivative claims in *Gaillard v. Natomas Company,* and because respondents have not objected to the appeal in *Ashton v. Commons* on this ground, we choose in our discretion to treat the appeal as a petition for writ of mandate and "dispose of the matter in what we deem to be a practical manner and in the interests of justice." (*Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 Cal.App.3d 276, 282, 101

Cal.Rptr. 820.)

2 As discussed *infra,* the parties disagree as to the appropriate labeling of the special termination benefits which are the subject of these actions. Because certain features of the benefits are indicative of that form of executive compensation known as "golden parachutes," we refer to them as such in our opinion.

3 This is the second appeal in the *Gaillard* action. The first appeal was from an order of dismissal following the sustaining of a demurrer to Gaillard's first amended complaint on the grounds that, following the merger, Gaillard did not retain standing to prosecute her derivative action because she ceased to be a Natomas shareholder. We disagreed and reversed. (*Gaillard v. Natomas Co.* (1985) 173 Cal.App.3d 410, 412, 219 Cal.Rptr. 74.)

4 The 12 outside directors of Natomas at the time of the merger, or their representatives, are Brown Badgett, Daniel A. Collins, Marjorie W. Evans, Mortimer Fleishhacker III, Orville L. Freeman, John P. Hammond, Chandler Ide, Wallace Macgregor, Richard W. Manderbach, Douglas McCormack, Forest N. Shumway, and Frank C. Osment (substituted by the co-executors of the Estate of Frank C. Osment). The 5 inside directors, who were also officers of the corporation, were Charles J. Lee, Kenneth G. Reed, John M. Seidl, Dorman L. Commons (now represented by Gerry B. Commons, as executrix of the Estate of Dorman L. Commons), and W.B. Seaton.

5 All further statutory references are to the Corporations Code unless otherwise indicated.

6 Brown Badgett was the former president of Brown Badgett, Inc. Daniel A. Collins was a consultant to Harcourt Brace Jovanovich, Inc. Marjorie W. Evans was an attorney, corporate consultant, and a director of Rainier Bancorporation. Mortimer Fleishhacker III was chairman of Pyramid Savings and Loan Association. Orville L. Freeman was the former United States Secretary of Agriculture, chairman of Business International Corporation, and a director of Grumman Corporation. John P. Hammond was an independent petroleum consultant and an advisory director of First Tulsa Bancorporation. Chandler Ide was an advisory director to BanCal Tri–State Corporation. Wallace Macgregor was an independent metals and minerals advisor, and also served as a director of Homestake Mining Company. Richard Manderbach was a former senior vice-president of a division of Bank of America. Douglas McCormack was a director of the Bank of Rio Vista. Frank C. Osment was a former executive vice-president of Standard Oil Company (Indiana) and director of Harris Bankcorp, Inc. and McGraw–Edison. Forrest N. Shumway was the chairman and chief executive officer of the Signal Companies, Inc., and was a director of five major corporations.

7 Although appellants state that Lee, Seidl, and Seaton also were entitled to payment of benefits in the event of their termination for reasons other than cause, the record is unclear as to the terms of such benefits.

8 Most commentators, however, have predicted that courts will apply the business judgment rule of current corporation law to golden parachutes. (See Note, *Ripcords, op. cit. supra,* 39 Stan.L.Rev. 955; Note, *Golden Parachutes, op. cit. supra,* 94 Yale L.J. at p. 912.)

9 We distinguish a "takeover" from another newly controversial form of corporate change of control, the "leveraged buy-out," in which a company's managers use borrowed money to buy the company from its shareholders.

10 The copy of portions of the transcript of the deposition testimony of the proposed expert appeared in support of appellants' motion for reconsideration below, which was denied. Respondents contend it is therefore not properly part of the record on appeal. We do not rely on this testimony, however, as part of the grounds for reversal, but refer to it for purposes of clarifying our opinion.

11 Because we hold that section 310, subdivision (a), does not operate to bar appellants' claims, we need not determine whether the requirements of that section—full disclosure to the shareholders of the material facts of the contract and the directors' interest therein, and shareholder approval under section 153—were satisfied here.

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LEGAL AUTHORITY AA-88

portunity to cross-examine the witness or witnesses. It could not be established by acts or statements of others directly admitting such a conspiracy, or by any statement of theirs from which it might be inferred.

The case having to be reversed for this error, it is not deemed necessary to consider the other assignments, relating to matters which may not occur upon another trial.

For the erroneous action of the court below in improperly admitting the testimony of Sullivan as to what Mrs. Hitchcock said after the killing, as evidence tending to show a conspiracy, and in charging the jury that the declarations of a party or parties as to their participation in the criminal act was competent evidence of the conspiracy, as against the plaintiff in error, the judgment of the court below must be reversed, and the cause remanded to the circuit court of the United States for the western district of Arkansas, with direction to set aside the judgment, and award plaintiff in error a new trial, and it is accordingly so ordered.

(150 U. S. 118)

GRAVES v. UNITED STATES.

(November 6, 1893.)

No. 838.

HOMICIDE—TRIAL — MISCONDUCT OF PROSECUTOR.

The failure of a person on trial for murder to have his wife in court, in order to afford witnesses an additional means of identifying him,—she having been seen with him near the time and place of the murder,—is not a proper subject for unfavorable comment in argument to the jury, the wife being incompetent as a witness for or against her husband. Mr. Justice Brewer, dissenting.

In error to the circuit court of the United States for the western district of Arkansas. Reversed.

Statement by Mr. Justice BROWN:

This was a writ of error upon the conviction of the plaintiff in error for the murder of an unknown man in the Indian Territory on the 13th day of February, 1889.

*119 The evidence on the part of the prosecution tended to show that, several days before the murder, two men stopped together at Vian, and obtained a contract to make rails for one Waters, and lived in a house about one mile from Waters' residence. They came from Winslow, in the state of Arkansas, in an old vehicle drawn by two horses, and were on their way to Oklahoma, staying at Vian for a few days for the purpose of earning provisions for themselves and horses. One of these men was accompanied by his wife and two small children. After remaining for several days, they left the neighborhood, and were next seen camping near the scene of the murder, on the evening of February 13th. Their personalities were remembered, although their names were forgotten, except that a boy remembered the name of one of them to have been John Graves. The morning after they were seen together in camp, one of the men was seen putting the horses to the vehicle, in which were the woman and a child, but the witness saw but one man and one child. About the 1st of May following, the remains of a dead man were found near the place where the witness claimed to have seen the people camped. The body was decayed, but was identified mainly by peculiarities of the teeth and clothing. He was the man who had claimed to own the horses and wagon. The witnesses for the prosecution recognized the defendant, Graves, as the other man, though to most of them his name had been unknown. Defendant's wife was admitted to have been in town at the time of the trial, but did not appear in the court room. She was seen by one of the witnesses of the prosecution outside of the court room, and was believed by the witness to have been the woman who had been with the party.

The defense was an alibi, and was supported by several witnesses, who swore that in the months of January, February, and March of that year defendant was in Washington county, Ark., a distance of 100 miles or more from the place where the remains of the dead man were found. Upon conviction of murder, defendant sued out this writ of error, making 15 assignments of error.

A. H. Garland, for plaintiff in error. Asst. Atty. Gen. Whitney, for the United States.

*120 Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The first assignment of error is to the action of the court in permitting "the district attorney, in his closing argument to the jury, over the objections of the defendant, to comment upon the absence of the defendant's wife from the presence of the court, and to state, among other things, to the jury, that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that witnesses for the government could see her, and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found; and other like arguments, statements, and declarations." While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made, having no connection with the case, or exaggerated expressions, such as counsel, in the heat of trial, are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially, it is its duty to interfere, and put a stop to them, and objection is made, if they are likely to be prejudicial to the accused. Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. Rep. 765; Hall v. U. S., 150 U. S. —, 14 Sup. Ct. Rep. 22.

Had the wife been a competent witness,

the comments upon her absence would have been less objectionable. It was said by Chief Justice Shaw in the case of Com. v. Webster, 5 Cush. 295, 316: "But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances, as they existed, and show, if such was the truth, that the suspicious* circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support, the charge." The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 Starkie, Ev. 54; People v. Hovey, 92 N. Y. 554, 559; Mercer v. State, 17 Tex. App. 452, 467; Gordon v. People, 33 N. Y. 508.

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But this presumption does not apply to every fact in the case which it may be in the power of the defendant to prove. He is not bound to anticipate every fact which the government may wish to show in the course of the trial, and produce evidence of that fact. In this case the wife was not a competent witness, either in behalf of or against her husband. If he had brought her into court, neither he nor the government could have put her upon the stand; and he was under no obligation to produce her for the purpose assigned by the district attorney,—that the witnesses for the government could see her, and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found. Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused that he had failed to produce his wife for identification, when, knowing that she could not be a witness, he was under no obligation to do so. The jury would be likely to draw the inference that she was prevented from testifying for her husband because her evidence might be damaging. It was, in fact, as if the court had charged the jury that it was a circumstance against him that he had failed to produce his wife in court.

The view we have taken of this assignment of errors renders it unnecessary to consider the others.

The judgment must be reversed, and the case remanded, with instructions to set aside the verdict and grant a new trial.

*122

* Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment of the court in this case. I think that the absence of the defendant's wife from the court room was, under the circumstances, a legitimate subject of comment in argument. The theory of the prosecution was that one of the two men who came to Vian was murdered by the other; that the body found was that of the murdered man; that the defendant was the murderer. The testimony was abundant that these men were accompanied in their trip by the wife and two small children of one of them. Defendant attempted to prove an alibi, and to show that at the times named, and when these two men were in the territory, he was in Washington county, Ark.,—more than a hundred miles away,—and that his wife was with him there. Witnesses for the prosecution who saw the two men and the woman at Vian, and who identified this defendant as one of those men, would unquestionably be strengthened in their testimony, if, upon seeing the woman, they were also able to identify her. There might be some mark, some peculiarity of feature, in the wife,—something, perhaps, for the time being forgotten,—which would make the witnesses absolutely sure that she was the woman who was present in the territory. And, conversely, there might be some peculiarity in the features of that woman which, not found in the defendant's wife, would have led the witnesses to hesitate as to their identification of him. One way or the other, a sight of her by the witnesses for the prosecution might be a significant factor in determining his identity. There was evidence before the jury that she was in Ft. Smith during the trial, and yet she was not in the court room, by the side of her husband, or where she could be seen by all the witnesses. It is true, several reasons for her absence might be suggested: She might have been in such a condition of health as to render it unsafe for her to come to the court room. She might have been alienated from him, and indifferent as to his conviction or acquittal. But, nevertheless, it was a suggestive fact, and an obvious fact, and therefore a legitimate subject of comment* by counsel. I do not understand that a jury, in their deliberations, are limited to a consideration of that which is, strictly speaking, testimony, but may properly consider any facts developed in the trial from which a reasonable inference may be drawn for or against either party. If, for instance, the fruits or instruments of crime are introduced in evidence, is not the action and conduct of the defendant at the sight of them, as also his demeanor generally in the presence of the jury, a matter of consideration and legitimate comment? If it be developed that a witness exists, presumably under the control of the defendant, who can throw light upon a vital matter, and he is not produced, may not the jury fairly consider that fact, and may not counsel comment on it? In the case of Com. v. Clark, 14 Gray, 367, there was testimony tending to show that the son of defendant

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was present, and participated in some of the acts relied upon as evidence of guilt. The son was not called as a witness by the defendant, and in the argument of the district attorney this fact was commented upon as tending to show his guilt. An instruction was asked to the effect that the jury must find the defendant guilty, if at all, upon the evidence given under oath in the case, and not from the absence of any witness who might have been produced, but was not. This instruction the court refused to give, but told the jury, in substance, that it was proper to consider the omission to produce this witness. In respect to this matter, the supreme court observed as follows: "The omission of the defendant to produce his son as a witness to meet and explain the evidence offered by the government in support of the indictment was a proper subject of comment by counsel before the jury, and might well be considered by them in connection with the testimony in the case. The witness was in the employment of the defendant, and in his interest, and could probably have given an explanation of some of the facts tending to show the guilt of the defendant, if they were susceptible of any construction favorable to his innocence. The failure to call the witness was not relied on as substantial proof of the charge by the government. Other evidence had been offered to establish that, which was submitted to the jury with proper instructions. If this evidence, unexplained, tended to prove his guilt, and he failed to bring evidence within his control to explain it, his omission to do so was a circumstance entitled to some weight in the minds of the jury."

In that case, as in this, there might have been some satisfactory reason for the absence of the witness, but none was given; and it was held, and rightly, that his nonproduction was a subject for consideration, and also for comment. See, also, Gavigan v. Scott, 51 Mich. 373, 16 N. W. Rep. 769; Tobin v. Shaw, 45 Me. 331; Com. v. Webster, 5 Cush. 295, 316; McDonough v. O'Neil, 113 Mass. 92; Blatch v. Archer, Cowp. 63, 65; 1 Starkie, Ev. 54. Somewhat analogous are the following cases: State v. Griffin, 87 Mo. 608, in which the prosecuting attorney commented upon the fact that the defendant's mother, though living only 15 miles from the court room, was not present at the trial, and had evidently abandoned him; and such comments were held by the supreme court not sufficient to disturb the judgment. It is true, however, the attention of the trial court was not called to the matter. State v. Jones, 77 N. C. 520, in which the defendant, having had a witness sworn, declined to examine him, and that fact was commented on by the prosecuting officer in his closing argument. Objection was made by defendant, but the court declined to interpose; and in this it was held by the supreme court that there was no error. Inman v. State, 72 Ga. 269: In this case it appeared that a continuance had once been obtained on the ground of the absence of a witness, and that when the trial was had the witness was present in court, but was not sworn or examined. Objection was made, but the court permitted the counsel to proceed, and in respect to this the supreme court observed: "The court held that the conduct of the accused and his counsel during the continuance of the trial were the proper subjects of comment by the counsel engaged in the case. Counsel are allowed the largest liberty in the argument of cases before juries; and whether the argument be logical or illogical, or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene.* Facts not proved cannot be discussed, but illogical conclusions from facts proved may be insisted upon, and there is no remedy; but in this case, we think, it was legitimate for counsel to allude to what had transpired in the case from the time it was called, through its whole proceeding, and the conduct of the party or his counsel in connection therewith was the proper subject of comment, and there was no error on the part of the court in allowing the comments of the solicitor general in this case. People v. White, 53 Mich. 537, 19 N. W. Rep. 174: This was a case of bastardy, in which counsel commented upon the resemblance between the defendant and the child of the complaining witness, then present in the court room, and in respect to this the supreme court said: "We do not well see how the jury could be prevented from noticing the child, which was properly enough in court; and while arguments of resemblance in so young an infant, in the absence of peculiarities, are a little preposterous, it is difficult, on this record, to determine that any rule of law was violated in discussing it."

In this case the wife could not be a witness for her husband, it is true; and yet her presence in the court room—a presence ordinarily to be expected—would, most certainly and obviously, have aided materially in the identification of the defendant. She was in the city, as the testimony showed, and her absence from the court room, unexplained, certainly suggested a motive, and that motive one which cast suspicion upon the defendant. I think the rule that should be laid down is that, in the absence of express prohibition, every fact which, in no illegal manner, comes to the knowledge of the jury during the progress of a trial, and which may influence their minds, is a subject of comment by counsel in their argument. The fact that defendant's wife was in the city was developed by the testimony; that she was not present in the court room was an obvious fact; the witnesses who saw the defendant at or near Vian, as they testified, saw his wife there with him; and it would most certainly add to the force of their tes-

timony if they could have said, "We there saw, not merely this defendant on trial, but this woman sitting by his side." Every *126 man would feel surer of an identification which included two persons, than if limited to but one. Some stress seems to be laid, in the opinion of the court, upon the fact that the defendant's wife was not a competent witness, and that this distinguishes the case from that cited from 14 Gray, and others in which the books abound. While it is true that she could not be sworn, and called upon to give testimony, yet she was herself testimony, and material testimony. Take this illustration: Suppose one of the witnesses for the government in this case had testified that while with the defendant, at Vian, he had seen in his possession a knife of a peculiar make, had there taken it, and made a mark upon it, and the government had proved by some other witness that he had seen in the possession of the defendant, on the very morning of the trial, a knife of substantially the same make, and no knife was produced by the defendant. Would not the omission to produce that knife be a significant fact, and one which the prosecuting attorney was at liberty to comment upon? If produced, and bearing the mark described by the first witness, it would tend very strongly to support the identification. Just so if this wife of defendant had been in the court room, and these various witnesses for the prosecution had testified that she was the same woman they had seen at Vian. Can there be any doubt that the identification would have been more certain? So, because, in the natural progress of the trial, without any misconduct on the part of the prosecution, this fact came to the notice of the jury, and was a fact which would naturally tend to affect the conclusions of men, it was a fact in respect to which the prosecuting officer was at liberty to comment, and suggest to the jury his own conclusions therefrom.

Again, the defense in this case was an alibi. The witnesses for the defense who testified to seeing the defendant in Washington county, Ark., at or about the time of the alleged murder, testified that his wife was with him there; that they had seen her in the city of Ft. Smith during the trial; and that she was the same woman with him theretofore in Washington county. It also appeared from the testimony of one wit- *127 ness that she had been in the hall of the courthouse,* and that, though in the city, she had not been around with the other witnesses.

Now, commenting upon the testimony, the counsel for the defense could argue to the jury that they had a double identification,—that of the defendant and that of his wife,—while the government had only one identification,—that of the defendant. Was it not a legitimate argument for the district attorney to make, in response to this, that if the wife had been in the court room, by the side of her husband, during the trial, as ordinarily she would be expected to be, the government might have had a double identification equally with the defendant? And as the testimony further showed that she was in the city, that she came up into the hall of the courthouse, and still was not around with the other witnesses for the defendant, so that the government witnesses might have had a chance to meet and see her, was it not also a legitimate argument, and was not the district attorney justified in making it, that there was probably a reason for her conduct, and that reason the danger of a double identification? The conclusion, it is true, cannot be positively affirmed to be correct; but surely a case ought not be reversed because the counsel for the government draws erroneous conclusions from the facts developed in the trial. If such a rule were laid down, how many verdicts could stand?

It must be borne in mind that there was nothing denunciatory, harsh, or abusive in the language of the district attorney. He simply commented upon the fact, obvious to the jury, that the wife of the defendant was not in the court room, although shown by the defendant's witnesses to be in the city, and drew his conclusions from such facts. The comment was one which would naturally occur to every man aware of the facts, whether on or off the jury. Can it be that the defendant was prejudiced by that? Ought the deliberate judgment of 12 men as to the defendant's guilt, approved as it was by the judge who presided, to be set aside for an error, if error it be, so frivolous as that?

For these reasons, I dissent.

(150 U. S. 156)

MORSE et al. v. ANDERSON.

(November 6, 1893.)

No. 63.

BILL OF EXCEPTIONS—TIME OF ALLOWANCE.

A bill of exceptions not allowed at the trial term, or within any time for which the term was extended for that purpose, is invalid, and cannot be considered. Muller v. Ehlers, 91 U. S. 249, followed.

In error to the circuit court of the United States for the district of Kentucky.

At law. Action by Nathan C. Morse, Jr., and Charles Evans, against John Jay Anderson and various others, to recover lands. There was a verdict for all the defendants, but the court granted a new trial as to all but said Anderson, in whose favor judgment was entered. Plaintiffs bring error. Affirmed.

The following statement as to the allowance of the bill of exceptions is made in the brief of plaintiffs in error:

"On December 17, 1887, the verdict was rendered, and 10 days' time allowed to pre-

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2012 WL 1252999
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

HANIFIN, INC., Plaintiff,
v.
MERSEN SCOTLAND HOLYTOWN, LTD., Defendant.

Civil Action No. 2010–11695–RBC.
|
April 12, 2012.

Attorneys and Law Firms

Richard B. Reiling, Reiling Law, Boston, MA, for Plaintiff.

Jonathan I. Handler, Jillian B. Hirsch, Day Pitney LLP, Boston, MA, for Defendant.

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (# 28) AND DEFENDANT MERSEN SCOTLAND HOLYTOWN, LTD'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF CONTRACT INTERPRETATION (# 30)

COLLINGS, United States Magistrate Judge.

***1** The contract at issue in this case is governed by New Jersey law. The Supreme Court of New Jersey has held that:

> [a]s a general rule, courts should enforce contracts as the parties intended. In doing so, the judicial task is clear: the court must discern and implement the common intention of the parties [and its] role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose.

McMahon v. City of Newark, 195 N.J. 526, 546, 951 A.2d 185, 196–197 (N.J., 2008) (citations and internal quotation marks omitted). "The construction of a written contract is usually a legal question for the court, but where there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation, then the doubtful provision should be left to the jury." *Great Atlantic & Pacific Tea Co., Inc. v. Checchio,* 335 N.J.Super. 495, 502, 762 A.2d 1057, 1061 (App.Div., 2000); *Petersen v. Township of Raritan,* 418 N.J.Super. 125, 133, 12 A.3d 250, 255 (App.Div., 2011); *Driscoll Const. Co., Inc. v. State, Dept. of Transportation,* 371 N.J.Super. 304, 314, 853 A.2d 270, 276 (App.Div., 2004).

In the instant case, while each side argues that the contracts are clear, neither party reconciles all the provisions of the contract. For example, Hanifin asserts it is entitled to "receive commissions on all business originating in the territory," defining that to mean all business the plaintiff developed and cultivated in the New England states even if the orders do not come from that territory. Assuming this interpretation to be correct, Hanifin does not square that clause with the contractual provision that "[c] ommissions **are payable** to the Representative on all acceptable orders **from within the territory."** Similarly, Mersen glosses over the fact that the term **"business originating** in the territory" differs from the term "all acceptable **orders from** within the territory," and argues simply that the provisions stand for the same proposition. Having reviewed all of the parties' submissions, the Court is of the view that ambiguities exist in the contract because "the terms of the contract are susceptible to at least two reasonable alternative interpretations." *Schor v. FMS Financial Corp.,* 357 N.J.Super. 185, 191, 814 A.2d 1108, 1112 (App.Div., 2002) (internal citation and quotation marks omitted).

Hanifin contends that it should prevail on its interpretation of the contract because the ambiguous terms must be construed against the preparer of the contacts, Mersen. Under New Jersey law, "where an ambiguity exists in the contract allowing at least two reasonable alternative interpretations, the writing is strictly construed against the drafter." *Driscoll Const.,* 371 N.J.Super. at 318, 853 A.2d at 279; *Orange Township v. Empire Mortgage Serv., Inc.,* 341 N.J.Super. 216, 227, 775 A.2d 174, 181 (App.Div., 2001). Thus, if:

> ***2** after a court has examined the terms of the contract, in light of the common usage and custom, and considered the circumstances surrounding its execution ... the court is unable to determine the meaning of the term, contra proferentem [the rule of contract interpretation requiring the court to adopt the meaning most favorable to the non-drafting party] may be

> employed as a doctrine of last resort .... [but that doctrine] is only available in situations where the parties have unequal bargaining power. If both parties are equally worldly-wise and sophisticated, contra proferentem is inappropriate.

Pacifico v. Pacifico, 190 N.J. 258, 267–268, 920 A.2d 73, 78 (N.J., 2007) (internal citations and quotation marks omitted).

Here, there is evidence to suggest that the parties negotiated the terms of the contract such that the prerequisite to the application of the doctrine, i.e., unequal bargaining power, may not exist. (# 31, Exh. F., Deposition of John P. Hanifin at 14–17); *See Pacifico,* 190 N.J. at 268, 920 A.2d at 79. Moreover, New Jersey courts also recognize that although "an ambiguity would be construed against the drafter, [that fact] does not act as a bar to prevent [the drafter] from even introducing its extrinsic evidence. Instead, it only goes to the interpretive function of the trier of fact in determining the true meaningof the language employed." *Schor,* 357 N.J.Super. at 193, 814 A.2d at 1113.

Thus, the Court rules that the issue of contract interpretation must be presented to the jury. Evidence as to how the course of conduct between the parties informs the interpretation may be introduced as well as any evidence as to the relative bargaining positions of the parties which might permit the application of the doctrine of *contra proferentum* may be introduced.

Accordingly, it is ORDERED that Plaintiff's Motion for Partial Summary Judgment (# 28) and Defendant Mersen Scotland Holytown, Ltd's Motion for Summary Judgment on the Issue of Contract Interpretation (# 30) be, and the same hereby are, DENIED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1252999

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LEGAL AUTHORITY AA-90

49 Cal.App.5th 928
Court of Appeal, First District, Division 5, California.

Guillermo HERNANDEZ et al., Plaintiffs and Appellants,
v.
DEPARTMENT OF MOTOR VEHICLES et al., Defendants and Respondents.

A156062
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Filed 6/2/2020

Synopsis

Background: Taxpayers filed petition for writ of mandate and declaratory and injunctive relief, seeking to compel the Department of Motor Vehicles (DMV) to stop suspending driver's licenses without notification of a violation of the Misdemeanor Statute. The Superior Court, Alameda County, No. RG16836460, Ioana Petrou, J., denied the petition. Taxpayers appealed.

Holdings: The Court of Appeal, Simons, J., held that:

[1] notification of violation of the Misdemeanor Statute is required before DMV suspends a driver's license;

[2] DMV must receive express written notice of a violation of the Misdemeanor Statute to suspend a driver's license; and

[3] "violation" of the Misdemeanor Statute means failure to be present in court at promised date and time.

Reversed and remanded.

Procedural Posture(s): On Appeal; Petition for Writ of Mandate; Complaint for Declaratory Relief.

West Headnotes (12)

[1] **Statutes** Purpose and intent

In any case involving statutory interpretation, court's fundamental task is to determine the legislature's intent so as to effectuate the law's purpose.

[2] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

In engaging in statutory interpretation, courts begin by examining the statutory language, giving it a plain and commonsense meaning.

[3] **Statutes** Language and intent, will, purpose, or policy
Statutes Statute as a Whole; Relation of Parts to Whole and to One Another

When interpreting a statute, court does not consider the statutory language in isolation; rather, it looks to the statute's entire substance in order to determine its scope and purposes.

[4] **Statutes** Language and intent, will, purpose, or policy
Statutes Context

Court construes statutory words in question in context, keeping in mind the statute's nature and obvious purposes.

[5] **Statutes** Statutory scheme in general
Statutes Construing together; harmony

In construing a statute, court must harmonize the statute's various parts by considering it in the

context of the statutory framework as a whole.

[6] **Statutes**🔑Plain language; plain, ordinary, common, or literal meaning
Statutes🔑Extrinsic Aids to Construction

If statutory language is unambiguous, then its plain meaning controls; if, however, the language supports more than one reasonable construction, then courts may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

[7] **Automobiles**🔑Judicial Remedies and Review in General

Notification of a violation of the Misdemeanor Statute is required before the Department of Motor Vehicles (DMV) suspends a driver's license pursuant to the Notification Statute. Cal. Veh. Code §§ 13365(a), 40509.

[8] **Statutes**🔑Superfluousness

It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage.

[9] **Statutes**🔑Superfluousness

An interpretation that renders statutory language a nullity is to be avoided.

[10] **Automobiles**🔑Administrative procedure in general

Department of Motor Vehicles (DMV) must receive express written notice of a violation of the Misdemeanor Statute to suspend a driver's license pursuant to the Notification Statute. Cal. Veh. Code §§ 13365(a), 40509.

[11] **Automobiles**🔑In General; Grounds

"Violation" of the Misdemeanor Statute, within meaning of Notification Statute that provides for suspension of a driver's license for violation of the Misdemeanor Statute, means failure to be present in court at date and time set forth in written promise to appear for traffic offense. Cal. Veh. Code §§ 13365(a), 40509.

[12] **Criminal Law**🔑Acts prohibited by statute

Word "willfully," as generally used in the law, is a synonym for "intentionally," i.e., defendant intended to do the act proscribed by the penal statute; in a criminal statute that penalizes the failure to perform a legally imposed duty, "willfulness" also denotes a requirement of proof that the defendant knew of his duty to act: a failure to act cannot be intentional or purposeful unless the defendant knew he was under a duty to act.

Witkin Library Reference: 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 217 [Other Serious Offenses.]

****501** Trial Court: Superior Court of Alameda County, Trial Judge: Honorable Ioana Petrou (Alameda County Super. Ct. No. RG16836460)

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Opinion

SIMONS, J.

****502** ***931** Vehicle Code section 13365, subdivision (a) (section 13365(a))[1] directs the Department of Motor Vehicles (DMV) to suspend a person's driver's license "[u]pon receipt of notification of a violation of subdivision (a) of Section 40508" and certain other conditions. Subdivision (a) of section 40508 (hereafter, the Misdemeanor Statute) makes it a misdemeanor for a traffic offender to "willfully violat[e] his or her written promise ... to appear in court ...." The DMV currently suspends driver's licenses upon notification of a failure to appear even without notification that this failure violated the Misdemeanor Statute. We conclude that this practice ***932** is contrary to section 13365(a), and reverse the trial court. We also define what constitutes a "violation" of the Misdemeanor Statute for purposes of section 13365(a).

BACKGROUND

Individual taxpayers (Plaintiffs) filed a writ petition and complaint for declaratory and injunctive relief, seeking to compel the DMV to stop suspending driver's licenses without notification of a violation of the Misdemeanor Statute.

The parties stipulated to the following facts. The DMV provides courts with electronic and paper methods to notify it of a person's failure to appear. Both methods of notification require the court to indicate the "sections violated" by the person failing to appear. The DMV will suspend a person's driver's license pursuant to section 13365 regardless of whether the failure to appear form indicates that the Misdemeanor Statute is one of the sections violated.

The trial court denied the petition. This appeal followed.[2]

DISCUSSION

I. *Statutory Framework*

The primary statute at issue—section 13365(a)—sets forth the conditions under which the DMV must suspend a person's driver's license following notification that the person failed to appear in court: "Upon receipt of notification of a violation of [the Misdemeanor Statute], the department shall take the following action: [¶] (1) If the notice is given pursuant to subdivision (a) of Section 40509, if the driving record of the person who is the subject of the notice contains one or more prior notifications of a violation issued pursuant to Section 40509 or 40509.5, ... the department shall suspend the driving privilege of the person. [¶] (2) If the notice is given pursuant to subdivision (a) of Section 40509.5, ... the department shall suspend the driving privilege of the person." The suspension is not effective until notice is mailed to the person and a 60-day waiting period has passed, and continues ***933** until the person's DMV record "does not contain any notification ****503** of a

violation of [the Misdemeanor Statute]." (§ 13365, subd. (b).)[3]

Section 13365(a) thus refers to notice from courts to the DMV relating to three separate statutes. The first is the Misdemeanor Statute, making it a misdemeanor for a person to "willfully violat[e] his or her written promise to appear ...." (§ 40508, subd. (a).)

The second two statutes referenced in section 13365(a)—sections 40509 and 40509.5 (hereafter, the Notification Statutes)—provide for courts to notify the DMV of a person's failure to appear. The first Notification Statute (§ 40509) authorizes permissive notification "if a person has violated a written promise to appear ... or violated an order to appear in court ...." (§ 40509, subd. (a).)[4] The second Notification Statute (§ 40509.5) contains similar provisions but also provides (among other differences) that DMV notification is mandatory when the underlying alleged violation is for certain serious offenses. (§ 40509.5, subds. (a) & (b).)[5] Both Notification ****504** Statutes provide that if, following notification, the person "appears in court" or the ***934** matter is adjudicated, the court "shall" so certify to the DMV. (§§ 40509, subd. (a), 40509.5, subds. (a) & (b).)

Additional statutes set forth consequences when a person's DMV record contains a failure to appear pursuant to the Notification Statutes. For example, the DMV shall not renew the person's license (§ 12807, subd. (c)), and any penalty assessments are a lien upon the person's vehicles subject to registration (§ 14911, subd. (a)).

II. *Analysis*

The DMV contends it is authorized under section 13365(a) to suspend a license upon receiving notification pursuant to the Notification Statutes (and ***935** any other requirements regarding existing notifications, notice to the license holder, and waiting periods), regardless of whether the notification indicates a violation of the Misdemeanor Statute. Plaintiffs argue the DMV must receive express notification of a violation of the Misdemeanor Statute before suspending a license under section 13365(a).[6]

****505** [1] [2] [3] [4] [5] [6]" 'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] The well-established rules for performing this task require us to begin by examining the statutory language, giving it a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language in isolation; rather, we look to the statute's entire substance in order to determine its scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statute's nature and obvious purposes. [Citation.] We must harmonize the statute's various parts by considering it in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106–1107, 133 Cal.Rptr.3d 738, 264 P.3d 579.)

A. *Is Notification of a Violation of the Misdemeanor Statute Required?*

[7] [8] [9]The parties dispute whether section 13365(a) requires the DMV to receive notification of a violation of the Misdemeanor Statute before it suspends a license following a failure to appear. The issue is easily resolved. Section 13365(a)'s plain language requires "notification of a violation of [the Misdemeanor Statute]" before the DMV may suspend a license. To find no such notification required would render this statutory language a nullity. "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage. [Citations.] 'An interpretation that renders statutory language a nullity is obviously to be avoided.' " (***936** *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038–1039, 175 Cal.Rptr.3d 601, 330 P.3d 912.) Accordingly, we conclude that notification of a violation of the Misdemeanor Statute is required before the DMV suspends a license pursuant to section 13365(a).[7]

B. *Is Notification Pursuant to the Notification Statutes Sufficient?*

The DMV argues notification of a failure to appear pursuant to the Notification Statutes is sufficient to satisfy the requirement of notification of a violation of the Misdemeanor Statute. We disagree.

As Plaintiffs contend, a violation of the Misdemeanor Statute requires two elements that are not necessary for notification pursuant to the Notification Statutes. First, the Misdemeanor Statute requires violation of a person's "written promise to appear ...." (§ 40508, subd. (a).)[8] In contrast, ****506** notification pursuant to the Notification Statutes is authorized upon violation of a "written promise to appear ..., *or ... an order to appear in court*, including, but not limited to, a written notice to appear issued in accordance with Section 40518." (§§ 40509, subd. (a), italics added, 40509.5, subd. (a), italics added.) An order to appear in court is not equivalent to a written promise to appear. For example, section 40518, expressly included by the Notification Statutes, authorizes the mailing of notices to appear where an automated traffic enforcement system has recorded an alleged violation, such as a red light violation. (§ 40518, subd. (a).) Second, the Misdemeanor Statute requires the promise to appear be violated "willfully." In contrast, the Notification Statutes authorize notification when "a person has violated" a promise or order to appear, with no express requirement that the violation be willful. (§§ 40509, subd. (a), 40509.5, subd. (a).)

Despite these additional requirements for a violation of the Misdemeanor Statute, the trial court found notification pursuant to the Notification Statutes ***937** was sufficient because courts understood that the DMV would construe every such notification as a notification of a violation of the Misdemeanor Statute. In so finding, the trial court relied on the following language in a DMV manual provided to courts about *electronic* notifications of failures to appear: "The FTA [failure to appear] should show section violated CVC § 40508 [the Misdemeanor Statute] in addition to the original section(s) violated. However, this is not required, the abstract will still be an FTA on the driving record if [the Misdemeanor Statute] is not reported to DMV."

[10]The language in the DMV's manual is not substantial evidence supporting the trial court's finding. Most notably, the manual appears to be only for electronically transmitted notifications, and therefore is not evidence of the understanding of courts with respect to paper notifications. Indeed, the form used for paper notifications states the identified person "has violated a written promise to appear ... *or violated an order to appear in court*" (capitalization altered, italics added), and is therefore expressly *not* limited to violations of the Misdemeanor Statute. In addition, the manual regarding electronic notification states the notification will result in "an FTA on the driving record," but it is not clear that courts would interpret this to mean a failure to appear pursuant to notification of a violation of the Misdemeanor Statute. Instead, a court might construe the manual's reference to "an FTA on the driving record" to mean a failure to appear following notification pursuant to the Notification Statutes which, as noted in part I, *ante*, has distinct consequences, not including an automatic DMV suspension.

Accordingly, we conclude the DMV must receive express notice of a violation of the Misdemeanor Statute to suspend a license pursuant to section 13365(a).

C. *What Constitutes a "Violation" of the Misdemeanor Statute?*

We now turn to what constitutes a "violation" of the Misdemeanor Statute for purposes of section 13365. Plaintiffs argued below that violation meant a conviction; the DMV suggests Plaintiffs' position requires that violation means a formal charge; and the trial court construed violation to mean "suspected or alleged violation" (a construction Plaintiffs apparently ****507** accept on appeal). Because the statutory language is susceptible to all of the above meanings, we turn to the legislative history for guidance.

1. *Legislative History*

As originally enacted and for many years thereafter, section 13365 provided for the DMV to suspend a driver's license when the person's record contained two or more notifications pursuant to the first Notification Statute ***938** (the second Notification Statute had not yet been enacted), with no reference to notifications regarding the Misdemeanor Statute. (Stats. 1963, ch. 354, § 1, p. 1145; Stats. 1971, ch. 1532, § 2, p. 3037; Stats. 1981, ch. 584, § 1, p. 2250; Stats. 1983, ch. 983, § 5, p. 3505.) The reference to the Misdemeanor Statute was added to section 13365(a) in 1984. (Stats. 1984, ch. 858, § 1, p. 2902.)[9] The same bill also added the second Notification Statute and provided that, with respect to certain offenses set forth in the second Notification Statute, the DMV was to suspend licenses upon the first notification. (Stats. 1984, ch. 858, §§ 1 & 3, p. 2902.)

The legislative history is unequivocal that the bill's purpose was "to cut down arrest warrants which are

issued for traffic infractions." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Jun. 25, 1984, p. 2.) The bill's proponents argued that "the courts are trying to get out of the traffic arrest warrant business. An arrest warrant is too cumbersome a mechanism, triggers consequences of great embarrassment and inconvenience to the traffic offender, and may give rise to false arrest litigation if an administrative mistake was made to justify its routine use. Proponents would like to use the DMV license suspension mechanism as the enforcement tool." (Assem. Com. on Crim. Law & Pub. Safety, Rep. on Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Apr. 9, 1984, p. 3.) To this end, as to certain offenses, the bill "would delete the requirement of a prior failure to appear before suspending the license of a driver, thus permitting courts to issue either suspensions or warrants on the first failure to appear." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Jun. 25, 1984, p. 2.) Before these amendments, a warrant could issue after the first failure to appear, but a license suspension required two or more failures to appear.[10]

The language referring to the Misdemeanor Statute did not appear in early versions of the bill as introduced and amended in the Assembly, but was subsequently added by Senate amendment. (Compare Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as introduced Jan. 30, 1984, and Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Apr. 9, 1984, with Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Jun. 25, 1984.) Legislative analyses of the bill following the Senate amendments discuss other changes **939** made in the Senate, but make no mention of the addition of a reference to the **508** Misdemean or Statute. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2539 (1983–1984 Reg. Sess.) as amended Jun. 25, 1984, p. 2; Assem. Off. of Research, concurrence in Sen. amendments to Assem. Bill No. 2539 (1983–1984 Reg. Sess.), as amended June 25, 1984, p. 1.) The overall purpose of the bill discussed in the analyses remained the same. (*Ibid.*)

2. *"Violation"*

Although the legislative history sheds no light on why the reference to the Misdemeanor Statute was added, it demonstrates an overarching intent to encourage license suspensions rather than bench warrants as a tool to compel appearance in court. This strongly suggests the Legislature did not intend to make it substantially more burdensome for the courts to initiate a license suspension following a failure to appear than it was before the amendments or than it was to issue an arrest warrant. Prior to the 1984 amendments, a court could provide the DMV with notification 15 days after a failure to appear (Stats. 1981, ch. 584, § 3, pp. 2250–2251), and could issue an arrest warrant within 20 days after a failure to appear (Stats. 1979, ch. 235, § 6, p. 491). Construing a "violation" of the Misdemeanor Statute within the meaning of section 13365(a) as requiring a conviction or formal charge would render license suspensions substantially more burdensome for courts to obtain and thus would run contrary to the legislative intent.

Indeed, the legislative history indicates an understanding that "violation" would not be so construed. Prior to the 1984 amendments, section 13365(a) authorized suspensions "[u]pon receipt of a notification of a *violation* of [the first Notification Statute] ...." (Stats. 1983, ch. 983, § 5, p. 3505 (italics added).) The first Notification Statute—then triggered by a "violat[ion]" of a "written promise to appear" (Stats. 1981, ch. 584, § 3)—did not criminalize any conduct, and therefore no charges could be filed or convictions obtained. The 1984 amendments used identical phrasing, but simply substituted the Misdemeanor Statute for the first Notification Statute. This supports our conclusion that the Legislature did not intend "violation" to mean a conviction or formal charge.

[11]Prior to the 1984 amendments, courts simply determined whether a "violation" of the first Notification Statute had occurred based on the information before them.[11] We see no indication that the Legislature intended a different **940** meaning of "violation" after the 1984 amendments. In most cases, the trial court can easily determine if a violation of the Misdemeanor Statute has occurred. Whether the person made a written promise to appear will be readily ascertainable from the court's file. The prescribed Judicial Council forms used to secure an arrestee's release include a box stating, "Without admitting guilt, I promise to appear at the time and place indicated below" (capitalization altered), with a line for the arrestee's signature. (E.g., Judicial Council Forms, form **509** TR-130; see also § 40500, subd. (b).) The court's copy of such a notice to appear will contain this signature. (See Judicial Council Forms, forms TR-130 at p. 1 [court's copy of form includes signature box], TR-INST at ¶ 6.240 ["The defendant's signature on the defendant's copy of the citation must be identical to the signature on the copy of the citation filed with the court."].) In contrast, the Judicial Council form for an automated traffic enforcement system notice to appear contains no box for a person to sign a written promise.

(Judicial Council Forms, form TR-115.) Thus the court can easily determine, based on the record before it, whether a written promise to appear was made.

Whether the person has violated the written promise to appear will also be readily apparent to the trial court. The person either will be present in court at the promised date and time, or will not be.

[12]The determination of whether the violation was willful is slightly more difficult. "The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute. 'Willfully' usually defines a general intent crime unless the statutory language expresses or implies another meaning. [Citation.] In a criminal statute that penalizes the failure to perform a legally imposed duty, 'willfulness' also denotes a requirement of proof that the defendant knew of his duty to act: a failure to act cannot be intentional or purposeful unless the defendant knew he was under a duty to act." (*People v. Davis* (2005) 126 Cal.App.4th 1416, 1435–1436, 25 Cal.Rptr.3d 92.) The person's written promise to appear establishes knowledge of the duty to act. With respect to whether the person failed to appear intentionally, in an analogous setting—the determination of whether a bailed defendant who failed to appear has demonstrated a "sufficient excuse" to avoid a bench warrant or bail forfeiture (Pen. Code, § 1305.1)—it has been held that " '[a] defendant's failure to appear without explanation is presumptively without sufficient excuse.' " (***941** *People v. The North River Ins. Co.* (2019) 37 Cal.App.5th 784, 796, 250 Cal.Rptr.3d 524.) Such a presumption is also appropriate here, in light of the legislative intent discussed above.[12]

Plaintiffs argue that in some cases courts will have evidence of a *lack* of willfulness, for example, when a person "called the court clerk with a valid explanation for a non-willful failure to appear." In such cases, depending on the nature of the explanation and any other relevant facts, the trial court may determine the failure to appear was not willful.[13] If the court so ****510** determines, the Misdemeanor Statute has not been violated for purposes of section 13365.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to (1) enter an order granting Plaintiffs' petition for writ of mandate that is consistent with this opinion, (2) conduct a hearing and provide the parties with the opportunity to present their views and, if necessary, evidence concerning how the DMV should be instructed to come into compliance with Vehicle Code section 13365, including what constitutes a reasonable timeframe for compliance, and then, (3) provide the DMV with specific instructions on what it must do in what timeframe to comply with the writ. Plaintiffs are awarded their costs on appeal.

We concur.

JONES, P.J.

BURNS, J.

All Citations

49 Cal.App.5th 928, 263 Cal.Rptr.3d 500, 20 Cal. Daily Op. Serv. 5009, 2020 Daily Journal D.A.R. 5332

Footnotes

1 All undesignated section references are to the Vehicle Code. In 2017, the legislature amended sections 13365, 40509, and 40509.5. (Stats. 2017, ch. 17, §§ 51, 53, & 54, effective June 27, 2017.) These amendments are not material to the issues on appeal. We cite to the current operative version of those statutes.

2 Amicus curiae briefs in support of Plaintiffs were filed by Legal Services of Northern California, the Inner City Law Center, and the Financial Justice Project of the San Francisco Treasurer and Tax Collector's Office. We do not address the policy arguments raised in the amicus briefs, which are properly directed to the Legislature. (*Fort Bragg Unified School Dist. v. Colonial American Casualty & Surety Co.* (2011) 194 Cal.App.4th 891, 909–910, 124 Cal.Rptr.3d 144 [" 'Crafting statutes to conform with policy considerations is a job for the Legislature, not the courts; our role is to interpret statutes, not to write them.' "].)

3 Section 13365 provides, in its entirety: "(a) Upon receipt of notification of a violation of subdivision (a) of Section 40508, the department shall take the following action: [¶] (1) If the notice is given pursuant to subdivision (a) of Section 40509, if the driving record of the person who is the subject of the notice contains one or more prior notifications of a violation issued pursuant to Section 40509 or 40509.5, and if the person's driving privilege is not currently suspended under this section, the department shall

suspend the driving privilege of the person. [¶] (2) If the notice is given pursuant to subdivision (a) of Section 40509.5, and if the driving privilege of the person who is the subject of the notice is not currently suspended under this section, the department shall suspend the driving privilege of the person. [¶] (b) [¶] (1) A suspension under this section shall not be effective before a date 60 days after the date of receipt, by the department, of the notice given specified in subdivision (a), and the notice of suspension shall not be mailed by the department before a date 30 days after receipt of the notice given specified in subdivision (a). [¶] (2) The suspension shall continue until the suspended person's driving record does not contain any notification of a violation of subdivision (a) of Section 40508."

4 Section 40509, subdivision (a) provides, in its entirety: "Except as required under subdivision (b) of Section 40509.5, if a person has violated a written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before the person authorized to receive a deposit of bail, or violated an order to appear in court, including, but not limited to, a written notice to appear issued in accordance with Section 40518, the magistrate or clerk of the court may give notice of the failure to appear to the department for any violation of this code, or any violation that can be heard by a juvenile traffic hearing referee pursuant to Section 256 of the Welfare and Institutions Code, or any violation of any other statute relating to the safe operation of a vehicle, except violations not required to be reported pursuant to paragraphs (1), (2), (3), (6), and (7) of subdivision (b) of Section 1803. If thereafter the case in which the promise was given is adjudicated or the person who has violated the court order appears in court or otherwise satisfies the order of the court, the magistrate or clerk of the court hearing the case shall sign and file with the department a certificate to that effect."

5 Section 40509.5 provides, in its entirety: "(a) Except as required under subdivision (b), if, with respect to an offense described in subdivision (d), a person has violated his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before the person authorized to receive a deposit of bail, or violated an order to appear in court, including, but not limited to, a written notice to appear issued in accordance with Section 40518, the magistrate or clerk of the court may give notice of the failure to appear to the department for a violation of this code, a violation that can be heard by a juvenile traffic hearing referee pursuant to Section 256 of the Welfare and Institutions Code, or a violation of any other statute relating to the safe operation of a vehicle, except violations not required to be reported pursuant to paragraphs (1), (2), (3), (6), and (7) of subdivision (b) of Section 1803. If thereafter the case in which the promise was given is adjudicated or the person who has violated the court order appears in court and satisfies the order of the court, the magistrate or clerk of the court hearing the case shall sign and file with the department a certificate to that effect. [¶] (b) If a person charged with a violation of Section 23152 or 23153, or Section 191.5 of the Penal Code, or subdivision (a) of Section 192.5 of that code has violated a lawfully granted continuance of his or her promise to appear in court or is released from custody on his or her own recognizance and fails to appear in court or before the person authorized to receive a deposit of bail, or violated an order to appear in court, the magistrate or clerk of the court shall give notice to the department of the failure to appear. If thereafter the case in which the notice was given is adjudicated or the person who has violated the court order appears in court or otherwise satisfies the order of the court, the magistrate or clerk of the court hearing the case shall prepare and forward to the department a certificate to that effect. [¶] (c) Except as required under subdivision (b), the court shall mail a courtesy warning notice to the defendant by first-class mail at the address shown on the notice to appear, at least 10 days before sending a notice to the department under this section. [¶] (d) If the court notifies the department of a failure to appear pursuant to subdivision (a), no arrest warrant shall be issued for an alleged violation of subdivision (a) of Section 40508, unless one of the following criteria is met: [¶] (1) The alleged underlying offense is a misdemeanor or felony. [¶] (2) The alleged underlying offense is a violation of any provision of Division 12 (commencing with Section 24000), Division 13 (commencing with Section 29000), or Division 15 (commencing with Section 35000), required to be reported pursuant to Section 1803. [¶] (3) The driver's record does not show that the defendant has a valid California driver's license. [¶] (4) The driver's record shows an unresolved charge that the defendant is in violation of his or her written promise to appear for one or more other alleged violations of the law. [¶] (e) Except as required under subdivision (b), in addition to the proceedings described in this section, the court may elect to notify the department pursuant to subdivision (b) of Section 40509. [¶] (f) A violation subject to Section 40001 that is the responsibility of the owner of the vehicle shall not be reported under this section."

6 The DMV does not dispute that, if section 13365(a) obliges it to receive express notification of a violation of the Misdemeanor Statute before suspending a license, the requirements for a writ of mandate are satisfied. (See *Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408, 181 Cal.Rptr.3d 109 ["A writ of mandate may be issued by any court 'to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.' (Code Civ. Proc., § 1085, subd. (a).) The showing required to be entitled to mandate is that the public agency has a clear, present, and ministerial duty to afford the relief sought, and that the petitioner has a clear, present, and beneficial right to performance of that duty."].)

7 To the extent the DMV argues that consideration of section 13365(a) in the context of the statutory framework requires us to ignore the specific direction regarding the Misdemeanor Statute, the argument cannot be reconciled with our obligation to avoid rendering this statutory language a nullity.

8 The written promise to appear is an integral part of the enforcement of minor traffic offenses. " '[I]n the vast majority of cases the [traffic] violator will not be taken into custody; ... the officer must prepare a written notice to appear (i.e., a citation or "ticket"), and must release the violator "forthwith" when the latter in turn gives his written promise that he will appear as directed (§§ 40500,

40504).' " (*People v. Monroe* (1993) 12 Cal.App.4th 1174, 1180, 16 Cal.Rptr.2d 267; see also § 40504, subd. (a) ["The officer shall deliver one copy of the notice to appear to the arrested person and the arrested person in order to secure release must give his or her *written promise to appear* in court or before a person authorized to receive a deposit of bail by signing two copies of the notice which shall be retained by the officer" (italics added)].)

9 At the time, the Misdemeanor Statute was not materially different from its current version. (See Stats. 1979, ch. 235, § 2, p. 489 ["Any person willfully violating his written promise to appear or a lawfully granted continuance of his promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested."].)

10 Arrest warrants could issue pursuant to former section 40515, which provided: "When a person signs a written promise to appear ... [,] the magistrate may issue and have delivered for execution a warrant for his arrest within 20 days after his failure to appear before the magistrate ...." (See Stats. 1979, ch. 235, § 6, p. 930.)

11 Courts routinely make similar determinations in related contexts, including issuing bench warrants upon a failure to appear for a traffic infraction (§ 40515, subd. (a) ["When a person signs a written promise to appear ... the magistrate may issue and have delivered for execution a warrant for his or her arrest within 20 days after his or her failure to appear ...."]), or deeming a failure to appear for a traffic infraction consent to have a trial by written declaration (§ 40903, subd. (a) ["Any person who fails to appear as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer, involving a violation of this code or any local ordinance adopted pursuant to this code."]).

12 We note that a license suspension pursuant to section 13365 is only effective after notice is mailed to the person and a 60-day waiting period has passed. (§ 13365, subd. (b)(1).)

13 No purpose would be served by an effort to speculate about and then analyze the myriad of explanations a party might provide to a court regarding a failure to attend a required court date. We note that courts may find it helpful to look to another context involving failures to appear: Penal Code section 1214.1, which authorizes a civil assessment when a defendant fails to appear "after notice and without good cause." (Pen. Code, § 1214.1, subd. (a).) The Advisory Committee comment to California Rule of Court rule 4.106(c), which prescribes procedures for assessments under this statute, notes: "Circumstances that indicate good cause may include, but are not limited to, the defendant's hospitalization, incapacitation, or incarceration; military duty required of the defendant; death or hospitalization of the defendant's dependent or immediate family member; caregiver responsibility for a sick or disabled dependent or immediate family member of the defendant; or an extraordinary reason, beyond the defendant's control, that prevented the defendant from making an appearance or payment on or before the date listed on the notice to appear."

LEGAL AUTHORITY AA-91

111 Cal.App.4th 1183
Court of Appeal, First District, Division 2, California.

Khai HUYNH, Plaintiff and Respondent,
v.
Thuan Nguyen VU et al., Defendants and Appellants.

No. A098568.
|
Sept. 9, 2003.
|
Certified for Partial Publication.*

Synopsis
Background: Real estate broker, who did not obtain a commission on the sale of real property, sued the vendor's husband for intentional interference with the vendor's performance of her contract with the broker. The Superior Court of Alameda County, No. 813350-2, John F. Kraetzer, J., entered judgment on a jury verdict in favor of the broker. The husband appealed.

Holdings: The Court of Appeal, Ruvolo, J., held that:

[1] the manager's privilege to interfere in a principal's contract applies to managers of natural persons;

[2] where a manager stood to reap a tangible personal benefit from the principal's breach of contract, the privilege does not apply unless the manager's predominant motive was to benefit the principal; and

[3] the record warranted a jury instruction on that privilege.

Reversed.

West Headnotes (5)

[1] **Torts** Employees and agents; corporate entities

Although the manager's privilege to interfere with a principal's contract is most often applied to bar actions against managers of a business entity, the privilege applies with equal force to an equivalent action against a manager or agent acting on behalf of a natural person.

16 Cases that cite this headnote

[2] **Torts** Employees and agents; corporate entities

In a case where a manager stood to reap a tangible personal benefit from the principal's breach of contract, the manager should not enjoy the protection of the manager's privilege to interfere with the principal's contract unless the trier of fact concludes that the manager's predominant motive was to benefit the principal.

21 Cases that cite this headnote

[3] **Contracts** Effect of breach in general

Under the "efficient breach theory," where it is worth more to the promisor to breach rather than to perform a contract, it is more efficient for the law to allow the promisor to breach the contract and to pay the promisee damages based on the benefit the promisee expected to gain by the completed contract.

6 Cases that cite this headnote

[4] **Torts** Contracts in general

Record warranted jury instruction on manager's privilege in broker's intentional interference with contract action against husband of vendor of real estate; there was ample evidence that, in interfering with the contract, the husband's predominant motive was to serve his wife's interests and he acted in accordance with her

wishes, there was no evidence that he acted from any motive or interest that conflicted with her interests, and any desire to enhance community interests was congruent with the wife's interest.

See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 673; 12 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 34:145; Cal. Jur. 3d, Interference with Economic Advantage, § 31.

5 Cases that cite this headnote

[5] Appeal and Error Contracts in general

Trial court's refusal to give a jury instruction on the manager's privilege was prejudicial error in a broker's intentional interference with contract action against the husband of the vendor of real property, since the husband was prevented from presenting a potentially meritorious defense to the jury.

4 Cases that cite this headnote

Attorneys and Law Firms

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***1185** RUVOLO, J.

I.

Introduction%H

This appeal follows a jury verdict for respondent Khai Huynh (Broker) in his action against Thuan Nguyen Vu (Seller) ****597** for a commission on Seller's sale of a parcel of commercial real property in Oakland (the Property) to Bill Phua (Buyer), and against Seller's husband, appellant Cuong Tat Vu (Husband), who was alleged to have acted as Seller's agent in connection with the transaction, and to have intentionally interfered with Seller's performance of the contract.

In the published portion of this opinion, we conclude that Husband was entitled to assert the common law manager's privilege in defense of Broker's tortious interference claim, since the evidence at trial could support the conclusion that the predominant motive for Husband's advice to Seller was to further Seller's interest and not the self-interest of Husband. Accordingly, the failure to instruct the jury on this defense was reversible error.

II.

Facts[1]

Broker is a licensed real estate broker. In 1998, Buyer requested Broker's help in buying a commercial property in Oakland. Broker knew that the Property had been on the market in 1997, and that no buyer had been found before the listing expired. To find out whether the Property might still be available, Broker contacted Husband, with whom he had been acquainted for a few years, and whom he understood to be the owner of the Property.

In fact, as of 1998 Husband did not hold title to the Property. Husband and Seller had originally purchased the Property together in 1993, but Husband ***1186** transferred his interest to Seller by interspousal grant deed almost immediately thereafter, and she remained the sole owner. Husband still participated actively in managing the Property, however. For example, Husband collected some of the rent; handled some of the maintenance and repairs; and signed at least one of the leases on his wife's behalf, with her authorization. One of the tenants testified that he dealt entirely with Husband in all matters concerning his lease and considered Husband to be his landlord, though he had not checked to see whether Husband actually had title to the Property.

When Broker contacted him, Husband indicated that he was still interested in selling, and that Broker should present an offer in writing. Broker mailed an informal letter of intent to Husband and Seller, and Husband responded by telephoning Broker and requesting that he prepare a formal offer. Broker then sent Husband, at the office address shared by Husband and Seller, a standard form real estate purchase offer dated September 25, 1998, signed by Buyer, offering to purchase the Property for $1.1 million. The offer also provided for Broker to receive a commission of 6 percent.

On November 3, 1998, after discussing the terms of the proposed transaction with ****598** Seller, Broker prepared a counteroffer and transmitted it to Buyer. By this time, Broker had learned that the true owner of the Property was Seller, not Husband. Husband did not have a power of attorney or any other written authority from Seller to act on her behalf in connection with the sale of the Property. Nonetheless, when Broker contacted Seller about the transaction, she often referred him to Husband, and Broker's communications with Seller generally went through Husband.

In the counteroffer, at Seller's request, Broker reduced his commission on the counteroffer to 3 percent. The counteroffer also increased the purchase price to $1.3 million, and added the following condition: "Escrow to close 90 days from Seller's acceptance. [¶] Contract extension, if any, after the expiration date have [*sic*] to be agreed by Seller in writing, or contract to be null & void at Seller [*sic*] choice." The 90–day deadline for close of escrow was added at Seller's request because of the rapidly changing nature of the real estate market at that time, but the provision that extensions must be agreed to by Seller in writing was supplied by Broker himself.

Buyer accepted the counteroffer on November 16, 1998. Broker opened an escrow the following day. The 90–day period was thus set to expire either in mid-February 1999, as Broker understood it, or on March 5, 1999, according to Seller's testimony.

During the period between mid-November 1998 and mid-February 1999, Broker unsuccessfully requested that Seller and Husband provide documentation about the income and expenses associated with the Property, which was ***1187** necessary in order for Buyer to obtain financing for the purchase. Husband is a medical doctor and, according to Broker, he and Seller frequently told Broker when he contacted them that they were too busy to respond to him. Seller explained at trial that she did not necessarily track the expenses on the property on a monthly basis, and did not normally compile complete expense information until it was needed to prepare her income tax returns.

Broker testified that he reminded Seller of the 90–day deadline for escrow to close, which Seller or Husband had requested, and indicated that it would be difficult for the transaction to close if the information Broker had requested was not forthcoming. Some documentation was provided, but it was incomplete, unverified, and otherwise inadequate.

Husband testified that he gave Broker all the leases he had, and that he explained to Broker the reason some were missing was that the current lender on the Property had requested them when Seller purchased it, and had not returned them all. Husband reported that Broker told him he was able to get the missing leases from the lender. One of the leases had expired. Husband tried to find the current version in his files, but was not able to find it, and ultimately a new lease had to be prepared for that particular tenant.

Broker also gave a set of tenant estoppel certificates[2] to Husband, who asked to review them before they were presented to the tenants; Husband promised to return them with the tenants' signatures a week later, but failed to do so. Broker prepared the estoppel certificates using the best information ****599** he had available, based on the few leases he had received from Husband together with information he had obtained by interviewing the tenants. Broker recognized that some of the information he used might be inaccurate, but expected that the tenants would correct any errors before signing the estoppel certificates.

In January 1999, Seller and Husband told Broker that copies of some of the leases on the Property were available from Seller's current lender, but even then Broker experienced difficulty obtaining them. Despite repeated requests, when the mid-February deadline arrived, Broker still had not received complete documentation.[3]

***1188** On March 4, 1999,[4] Buyer closed escrow on his sale of a commercial property in San Francisco. Buyer was planning to shelter his capital gain on that sale from federal income tax liability by designating the Property he was purchasing from Seller as replacement property in a tax-free exchange under section 1031 of the Internal Revenue Code (section 1031). Because of the time limits applicable to section 1031 exchanges, Buyer informed Broker on March 4 that he was ready and eager to close escrow with Seller as soon as possible.[5]

As of March 4, neither Buyer nor Seller had affirmatively taken any action to declare the contract void or cancel the escrow, so Broker and Buyer both believed that the contract was still in effect even though, by their reckoning, the 90–day deadline to close escrow had passed. Accordingly, Broker called Seller and Husband's shared office, which was also the office for Husband's medical practice, and spoke with Husband about Buyer's desire to close. The trial testimony gave differing versions of the facts as to what happened next, but neither party contended that Seller or Husband indicated an intent to cancel the transaction at this time, even though the 90–day deadline had already lapsed and no extension had yet been requested or given.

According to Broker's trial testimony, Husband responded that he and Seller needed additional time before closing in order to coordinate the sale of the Property with a separate section 1031 exchange that Seller was planning. Husband therefore requested an extension, though he was not sure how many additional days would be required. At Husband's request, Broker prepared a document (the March 5 extension letter) for Seller's signature, indicating that "[S]eller request [*sic*] the close of escrow on the [P]roperty ... be extended for [blank] days from today."

It is undisputed that Broker took the March 5 extension letter to Husband's office, and that Husband filled in the blank with the number "45"[6] to indicate the ****600** number of days the escrow was to be extended, and signed both his own ***1189** and Seller's name. There was a sharp conflict in the testimony, however, regarding the circumstances under which Husband did so.

Broker testified that when Broker told Husband that Seller was supposed to sign the document, Husband said he could sign on her behalf, and added Seller's name after his own signature. Broker accepted Husband's representation that he had authority to sign the extension on Seller's behalf, and did not ask for or receive any written confirmation of that authority.

Husband's version of how he came to sign the March 5 extension letter was as follows: Broker called earlier that day to ask if Husband had checked with his accountant about a "designation" (presumably of section 1031 exchange property). Husband told Broker that he understood from his accountant that he had 45 days to "do the job," and that was the end of the conversation. Later that day, Broker unexpectedly showed up with the March 5 extension letter and asked Husband to fill in the number of days that his accountant had given him, i.e., 45, and to sign the document. Husband did so, but he was very busy at the time, and did not actually read the document until after he had signed it, when Broker asked him also to write his wife's (Seller's) name. At that point, Husband told Broker that they had never discussed an extension; that Broker would have to prepare another document for Seller to sign and should not use the one Husband had just signed; and that Husband had only signed the document by mistake.

It is not disputed that Buyer visited Husband's office on the evening of March 5 with Broker and Harry Han (Banker), who was both a representative of the lender[7] and a patient of Husband's. Once again, however, there was a conflict in the trial testimony concerning the specifics: how the visit came about, and what happened during the time the three men were at Husband's office.

Broker and Buyer's version was as follows. Buyer was willing to accept the extension, but he remained eager to close escrow as soon as possible, and the extension request had caused him to become concerned that there might be a problem closing the transaction. Accordingly, on that same day (March 5), after Husband signed the extension letter, Buyer requested the assistance of Banker, and went with him and Broker to Husband's office. While they were sitting in the waiting room, Husband came out and signaled to Banker to join him in an inner office. After 20 or 30 minutes, Banker emerged and told Buyer that there was no problem, and that Husband was "going to go through [with] it." Banker also told Broker and Buyer that Husband's ***1190** willingness to close the transaction depended on Buyer's agreement to reduce, from $20,000 to $5,000, the amount of the credit he was requesting on account of the deteriorated air conditioning system at the Property. Buyer was willing to agree to this condition. Banker then said that Husband wanted Broker to prepare a new copy of the purchase contract, reflecting the amount of the air conditioning credit and updating the dates, and to give it to Banker.

****601** Banker's account of the March 5 meeting at Husband's office was entirely different. He denied that he was there because Buyer had asked for his help in facilitating the transaction. He testified that he was already planning to visit Husband to obtain some medication, and that he simply ran into Buyer and Broker on the way. According to Banker, while Banker and Buyer were sitting in the waiting room, and before Banker went into Husband's back office, Broker met separately with Husband to obtain Husband's signature on the extension letter. Banker contended that he was only in Husband's office for two or three minutes, just long enough to get his medication, and Husband also denied discussing the transaction with Banker on March 5.

Banker denied telling Broker anything about preparing a new purchase contract for the Property. He also denied telling him that Husband had said Seller was prepared to go through with the transaction. Banker acknowledged, however, that Husband did not appear agitated or distressed during their meeting, and did not assert that Broker had deceived him or that he had made a mistake.

After the March 5 meeting, Broker prepared a proposed revised contract reflecting the $5,000 credit for the air conditioning. Broker testified that he gave it to Banker on March 6, but Husband testified that he found it on the counter at his office later in the evening on March 5. Husband gave the proposed new contract to Seller, but it was never signed. Husband testified that because Broker had prepared the new contract, he thought that the mistake about his signing the March 5 extension letter had been taken care of, because the new contract would replace the extension letter.

Seller testified that, on March 7, Broker called her to ask why the new contract reflecting the $5,000 credit for the air conditioning had not been signed. She told him that she did not want to agree to sell for less than the original price, and also that she had not authorized Husband to sign her name or approve the extension of time.

On March 10, Buyer's attorney, Michael Kinane, sent Broker and Seller a letter indicating that Buyer had approved the 45–day extension of time for escrow to close, and giving April 19 as the extended deadline. Husband testified that he was surprised to receive this letter, because he had already told Broker that he had signed the March 5 extension letter by mistake, and ***1191** Seller had reiterated this on March 7. Seller and Husband admitted, however, that when they received Kinane's March 10 letter, neither of them contacted Kinane or Buyer to tell them that there had been a mistake, or that the deadline would not be extended.

By March 12, the lender had issued an official commitment letter for Buyer's loan, subject to conditions including a satisfactory appraisal. Seller still had not provided some of the documentation for the loan, including estoppel certificates, copies of leases, and an income and expense statement that was needed to complete the appraisal. Nonetheless, Buyer testified that the loan approval conditions could easily have been satisfied. At Buyer's request, because of his concern about the potential for a delay in closing the transaction due to Husband's request for additional time, a representative of the lender extended the expiration date of the loan commitment from March 31 to May 15.

On March 16, Husband wrote a letter to Broker stating that he had signed the March 5 extension letter by mistake. Husband testified at trial that he thought ****602** the problem about the mistake in signing the March 5 extension letter was taken care of at this point. The letter also stated that Broker had confirmed this in a conversation with Husband but, at trial, Broker denied that any such conversation had occurred.

After receiving Husband's March 16 letter, Broker tried unsuccessfully to contact Seller and Husband, but they did not return his calls. Buyer gave a copy of the letter to Kinane, and also asked to meet with Banker. On March 24, Banker told Buyer that Seller thought the property was worth $1.8 million rather than the $1.3 million purchase price specified in the contract, and that Seller and Husband wanted $1.5 million in order to close the escrow. Banker did not, however, indicate that Seller was taking the position that the contract had expired, and Seller and Husband did not tell Buyer they were taking that position until several weeks later.

On March 25, Kinane sent a letter to Seller and Husband regarding the transaction, with a copy to Verne Perry, who was Broker's attorney. Seller did not respond to this letter by contacting Kinane, Buyer, or Broker.

On April 12, Seller faxed Broker a letter telling him that his services were terminated, effective immediately, and that she had retained Mark Rubke, a real estate broker and attorney. Perry later forwarded Broker's file to Rubke at Seller's request. On the same date, Rubke also informed Kinane (Buyer's attorney) that he was now representing Seller in connection with the transaction.

After receiving Seller's April 12 letter, Broker talked to Buyer, who still wanted the transaction to close. In an effort to assist Buyer, between April 12 ***1192** and April 19, Broker located copies of the estoppel certificates he had prepared a few months earlier and given to Husband, and took them to the Property to attempt to get the tenants to sign them.[8]

Some of the tenants declined, however. Broker testified that one of the tenants told him that the certificate Broker had prepared for that tenant contained inaccurate information concerning the amount of the rent, and that Husband had instructed the tenant not to sign it. The tenant testified that he had declined to sign the certificate because he did not know the person who was presenting it, and because when he called Husband for instructions, Husband told him not to sign it, without giving a reason. The tenant further testified that his refusal to sign the certificate was due to Husband's instructions, and not due

to the inaccuracy in the document.[9]

Husband, on the other hand, testified that when the tenant called, Seller talked to him first, and explained that the tenant should have the inaccurate information corrected before he signed the certificate, but then Seller gave Husband the telephone because she was afraid she had not explained herself adequately due to her lack of confidence in her ability to communicate in English. Seller's testimony about her own conversation with tenant was essentially consistent with Husband's, but she did not mention any subsequent conversation between Husband and the tenant. Husband denied ever telling any other tenant not to sign documents submitted to them by Broker in connection with the transaction.

****603** On April 15, Kinane and Rubke spoke by telephone, and Kinane emphasized to Rubke that Buyer still expected the escrow to close on April 19. Rubke responded that he would have to consult with his clients, and did not indicate that they intended to cancel the transaction. Rubke and Kinane did not communicate further between April 15 and April 19.

Buyer continued to make efforts to close the transaction, because April 19 was the deadline by which he had to make a final designation of the replacement property for his section 1031 exchange. Even after April 19 came and went without escrow having closed, Buyer continued to believe that the contract remained in effect, and still wanted to close escrow. On April 20, Rubke faxed Kinane a letter intended to convey that Seller had not yet decided what she intended to do about closing escrow.

***1193** Early in the morning on April 22, Kinane faxed Rubke a letter stating that the escrow company had the closing documents ready, and that Buyer intended to close the transaction that day. Rubke responded by return fax later the same day, stating that as a practical matter it would not be possible for him to review the closing documents, discuss them with his client, and close escrow that day. Nonetheless, Buyer signed the escrow documents on April 22. Broker testified that some of the documentation Buyer had requested from Seller and Husband still had not been provided, but at this point Buyer was prepared to close without it.

On April 23, Seller received a fax from the title company telling her that the escrow documents were ready to be signed. She gave it to Rubke, but did not sign the documents, because her position was that the sale contract had already expired.

On April 27, Rubke faxed Kinane another letter saying that Seller had decided to exercise her right to cancel the agreement, based on the provision in her November 3, 1998 counteroffer requiring that escrow close within 90 days. Although Kinane had already become concerned that the transaction would not close, this was the first time Seller had formally communicated her intent to cancel the agreement to Buyer or Kinane.

By April 27, the deadline for Buyer to designate a different property for his section 1031 exchange had passed, and he was obligated to consummate the purchase of the Property in order to avoid capital gains taxes on the property he had sold in San Francisco. He therefore approached Banker for help in getting Seller to reopen the transaction.

Seller told Banker she was willing to sell the property to Buyer for $1.5 million. The parties ultimately agreed on a price of $1.425 million. On May 5, Seller instructed Rubke to prepare another contract for the sale of the property to Buyer.

Banker presented the new terms to Buyer on a "take it or leave it" basis, and Buyer reluctantly accepted. In the new contract, Buyer agreed to pay a higher purchase price ($1.425 million rather than $1.3 million), and there was no provision for a commission to Broker. Buyer also signed a letter, dated May 8, saying that he was no longer represented by any attorney or broker in connection with the transaction. The contract was signed on May 11, the missing estoppel certificates and other information were supplied, and escrow closed on May 24.

Subsequently, Broker sued Seller for his commission on the sale, and also sued Husband for intentional interference with Seller's performance of the ***1194** contract. The jury awarded Broker $42,750 as against Seller, and $15,000 compensatory damages ****604** plus $173,250 in punitive damages as against Husband. This appeal followed.[10]

III.

Discussion

Appellant Husband argues on appeal that even if he interfered with Seller's performance of her contract with

Broker, his actions were privileged under the manager's privilege (also known as the agent's privilege).[11] (See generally *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391–1396, 77 Cal.Rptr.2d 383 (*Halvorsen*).) He contends that the trial court erred in failing to grant his motions for nonsuit and for judgment notwithstanding the verdict on the basis of that privilege. Alternatively, he contends that the jury should have been instructed to consider his manager's privilege defense. As noted, we agree with the latter contention, and therefore reverse.

A.

Preservation of Manager's Privilege Issue for Appeal[**]

B.

Scope and Applicability of Manager's Privilege

One of the early modern cases on the manager's privilege described it as follows: "The privilege to induce an otherwise apparently tortious breach of contract is extended by law to further certain social interests deemed of sufficient importance to merit protection from liability. Thus, a manager or agent may, with impersonal or disinterested motive, properly endeavor to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interests. [Citation.]" (*Olivet v. Frischling* (1980) 104 Cal.App.3d 831, 840–841, 164 Cal.Rptr. 87, fn. omitted, disapproved on ***1195** other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510, 28 Cal.Rptr.2d 475, 869 P.2d 454; accord, *Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 684, 274 Cal.Rptr. 81.)

[1] We note initially that the privilege is most often applied to bar actions against managers of a business entity that charge the managers with inducing the entity to breach a contract. The rationale for the privilege, however, as articulated in *Olivet v. Frischling,* and as discussed below, applies with equal force to an equivalent action against a manager or agent acting on behalf of a natural person. We are not persuaded by respondent Broker's somewhat pallid argument that the privilege should be limited to instances where the principal is a business entity, nor do we discern any public policy reason to limit its reach in this manner. Furthermore, Broker has not cited us to any case law drawing a distinction between the two situations, and our research has revealed ****605** none.[16] Accordingly, we see no reason to limit the application of the manager's privilege solely to the managers of business entities, and we therefore conclude that Husband is not precluded from asserting the manager's privilege because his principal, his spouse, is not a business.

The scope of the manager's privilege, as developed under California's common law since *Olivet v. Frischling* was decided, is neither clear nor consistent. (*Halvorsen v. Aramark Uniform Services, Inc., supra,* 65 Cal.App.4th at pp. 1391, 1393, 77 Cal.Rptr.2d 383.) Indeed, in *Aalgaard v. Merchants Nat. Bank, Inc., supra,* 224 Cal.App.3d 674, 274 Cal.Rptr. 81 (*Aalgaard*), the court commented that the question of whether the privilege is absolute or qualified is "somewhat muddled in California law," resulting in a "knot of authority" on the issue. (*Id.* at pp. 684–685, 274 Cal.Rptr. 81.) As the court explained in *Halvorsen,* "There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive." (*Halvorsen, supra,* 65 Cal.App.4th at p. 1391, 77 Cal.Rptr.2d 383.)

If the privilege is absolute, it is based solely on the manager's status as the manager of the breaching party, without regard to the manager's motives or state of mind. The "mixed motive" formulation applies the privilege as long as the manager is motivated, at least in part, by a desire to benefit the principal. The "predominant motive" formulation is the most restrictive, granting a manager the privilege of interfering with a principal's contract only when the manager's predominant motive is to serve the interest of the principal. (See generally *Aalgaard, supra,* 224 Cal.App.3d at pp. 684–686, 274 Cal.Rptr. 81.)

***1196** In the absence of a clear declaration in California case law, the Ninth Circuit in *Los Angeles Airways, Inc. v. Davis* (9th Cir.1982) 687 F.2d 321, was forced to prognosticate which test would be adopted by the California Supreme Court. It concluded that our high court would most probably follow the mixed motive test. In affirming an order granting summary judgment to an

attorney/business advisor who was alleged to have induced a breach of contract by the corporation for which he worked, the court rejected the argument that the privilege was inapplicable merely because the manager was alleged to have been motivated in part by a desire to elevate his own standing in the eyes of the corporation's principal. The court distinguished *Olivet v. Frischling, supra,* 104 Cal.App.3d 831, 164 Cal.Rptr. 87, and reasoned that "where, as here, an advisor is motivated *in part* by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged. The privilege is designed to further certain societal interests by fostering uninhibited advice by managers to their principals. The goal of the privilege is promoted by protecting advice that is motivated, *even in part,* by a good faith intent to benefit the principal's interest." (*Los Angeles Airways, Inc., supra,* 687 F.2d at p. 328, 164 Cal.Rptr. 87, italics added.)

The opinion went on to embrace a rule acknowledging the practical reality that few business decisions are made with complete altruism: "We believe that advice by an agent to a principal is rarely, if ever, motivated purely by a desire to benefit ****606** only the principal. An agent naturally hopes that by providing beneficial advice to his principal, the agent will benefit indirectly by gaining the further trust and confidence of his principal. If the protection of the privilege were denied every time that an advisor acted with such mixed motive, the privilege would be greatly diminished and the societal interests it was designed to promote would be frustrated. We do not believe that the California Supreme Court would so eviscerate the privilege, and we decline to do so." (*Los Angeles Airways, Inc. v. Davis, supra,* 687 F.2d at p. 328.)

Thereafter, in the unique context of employment advice to higher management, one court has concluded the manager's privilege should be absolute as to any suit by a terminated at-will employee against the members of the management team. (*Halvorsen, supra,* 65 Cal.App.4th at p. 1395, 77 Cal.Rptr.2d 383.) The *Halvorsen* court opted for an absolute privilege based on the primacy of protecting the employer-manager relationship. Its decision grew out of a concern that commercial success could best be promoted by allowing the employer's "relationship and communication with management [to] be open and specific." Thus, the court concluded that any disruption of the relationship between an enterprise and its managers should be left up to the Legislature, where "the public policy implications of such interference can be openly debated in a democratic forum." (*Ibid.*)

***1197** Several earlier cases applying California law in the employment termination context are consistent with *Halvorsen's* holding. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24–25, 276 Cal.Rptr. 303, 801 P.2d 1054 [affirming trial court's order sustaining demurrer to cause of action against managers of public entity employer for inducing breach of plaintiff's employment contract]; *McCabe v. General Foods Corp.* (9th Cir.1987) 811 F.2d 1336, 1339 [suit against corporate managers for inducing corporation to discharge at-will employee failed to state cause of action despite allegation that managers were motivated in part by ill will].) *Aalgaard* declined to reach the issue, because the plaintiff had presented no evidence whatsoever that the defendant managers had acted out of any motive other than the employer's interests, so the privilege clearly applied even if it was qualified. (*Aalgaard, supra,* 224 Cal.App.3d at pp. 685–686, 274 Cal.Rptr. 81.)

But, even in the area of wrongful termination, there are several cases holding that the privilege is less than absolute. For example, in *Graw v. Los Angeles County Metropolitan Transport.* (C.D.Cal.1999) 52 F.Supp.2d 1152, the court expressly declined to follow *Halvorsen* in applying an absolute privilege to employment termination cases under California law. The plaintiff in *Graw* alleged that the actions of his supervisors in terminating his employment were outside the course and scope of their authority, and were undertaken for their personal benefit. The court denied the defendants' motion for summary judgment based on the manager's privilege, reasoning that "[i]f the manager's acts were not done to benefit the company, the manager should not be deemed an interested party and should not enjoy the privilege to interfere with the economic relationship between the employee and the employer." (*Id.* at p. 1155.)

The result reached in *Graw* was in accord with two pre-*Halvorsen* employment termination cases, *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593, 86 Cal.Rptr. 52, and *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 281 Cal.Rptr. 890. In *Kozlowsky,* the complaint alleged that the majority shareholder of the plaintiff's corporate employer ****607** acted maliciously and without justification in inducing the corporation to terminate the plaintiff's employment. The court reversed an order sustaining a demurrer, holding that a majority shareholder in a corporation is not privileged as a matter of law to induce the corporation to breach a contract, so the cause of action was viable based on the allegations of malice and lack of justification. (*Kozlowsky, supra,* 6 Cal.App.3d at pp. 599–600, 86 Cal.Rptr. 52.) In *Wanland,* the court upheld the dismissal of the plaintiff's claims against the owner and manager of her corporate employer. It held that the owner's and manager's privilege to interfere with the plaintiff's

employment contract was only qualified, but found that there was no evidence in the trial record tending to negate the existence of the privilege. (*Wanland, supra,* 230 Cal.App.3d at p. 1522, 281 Cal.Rptr. 890.)

***1198** Thus, the case law on the scope of the manager's privilege is less than unanimous even in the at-will employment context. Nevertheless, outside the at-will employment arena the privilege is most often applied as a qualified one. However, there is no consensus regarding whether this qualified manager's privilege requires that the manager's motive to benefit the principal *predominate* over any personal motive (the predominant motive test), or merely require a showing that the manager is motivated in part, if not primarily, by a desire to benefit the principal (the mixed motive test).

[2] In our view, when a manager stood to reap a tangible personal benefit from the principal's breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager's privilege unless the trier of fact concludes that the manager's *predominant* motive was to benefit the principal. Thus, in a case such as the instant one, where the manager had a material, albeit indirect, personal financial interest in the transaction,[17] we are of the opinion that the predominant motive test should be applied.

Our conclusion that the predominant motive test should be applied when a defense of manager's privilege is asserted in response to most forms of commercial tort claims rests on several factors. First, in practical terms, adopting the mixed motive test would be tantamount to proclaiming absolute immunity. Rare indeed would be the case where the principal's interest could not be advanced at least to some degree by the manager's advice. If not, how else would the principal become convinced to breach its contract in the first place? Despite the weight of evidence which may exist as to the real motive and interest of the manager, if the manager can enjoy immunity from tort liability merely by proffering some plausible reason the principal might benefit from a breach, few cases will ever reach a civil jury, let alone result in a verdict against the manager.

[3] Second, the predominant motive test also best meets the economic considerations applicable to the tort of interference with contract. Generally, the right of a contracting party to breach a contract and pay damages (nominally referred to as ****608** "expectation damages"[18]), instead of being required by law to perform, has driven legal economists to extol the principle of efficient breach of contract as " '[o]ne of the most enlightening insights of law and ***1199** economics.' " (McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence* (1999) 28 J. Legal Stud. 131, 132, fn. omitted, quoting Cooter & Ulen, Law and Economics (1988), p. 290.) Essentially, where it is worth more to the promisor to breach rather than to perform a contract, it is more efficient for the law to allow the promisor to breach the contract and to pay the promisee damages based on the benefit the promisee expected to gain by the completed contract. (*Ibid.*) Providing a manager with immunity where the advice to breach is given predominantly to benefit the principal is consistent with the efficient breach theory: The principal/promisor is thus enabled to obtain and rely on the manager's advice in making a judgment whether its interests are best served by performance, or by breach and the payment of damages to the promisee.

However, if the manager's privilege is absolute, or subject only to the mixed motive test, the privilege would allow the manager to retain the manager's own benefit from the principal's breach while escaping any allocated share of liability. Where the economic benefit to the manager occasioned by the principal's breach of contract exceeds any incremental benefit to the principal, then the privilege would permit the manager to shift the manager's own burden in having caused the promisee's damages improperly to the principal. In addition, if the principal is unable to pay expectation damages to the promisee (for example, if the principal becomes bankrupt), then the inefficiency of the principal's breach is compounded by the shortfall in damages recoverable by the promisee who would be precluded from recovering an aliquot share against the manager.

This example reveals an unnecessary inequity created by not applying the predominant motive test to the manager's privilege under a fundamental economic theory of law. It is also not simply a hypothetical illustration. (See Comment, *Boxing Basinger: Oral Contracts and the Manager's Privilege on the Ropes in Hollywood* (2002) 9 UCLA Ent. L.Rev. 285, 287–291; Note, *Main Line v. Basinger and the Mixed Motive Manager: Reexamining the Agent's Privilege to Induce Breach of Contract* (1995) 46 Hastings L.J. 609, 626.)

The final factor in our decision to adopt a predominant motive test, while not compelling, is that this result is in accord with decisions of the highest courts of several other states. (See, e.g., *Geolar, Inc. v. Gilbert/Commonwealth* (Alaska 1994) 874 P.2d 937, 940–941; *Jones v. Lake Park Care Center, Inc.* (Iowa 1997) 569 N.W.2d 369, 376–378; *Nordling v. Northern States Power Co.* (Minn.1991) 478 N.W.2d 498, 507;

Trau–Med of America, Inc. v. Allstate Ins. Co. (Tenn.2002) 71 S.W.3d 691, 701–702 & fn. 5; see also Note, *supra,* 46 Hastings L.J. at pp. 629, 632–637; but see ***1200** *Welch v. Bancorp Management Advisors, Inc.* (1983) 296 Or. 208, 675 P.2d 172, 178–179, mod. on other grounds, 296 Or. 713, 679 P.2d 866 [adopting mixed motive test].)

[4] In reviewing the record in this case under the predominant motive test, it appears that Husband might well have been able to establish that his conduct here was privileged, even under this more restrictive test. There was ample evidence from which the jury could have concluded that, in interfering with the contract, Husband's ****609** predominant motive was to serve Seller's interests, and that he acted in accordance with her wishes. Indeed, there was *no* evidence that Husband acted from any motive or interest of his own that conflicted in any way with Seller's interests or wishes. (Cf. *Aalgaard, supra,* 224 Cal.App.3d at pp. 685–686, 274 Cal.Rptr. 81 [summary judgment properly granted for defendants on claim for interference with plaintiff's employment contract, where there was no evidence that employer's managers personally benefited from plaintiff's termination, or that they acted out of self-interest].) The most that can be said is that Husband may have been motivated to some extent by a desire to enhance whatever community property interest he had in the proceeds from the transaction. But that motive was fully congruent with the interests of Seller as the other member of the marital community, and even under the predominant motive test, a manager's desire to advance his or her personal interests as an indirect and secondary result of benefiting the principal should not vitiate the privilege. (Cf. *Los Angeles Airways, Inc. v. Davis, supra,* 687 F.2d at pp. 326–328 [same, under mixed motive test].)

[5] Thus, even applying the predominant motive test, it is reasonably probable that Husband would have been exonerated under the manager's privilege, if the jury had been instructed to consider it. Because the trial court's refusal to give the requested instruction prevented Husband from presenting a potentially meritorious defense to the jury, he was unquestionably prejudiced by the error. (See *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423–425, 99 Cal.Rptr.2d 665; *Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 158–160, 75 Cal.Rptr.2d 132.) The judgment against Husband must therefore be reversed.

C.

Availability of Emotional Distress Damages[***]

IV.

Disposition

The judgment in favor of Broker on his cause of action against Husband for intentional interference with contract is reversed. As the parties have ***1201** settled the remaining aspects of the case, this opinion does not address or affect any other portion of the judgment.

We concur: KLINE, P.J., and HAERLE, J.

All Citations

111 Cal.App.4th 1183, 4 Cal.Rptr.3d 595, 03 Cal. Daily Op. Serv. 8249, 2003 Daily Journal D.A.R. 10,269

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III. A. and III C.

1 We are required to construe all of the facts and draw all reasonable inferences in the light most favorable to the judgment, as long as they are supported by substantial evidence in the record. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134, 41 Cal.Rptr.2d 295; see also *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465, 46 Cal.Rptr.2d 427, 904 P.2d 834, disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352, fn. 7, 100 Cal.Rptr.2d 352, 8 P.3d

1089.) Except as to the facts relating specifically to Husband's own role in the transaction and his personal liability, he does not contend that the judgment is not supported by substantial evidence. Accordingly, we state the background facts in the manner most favorable to Broker, resolving all evidentiary conflicts in his favor. (*Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1383, fn. 1, 74 Cal.Rptr.2d 721.) With respect to facts bearing directly on Husband's liability, we have summarized all of the evidence.

2 As Broker explained at trial, a tenant estoppel certificate, also known as a tenancy statement, is a document signed by a tenant confirming the terms of the tenant's lease and the amount of any deposit, which gives the buyer of commercial real property assurance that the tenants will not contend, after the purchase, that their lease terms differ from the terms that the buyer understands to be in effect.

3 Buyer testified that he was told informally as early as January 1999 that his loan would be approved, but a representative of the lender testified to the contrary. In any event, Buyer admitted at trial that the loan could not have been funded at that time, because some documentation was still missing, and the appraisal of the Property had not yet been completed.

4 All further unspecified references to dates are to the year 1999.

5 Buyer could have closed escrow on or before March 4, even if his loan had not yet been approved. He had other sources from which he could have advanced the entire purchase price, and he could still have made a section 1031 exchange even if he completed the purchase of the Property before selling his San Francisco property. However, Buyer did not inform Broker or Seller that he could close escrow without waiting for his loan to be approved.

6 Buyer testified that although 45 days happened to be the time limit for him to designate a property for his own section 1031 exchange, the choice of this length for the extension did not originate with him; on the contrary, he was eager to close escrow as soon as possible. Buyer also testified that this was the first time he had heard that Seller was also planning to make a section 1031 exchange in connection with the sale of the Property.

7 Buyer's loan application was pending with the same bank from which Seller had obtained the existing financing.

8 Rubke later wrote to Kinane stating that Broker and Buyer did not have permission to contact the tenants directly, because the tenants had complained to Seller about Broker's contacts with them.

9 On May 15, when Husband brought the tenant another estoppel certificate, Husband told the tenant to sign it, and he did.

10 Seller also cross-complained against both Broker and Buyer, and Buyer in turn cross-complained against Seller and Husband. Judgment was entered against Seller on her cross-complaint against Broker and Buyer, and for Buyer on his cross-complaint against Seller and Husband. During the pendency of the ensuing appeals, the parties settled all other aspects of the case, leaving only Husband's appeal for adjudication.

11 The privilege has been referred to interchangeably as the "agent's privilege" as well as the "manager's privilege." For uniformity's sake we will refer to it as the manager's privilege.

** See footnote *, *ante*.

16 In discussing the circumstances under which an actor responsible for the welfare of another—including an agent with a duty to his or her principal—may lawfully interfere with the other's contractual relationships, the comments to the Restatement Second of Torts, section 770, include several examples in which the party being induced to breach a contract is a natural person.

17 The Property was originally purchased with funds belonging to both Husband and Seller. Moreover, as is clear from our recitation of the facts, *ante,* Seller and Husband both expended time and effort during the marriage in managing it. Accordingly, even though Husband did not hold title to the Property, he presumably retained some beneficial interest in the proceeds from its sale.

18 See Cooter & Ulen, Law & Economics (3d ed.2000), page 226.

*** See footnote *, *ante,* page 1183.

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LEGAL AUTHORITY AA-92

537 U.S. 12, 154 L.Ed.2d 272

[12]IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,

v.

Fredy ORLANDO VENTURA.

No. 02–29.

Nov. 4, 2002.

Alien petitioned for review after the Board of Immigration Appeals (BIA) dismissed his appeal following denial of his application for asylum and withholding of deportation. The United States Court of Appeals for the Ninth Circuit, 264 F.3d 1150, granted the petition for review, granted petitioner's application for withholding of deportation, and remanded the application for asylum. On grant of the government's petition for certiorari, the Supreme Court held that the Court of Appeals should have remanded asylum issue to BIA rather than considering the question de novo on alien's petition for review of BIA's denial of alien's application for withholding of deportation and for asylum.

Reversed in part and remanded.

1. Aliens ⚿44

Within broad limits, the law entrusts the Immigration and Naturalization Service (INS) to make the basic decision regarding asylum eligibility based upon an alien's persecution or fear of persecution on account of political opinion. Immigration and Nationality Act, §§ 101(a)(42), 208(a), as amended, 8 U.S.C.A. §§ 1101(a)(42), 1158(a); § 243(h)(1), 8 U.S.C.(1988 Ed.) § 1253(h)(1).

2. Administrative Law and Procedure ⚿760

A judicial judgment cannot be made to do service for an administrative judgment on a basic matter entrusted by law to an administrative agency.

3. Constitutional Law ⚿74

An appellate court may not intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

4. Administrative Law and Procedure ⚿744.1, 817.1

On review of an administrative judgment on a basic matter entrusted by law to an administrative agency, a court of appeals is not generally empowered to conduct a de novo inquiry into the matter and to reach its own conclusions based on such an inquiry; rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

5. Aliens ⚿54.3(6)

Court of Appeals was required to remand case to Board of Immigration Appeals (BIA) for BIA's consideration of alien's eligibility for asylum based upon alien's persecution or fear of persecution on account of political opinion, rather than considering the question de novo on alien's petition for review of BIA's denial of alien's application for withholding of deportation and for asylum, where the BIA did not consider the changed circumstances issue in regard to the asylum application, so that the BIA could bring its expertise to bear upon the matter, evaluate the evidence, make an initial determination, and, through informed discussion and analysis, help a court later determine whether its decision exceeded the leeway that the law provided. Immigration and Nationality Act, §§ 101(a)(42), 208(a), as amended, 8 U.S.C.A. §§ 1101(a)(42), 1158(a); § 243(h)(1), 8 U.S.C.(1988 Ed.) § 1253(h)(1).

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[13]PER CURIAM.

Federal statutes authorize the Attorney General, in his discretion, to grant asylum to an alien who demonstrates "persecution or a well-founded fear of persecution on account of ... [a] political opinion," and

they require the Attorney General to withhold deportation where the alien's "life or freedom would be threatened" for that reason. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), 243(h), 66 Stat. 166, as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a), 1253(h)(1) (1994 ed. and Supp. V). The Board of Immigration Appeals (BIA) determined that respondent Fredy Orlando Ventura failed to qualify for this statutory protection because any persecution that he faced when he left Guatemala in 1993 was not "*on account of*" a "*political opinion.*" The Court of Appeals for the Ninth Circuit reversed the BIA's holding. 264 F.3d 1150 (2001) (emphasis added).

The Court of Appeals then went on to consider an alternative argument that the Government had made before the Immigration Judge, namely, that Orlando Ventura failed to qualify for protection regardless of past persecution because conditions in Guatemala had improved to the point where no realistic threat of persecution currently existed. Both sides pointed out to the Ninth Circuit that the Immigration Judge had held that conditions had indeed changed to that point but that the BIA itself had not considered this alternative claim. And both sides asked that the Ninth Circuit remand the case to the BIA so that it might do so. See Brief for Petitioner in No. 99–71004(CA9), pp. 5, 6, 24; Brief for Respondent in No. 99–71004(CA9), pp. 8, 9, 23.

[14] The Court of Appeals, however, did not remand the case. Instead, it evaluated the Government's claim itself. And it decided the matter in Orlando Ventura's favor, holding that the evidence in the record failed to show sufficient change. 264 F.3d, at 1157–1158. The Government, seeking certiorari here, argues that the Court of Appeals exceeded its legal authority when it decided the "changed circumstances" matter on its own. We agree with the Government that the Court of Appeals should have remanded the case to the BIA. And we summarily reverse its decision not to do so.

I

We shall describe the basic proceedings so far. In 1993 Orlando Ventura, a citizen of Guatemala, entered the United States illegally. In 1995 the Attorney General began deportation proceedings. And in 1998 an Immigration Judge considered Orlando Ventura's application for asylum and withholding of deportation, an application based upon a fear and threat of persecution "on account of" a "political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1253(h) (1994 ed. and Supp. V). Orlando Ventura testified that he had received threats of death or harm unless he joined the guerrilla army, that his family members had close ties to the Guatemalan military, and that, in his view, the guerrillas consequently believed he held inimical political opinions.

The Immigration Judge denied relief. She recognized that Orlando Ventura subjectively believed that the guerrillas' interest in him was politically based. And she credited testimony showing (a) that Orlando Ventura's family had many connections to the military, (b) that he was very close to one cousin, an army lieutenant who had served for almost 12 years, (c) that in 1987 his uncle, a local military commissioner responsible for recruiting, was attacked by people with machetes, and (d) that in 1988 his cousin (a soldier) and the cousin's brother (a civilian) were both shot at and the soldier-cousin killed. Nonetheless, Orlando Ventura had [15] failed objectively "to demonstrate that the guerillas' interest" in him was "on account of his political opinion." App. to Pet. for Cert. 22a. The Immigration Judge added that "conditions" in Guatemala had changed significantly. Even "if the guerillas" once had had a politically based "interest" in Orlando Ventura, the evidence failed to show that the guerrillas would "continue to have motivation and inclination to persecute him in the future." *Ibid.*

The BIA, considering the matter *de novo,* "agree[d]" with the Immigration

Judge that Orlando Ventura "did not meet his burden of establishing that he faces persecution 'on account of' a qualifying ground . . . ." *Id.*, at 15a. The BIA added that it "need not address" the question of "changed country conditions." *Ibid.*

The Court of Appeals, reviewing the BIA's decision, decided that this evidence "*compel[led]*" it to reject the BIA's conclusion. 264 F.3d, at 1154 (emphasis added); see *INS v. Elias–Zacarias*, 502 U.S. 478, 481, n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) ("To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it . . ." (emphasis in original)). It recognized that the BIA had not decided the "changed circumstances" question and that "generally" a court should remand to permit that consideration. 264 F.3d, at 1157. Cf. *Castillo v. INS*, 951 F.2d 1117, 1120–1121 (C.A.9 1991) (specifying that the Court of Appeals must review the decision of the BIA, not the underlying decision of the immigration judge). But the Court of Appeals added that it need "not remand . . . when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." 264 F.3d, at 1157. And it held that the record evidence, namely, a 1997 State Department report about Guatemala, "clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted." *Ibid.* Hence, it concluded, "remand . . . is inappropriate." *Ibid.*

[16]The Government challenges the decision not to remand. And it says the matter is important. The "error," it says, is a "recurring error [that] puts the Ninth Circuit in conflict with other courts of appeals, which generally respect the BIA's role as fact-finder by remanding to the BIA in similar situations." Pet. for Cert. 11. See also Pet. for Cert. in *INS v. Chen*, O.T. 2002, No. 25, p. 23 (referring to eight other recent decisions from the Court of Appeals for the Ninth Circuit, which, in the Government's view, demonstrate this trend). After examining the record, we find that well-established principles of administrative law did require the Court of Appeals to remand the "changed circumstances" question to the BIA.

II

[1–4] No one disputes the basic legal principles that govern remand. Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. *E.g.*, 8 U.S.C. § 1158(a); 8 U.S.C. § 1253(h)(1) (1994 ed.); *Elias–Zacarias*, *supra*, at 481, 112 S.Ct. 812; *INS v. Aguirre–Aguirre*, 526 U.S. 415, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). See also 8 CFR § 3.1 (2002). In such circumstances a "judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Nor can an "appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Ibid.* A court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* Cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) (describing the reasons for remand).

[5] Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance[17] in the immigration context. The BIA has not yet considered the "changed circumstances" issue. And every consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can

make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

These basic considerations indicate that the Court of Appeals committed clear error here. It seriously disregarded the agency's legally mandated role. Instead, it independently created potentially far-reaching legal precedent about the significance of political change in Guatemala, a highly complex and sensitive matter. And it did so without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise.

The Court of Appeals rested its conclusion upon its belief that the basic record evidence on the matter—the 1997 State Department report about Guatemala—compelled a finding of insufficiently changed circumstances. But that foundation is legally inadequate for two reasons. First, the State Department report is, at most, ambiguous about the matter. The bulk of the report makes clear that considerable change has occurred. The report says, for example, that in December 1996 the Guatemalan Government and the guerrillas signed a peace agreement, that in March 1996 there was a cease fire, that the guerrillas then disbanded as a fighting force, that "the guerrillas renounced the use of force to achieve political goals," and that "there was [a] marked improvement in the overall human rights situation." Bureau of Democracy, Human Rights and Labor, U.S. Dept. of State, Guatemala–Profile of Asylum Claims & Country Conditions 2–4 (June 1997).

As the Court of Appeals stressed, two parts of the report can be read to the contrary. They say that (1) even "after [18]the March cease-fire, guerrillas continued to employ death threats" and (2) "the level of crime and violence now seems to be higher than in the recent past." *Id.,* at 3–4. Yet the report itself qualifies these statements. As to the second, the report (as the Court of Appeals noted) says: "*Although* the level of crime and violence now seems to be higher than in the recent past, *the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance,*" *i.e.,* not politics. *Id.,* at 4 (emphasis added). And the report (in sections to which the Court of Appeals did not refer) adds that in the context of claims based on political opinion, in "our experience, only party leaders or high-profile activists generally would be vulnerable to such harassment and usually only in their home communities." *Id.,* at 8. This latter phrase "only in their home communities" is particularly important in light of the fact that an individual who can relocate safely within his home country ordinarily cannot qualify for asylum here. See 8 CFR § 208.13(b)(1)(i) (2002).

Second, remand could lead to the presentation of further evidence of current circumstances in Guatemala—evidence that may well prove enlightening given the five years that have elapsed since the report was written. See §§ 3.1, 3.2 (permitting the BIA to reopen the record and to remand to the Immigration Judge as appropriate).

III

We conclude that the Court of Appeals should have applied the ordinary "remand" rule. We grant the Government's petition for certiorari. We reverse the judgment of the Court of Appeals for the Ninth Circuit insofar as it denies remand to the agency. And we remand the case for further proceedings consistent with this opinion.

So ordered.

LEGAL AUTHORITY AA-93

In re BEN FRANKLIN RETAIL STORE, INC., et. al., Debtor.

Bankruptcy Nos. 96 B 19482, 96 B 19489, 96 B 19483, 96 B 19494, 96 B 19501, and 96 B 19497.

United States Bankruptcy Court,
N.D. Illinois,
Eastern Division.

Nov. 12, 1998.

Creditor objected to fee application filed by law which had represented interim Chapter 7 trustee. The Bankruptcy Court, Ronald Barliant, J., held that: (1) legal services provided by law firm that represented interim Chapter 7 trustee, in connection with interim trustee's challenge to election at which permanent trustee was selected, were not necessary services, of kind for which law firm was entitled to be compensated, and (2) facsimile charges were not reimburseable expense.

Objection sustained in part.

1. Bankruptcy ⇨3169, 3205

Burden of proving entitlement to compensation is on bankruptcy professional requesting such fees and expenses. Bankr. Code, 11 U.S.C.A. § 330(a).

2. Bankruptcy ⇨3159, 3182

Professional services are "necessary," within meaning of bankruptcy statute authorizing professional to be compensated only for actual and necessary services, if they are of aid to professional's client in fulfilling its duties under the Code. Bankr.Code, 11 U.S.C.A. § 330(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⇨3008.1

Statutory list of Chapter 7 trustee's duties in Bankruptcy Code is meant to be exhaustive. Bankr.Code, 11 U.S.C.A. § 704.

4. Statutes ⇨195

As general rule of statutory construction, when the legislature expresses things through list, things not included on list are excluded.

5. Bankruptcy ⇨3009

Interim Chapter 7 trustee had no duty to object to or dispute election of permanent trustee, regardless of any good faith belief which he may have held that there were grounds for such objection or dispute. Bankr.Code, 11 U.S.C.A. § 704.

6. Bankruptcy ⇨3009

While interim Chapter 7 trustee may be a party in interest with standing to object to improprieties surrounding election of permanent trustee, he or she does so in his or her own interest and not pursuant to any duty to administer bankruptcy estate. Bankr.Code, 11 U.S.C.A. § 704; Fed.Rules Bankr.Proc. Rule 2006(f), 11 U.S.C.A.

7. Bankruptcy ⇨3008.1, 3009

Role of objecting to improprieties surrounding election of permanent Chapter 7 trustee is one reserved, not to interim trustee, but to the United States Trustee. Bankr. Code, 11 U.S.C.A. § 702(b); Fed.Rules Bankr.Proc.Rule 2003(b, d), 11 U.S.C.A.

8. Bankruptcy ⇨3182

Legal services provided by law firm that represented interim Chapter 7 trustee, in connection with interim trustee's challenge to election at which permanent trustee was selected, were not necessary services, of kind for which law firm was entitled to be compensated from bankruptcy estate; in challenging election, interim trustee had to be deemed as acting in his own interests. Bankr.Code, 11 U.S.C.A. § 330(a).

9. Bankruptcy ⇨3187(1)

Facsimile charges that law firm incurred in representing interim Chapter 7 trustee were not reimburseable expense. Bankr. Code, 11 U.S.C.A. § 330(a).

Allan S. Brilliant, Christopher J. Horway, Holleb & Coff, Chicago, IL, for Debtors.

Jay Steinberg, Stephen E. Garcia, Hopkins & Sutter, Chicago, IL, for Unsecured Creditors' Committee.

Michael M. Eidelman, Altheimer & Gray, Chicago, IL, for Official Bondholders' Committee.

Michael Desmond, Office of the U.S. Trustee, Chicago, IL, for United States Trustee.

Miriam R. Stein, James A. Chatz, Kamensky & Rubinstein, Lincolnwood, IL, for Prime Leasing Co.

Lawrence Fisher, Gardner, Carton & Douglas, Chicago, IL, for Trustee/Lawrence Fisher.

Gerald Munitz, Goldberg, Kohn, et al., Chicago, IL, for Jackson Nat'l Life Insurance.

MEMORANDUM OPINION

RONALD BARLIANT, Bankruptcy Judge.

Gardner, Carton & Douglas ("GCD") has presented an Application for Allowance of Compensation and Reimbursement of Expenses incurred in representing the interim trustee, Lawrence Fisher. The total amounts sought are $202,032.25 in fees and $16,217.29 for expenses. One creditor, Prime Leasing, Inc. ("Prime") objected to that portion of the fees in the amount of $85,544.50, related to a contested trustee election. For the reasons set forth below, this Court will not allow the fees related to the election.

BACKGROUND

Ben Franklin Retail Stores, Inc. ("Retail") a holding company, and its five operating subsidiaries filed bankruptcy on July 26, 1996.[1] Shortly after their filing the Court ordered that the six cases be jointly administered under Bankr.Rule 1015(b). About eleven months after operating in Chapter 11, the cases were converted to cases under Chapter 7 of the Bankruptcy Code and the United States Trustee appointed an interim trustee for the Retail estate and another interim trustee, Mr. Fisher ("Interim Trustee"), for all of the Subsidiaries' estates. The Interim Trustee retained Gardner, Carton & Douglas as counsel.

At their meeting of creditors, the creditors of the Subsidiaries requested elections and elected Jay Steinberg as permanent trustee.[2] The United States Trustee and the Interim Trustee objected to the joint election, the proxies and the form and the manner of the solicitation.[3] This Court held hearings on the objections over approximately six weeks. Although it sustained some of the objections raised by the Interim Trustee, it concluded that creditors of these estates had expressed their will to have Mr. Steinberg represent their interests and determined that Mr. Steinberg had been properly elected. *See In re Ben Franklin Retail Stores, Inc., et. al.*, 214 B.R. 852 (Bankr.N.D.Ill.1997).

Counsel for the Interim Trustee, Gardner, Carton & Douglas, now seek allowance for the time expended in representing Mr. Fisher in that disputed election. Those fees are separately categorized in their Application under "Trustee Election" and total $85,544.40. Prime objected to these fees contending that they were not reasonably likely to benefit the debtor's estate or "necessary to the administration of the case" and therefore must be disallowed under § 330(a)(4). Prime argues that the Interim Trustee's action in contesting the election "served no beneficial purpose for the debtor's estate or the administration of the case. His efforts to protect his potential fees in these cases caused substantial delay and cost. . . ." Objection at p. 4. Prime contends that it was not the Interim Trustee's role to "contest the clear choice of creditors." Id.

DISCUSSION

[1, 2] A professional may be awarded compensation under § 330(a)(1) of the Bank-

1. The operating subsidiaries are: Ben Franklin Stores, Inc. (''Stores''), No. 96 B 19489; Ben Franklin Crafts, Inc. (''Crafts''), No. 96 B 19493; Ben Franklin Transportation, Inc. (''Transportation''), No. 96 B 19494; Ben Franklin Realty II, Inc. (''Realty II''), No. 96 B 19497; Ben Franklin Realty, Inc. (''Realty''), No. 96 B 19501 (collectively, the ''Subsidiaries'').

2. At a separate meeting of the creditors of Retail an election was also held, without dispute.

3. Before the meeting, the Interim Trustee had been advised that there were sufficient votes to elect a permanent trustee. Bankr.Rule 2003(b)(3) provides that a creditor who has filed a proof of claim is entitled to vote. The Interim Trustee prepared objections to every one of the approximately 600 proofs of claim filed in these cases. At the meeting he filed the objections to all the claims that voted, except the one claim that was voted in his favor.

ruptcy Code only for actual and necessary services. The burden to prove entitlement to compensation under 330(a) is on the professional requesting such fees and expenses. *In the Matter of Kenneth Leventhal & Co.*, 19 F.3d 1174, 1177 (7th Cir.1994). Necessary services are those that "aid the professional's client in fulfilling its duties under the Code." *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 485 (Bankr.N.D.Ill.1992). Accordingly, a trustee (or interim trustee) performs necessary services when he carries out the duties set forth in § 704 of the Code. They are:

> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> (2) be accountable for all property received;
>
> (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
>
> (4) investigate the financial affairs of the debtor;
>
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
>
> (6) if advisable, oppose the discharge of the debtor;
>
> (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
>
> (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
>
> (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

[3–5] None of the enumerated duties includes any role for an interim trustee in an election for permanent trustee.[4] A general rule of statutory construction is that "[w]hen the legislature expresses things through a list, the court assumes that what is not listed is excluded." 2A Sutherland Statutory Construction § 47.23, at 216–17 (5th ed.1992). Moreover the Bankruptcy Code contains a rule of construction which provides that the words " 'includes' and 'including' are not limiting." § 102(2). If Congress had intended that the list of trustee duties contained in § 704 be non-exhaustive, it could have simply used the word "includes." It did not do so. Accordingly this Court must conclude that the list of duties in § 704 is exhaustive and a trustee has no duty to object to or dispute an election of a permanent trustee, regardless of any good faith belief that there are grounds for such objection or dispute. *See In the Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542 (7th Cir.1985)(finding that a currency exchange may not be a debtor under § 109(b)(2) by applying the rule of statutory construction *expressio unius est exclusio alterius* and on the basis that the statute did not use the word "include" or "including"). *See also In re Palm Coast, Matanza Shores L.P.*, 101 F.3d 253, 258 (2d Cir.1996)(court determined that a trustee may not hire his own real estate firm as a consultant, because "section 327(d) permits the trustee to serve only as 'attorney or accountant.' It does not authorize the trustee to serve in any other professional capacity.")

[6] This construction is not only required by the plain meaning rule of construction, but is also both practical and consistent with other provisions of the Bankruptcy Code dealing with trustee elections. First, authorizing an interim trustee to dispute a creditor election for permanent trustee raises issues

4. Section 7004(5) authorizes a trustee to object to allowability of proofs of claim. Some of the services included in the "Trustee Election" category include the time spent reviewing and preparing objections to nearly 600 proofs of claim. It is clear to this Court, however, that in this case the objections were not prepared in the general administration of the case but solely for the purpose of eliminating votes in the election. The Court will, therefore, treat that time as related to the election (which is consistent with the way Gardner, Carton & Douglas has categorized it).

concerning the interim trustee's motivations: Is the interim trustee acting in his own self-interest, as has been alleged here, to protect future fees? Or is the interim trustee acting in the best interests of the creditor body, as Gardner, Carton & Douglas contends? Those difficult and contentious issues are avoided by holding that, although an interim trustee may be a party in interest with standing to object to improper solicitations (B.Rule 2006(f)), he or she does so in his or her own interest and not pursuant to a duty to administer the estate.[5]

Next, the Bankruptcy Code and Rules designate the Unites States Trustee as the party responsible for overseeing elections. Section 341 provides that the United States Trustee "shall convene and preside at a meeting of creditors." Section 702(b) authorizes creditors to elect a trustee at the 341 meeting, over which the United States Trustee is presiding.

The Bankruptcy Rules set forth more detailed procedures for conducting trustee elections. Rule 2003(b)(1) reiterates that the United States Trustee presides over the meeting of creditors. Rule 2003(b)(3) requires the United States Trustee to tabulate votes and "[i]n the event of an objection to the amount or allow ability of a claim for the purpose of voting" the United States Trustee is required to tabulate the votes and the votes for each alternative and present them to the court for resolution.

The Bankruptcy Rules thus requires the United States Trustee to present any disputes to the Court for resolution. In this case the United States Trustee properly advised the Court that there was a disputed election. The United States Trustee also objected to the holding of a consolidated election.[6] So even if the Interim Trustee had taken no action at the election beyond objecting to claims and votes, the disputes would have been brought to the attention of this Court for resolution. This requirement is reinforced by Rule 2003(d), which requires the "presiding officer", the United States Trustee, to inform the court, in writing, if an election dispute exists. And, of course, nothing prohibits a creditor from prosecuting an objection.

CONCLUSION

[7, 8] A trustee is authorized to perform only those duties enumerated in § 704. Those duties do not include contesting an election for permanent trustee. Rather, that role is reserved to the United States Trustee by the Bankruptcy Code and Rules. Because the Interim Trustee and Gardner, Carton & Douglas were not performing "necessary" services in contesting the election, the services are not compensable under § 330(a)(1). Accordingly, the fees in the amount of $85,544.50 related to the "Trustee Election" are disallowed.

[9] Expenses related to the Trustee Election are also disallowed. It is, however, impossible for this Court to discern the expenses incurred in relation to the Trustee Election. Gardner, Carton & Douglas will therefore be required to submit a revised statement of expenses, omitting any expenses related to the disallowed fees. In addition, this Court does not allow recovery of facsimile charges. All facsimile charges should also be removed from the revised expense disbursement summary. The revised expense summary shall be filed within 14 days.

Gardner, Carton & Douglas also seeks compensation for other services rendered to the Interim Trustee. Prime objects generally to the remaining fees and requests a hearing, but it has not specified any basis for its objection. In its own review, the Court has seen no obvious basis for further disallowance. Prime will be allowed 14 days from

5. It may at first blush appear unseemly for a trustee to represent his or her own interests, but nothing in the code prohibits a trustee from doing so where there is no conflict with the interests of the estate. After all, § 704 does not impose a duty on trustees to apply for compensation, but it is not unseemly to do so. And a straight-forward recognition of the trustee's interests is preferable to a truly unseemly dispute about the interim trustee's subjective motives. In any event, the issue of the interim trustee's standing is not before the Court and need not be decided here.

6. Section 307 authorizes the United States Trustee to "appear and be heard on any issue in any case or proceeding under this title . . ."

the date of this opinion to supplement its objections to the balance of the request for compensation. If such a supplement is filed, Gardner, Carton & Douglas may respond within 21 days thereafter, and Prime may reply within 14 days. If Prime does not file a supplement the balance of the fees in the amount of $116,487.75 and expenses as adjusted in accordance with this Opinion, will be allowed and Gardner, Carton & Douglas may submit an appropriate form of order.

In re Edwin STACY, Debtor.

David R. BROWN, Trustee, Plaintiff,

v.

Edwin STACY and Marie Stacy, Defendants.

Bankruptcy No. 96 B 23596.
Adversary No. 97 A 01018.

United States Bankruptcy Court,
N.D. Illinois,
Eastern Division.

Dec. 3, 1998.

Chapter 7 trustee brought adversary proceeding to avoid debtor's prepetition transfer of property into tenancy by the entireties, on theory that transfer was made with actual intent to hinder, delay or defraud creditors within meaning of Illinois Uniform Fraudulent Transfer Act (UFTA). The Bankruptcy Court, John H. Squires, J., denied debtors' motion to dismiss, and debtors appealed. The District Court, Gettleman, J., 223 B.R. 132, reversed and remanded. On remand, the Bankruptcy Court, Squires, J., held that: (1) term "existing debt," as used in fraudulent transfer provision of Illinois entireties statute, is not limited in its reach solely to debts which have been reduced to judgment, and (2) allegations in strong-arm complaint that was filed by Chapter 7 trustee were sufficient to state claim under fraudulent transfer provision of Illinois entireties statute.

Motion denied.

1. Fraudulent Conveyances ⇨104(2)

Illinois Uniform Fraudulent Transfer Act (UFTA) did not apply to debtor-husband's transfer of property from land trust in which he and his wife had beneficial interest into tenancy by the entireties; rather, question of whether debtor-husband's creditors could avoid transfer, as having been fraudulently made, was governed exclusively by fraudulent transfer provision of Illinois entireties statute, under which entireties property is not liable to be sold upon judgment entered against single tenant unless property was transferred into tenancy by the entireties with sole intent to avoid payment of existing debt. S.H.A. 735 ILCS 5/12-112; 740 ILCS 160/5.

2. Courts ⇨99(1)

Law of the case doctrine requires lower court judge to comply with rulings made by higher courts in same case.

3. Fraudulent Conveyances ⇨213

Term "existing debt," as used in fraudulent transfer provision of Illinois entireties statute, under which entireties property is not liable to be sold upon judgment entered against single tenant unless property was transferred into tenancy by the entireties with sole intent to avoid payment of existing debt, is not limited in its reach solely to debts which have been reduced to judgment; rather, term included litigant's claim against debtor-husband for payment of amount certain, though debtor-husband disputed his liability to litigant, and judgment had not yet been entered in favor of litigant at time of challenged transfer. S.H.A. 735 ILCS 5/12-112.

See publication Words and Phrases for other judicial constructions and definitions.

4. Fraudulent Conveyances ⇨258.1

Allegations in strong-arm complaint that was filed by Chapter 7 trustee to avoid transfer of property from land trust in which

LEGAL AUTHORITY AA-94

139 Cal.App.4th 1075
Court of Appeal, Second District, Division 3, California.

Cornell Sterling MAYES et al., Plaintiffs, Respondents, and Cross–Appellants,
v.
David C. BRYAN etc., et al., Defendants, Appellants, and Cross–Respondents.

No. B172533.
|
April 25, 2006.
|
As Modified June 21, 2006.

Synopsis

Background: Woman's husband and son filed wrongful death action against doctor for medical malpractice for woman's death, allegedly caused by doctor's negligent post-operative interpretation of a lung scan. The Superior Court of Los Angeles County, No. GC027757, Jan A. Pluim, J., entered judgment for plaintiffs on jury's verdict. Doctor appealed.

Holdings: The Court of Appeal, Aldrich, J., held that:

[1] substantial factor test for causation applies in negligence action;

[2] doctor's negligence was cause of patient's death; and

[3] computation of damages was proper.

Affirmed.

West Headnotes (15)

[1] Appeal and Error Instructions

When the sole contention on appeal concerns a jury instruction, court does not view the evidence in a light most favorable to the prevailing party, but in order to assess the instruction's prejudicial impact, court assumes the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor; accordingly, court states the facts most favorably to the party appealing the instructional error alleged, in accordance with the customary rule of appellate review.

14 Cases that cite this headnote

[2] Appeal and Error Instructions

In a civil case an instructional error is prejudicial reversible error only if it is reasonably probable the appellant would have received a more favorable result in the absence of the error; the determination of prejudice depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, and actual prejudice must be assessed in the context of the individual trial record.

3 Cases that cite this headnote

[3] Appeal and Error Instructions

When evaluating the evidence to assess the likelihood that the trial court's instructional error prejudicially affected the verdict, Court of Appeal must, inter alia, evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.

7 Cases that cite this headnote

[4] Appeal and Error Instructions

A party may not complain of the giving of instructions which he has requested.

12 Cases that cite this headnote

[5] **Trial**Duty of judge in general
TrialNecessity in General

Whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities; a civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not obligated to seek out theories a party might have advanced, or to articulate for him that which he has left unspoken.

2 Cases that cite this headnote

[6] **Appeal and Error**Requests for instructions

Court of Appeal could not second-guess the trial court's finding that appellant requested an allegedly erroneous instruction, particularly where the record was inadequate.

4 Cases that cite this headnote

[7] **Appeal and Error**Nature or Subject-Matter of Issues or Questions
Appeal and Error Estoppel and Waiver; Invited Error

While appellate courts have broad discretion to decide whether to consider a tardily raised legal issue, they are more inclined to do so when matters of important public interest or public policy are involved; if the matter is important enough, court may consider it even though the appellant adopted an inconsistent position in the trial court.

1 Cases that cite this headnote

[8] **Trial**Issues and Theories of Case in General
TrialSufficiency of evidence to warrant instruction

Parties have the right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court.

3 Cases that cite this headnote

[9] **Negligence**Substantial factor

The proper test for proving causation in negligence action is the substantial factor test, under which the causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant's breach of duty was a substantial factor in bringing about the plaintiff's harm and (2) that there is no rule of law relieving the defendant of liability.

17 Cases that cite this headnote

[10] **Negligence**Continuous sequence; chain of events

Conduct can be considered a substantial factor in bringing about harm if it has created a force or series of forces which are in continuous and active operation up to the time of the harm, or the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another. BAJI 3.76.

See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1185.

9 Cases that cite this headnote

1 Cases that cite this headnote

[11] **Health**Proximate cause

In medical malpractice action, causation is proven when a plaintiff produces sufficient evidence to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.

8 Cases that cite this headnote

[12] **Trial**Personal injuries

In medical malpractice action, the trial court did not err in refusing to instruct the jury on "but for" causation as to doctor's negligence, since jury was instructed on "substantial factor" test, and "but for" was subsumed under the substantial factor test. BAJI 3.76.

10 Cases that cite this headnote

[13] **Health**Internal medicine in general
HealthCardiology; circulatory system
HealthRadiology, ultrasound, and other medical imaging

Evidence in medical malpractice action was sufficient to establish that doctor's negligence in post-operative interpretation of patient's lung scan as indicating a pulmonary embolism, for which she was treated, rather than a bowel obstruction from which she died, was a cause of her death; the clinicians who treated the patient considered gastric leak and bowel obstruction as possibilities, albeit low on the differential diagnosis list, until they received defendant's scan interpretation because that interpretation conclusively influenced their decision to treat patient for pulmonary embolism and to cease considering other diagnoses.

[14] **Health**Wrongful death

Trial court's computation of damages malpractice defendants owed to plaintiffs was not unfair in first reducing the non-economic verdict to the statutory maximum and then reducing it further to reflect the percentage of fault attributed to the settlement plaintiffs received from settling defendants. West's Ann.Cal.C.C.P. § 877; West's Ann.Cal.Civ.Code § 1431.2.

Flahavan et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2005) ¶ 4:185.20-24 (CAPI Ch. 4-D.).

5 Cases that cite this headnote

[15] **Compromise, Settlement, and Release**
Multiple or Joint Wrongdoers
ContributionDefenses
IndemnitySettlement with third party as bar to action

A good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant and the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff. West's Ann.Cal.C.C.P. § 877.

1 Cases that cite this headnote

Attorneys and Law Firms

****16** Law Offices of Bruce G. Fagel and Associates, Bruce G. Fagel, Beverly Hills, Richard Akemon, Redlands, and James E. Wright, Los Angeles, for Plaintiffs, Respondents, and Cross–Appellants.

Thelen Reid & Priest, Curtis A. Cole, Kenneth R. Pedroza, Los Angeles, and E. Todd Chayet; Schmid & Voiles, Susan Schmid, Los Angeles, and Rebecca J. Hogue for Defendants, Appellants, and Cross–Respondents.

ALDRICH, J.

***1079** INTRODUCTION

Tracy Mayes, wife and mother respectively of plaintiffs Cornell Sterling Mayes, Alan James Mayes, and Christopher Scott Mayes, died at Huntington Memorial Hospital where she had undergone surgery to staple her stomach. Plaintiffs brought this wrongful death action against several physicians and nurses and their institutions who had been involved in Mrs. Mayes's treatment, including Dr. David C. Bryan, M.D. and Hill Medical Corporation.[1] ***1080** (Dr. Bryan and his corporation are hereinafter referred to as defendants.) Plaintiffs' theory at trial was that Dr. Bryan's negligent post-operative interpretation of a lung scan led the other physicians involved to treat Mrs. Mayes for a pulmonary embolism even though she was suffering from a bowel obstruction, and to delay re-operation that could have prevented her death. The jury found that Dr. Bryan was negligent and his negligence was a cause of Mrs. Mayes's death. Judgment was entered against Dr. Bryan in the amount of $867,107, plus costs of $37,146.22.

Defendants appeal asserting instructional error. We hold that defendants invited any error in the substantial factor instruction and can not be heard to complain on appeal. We further hold that the trial court did not err in omitting to instruct the jury on but-for causation because that instruction would have been redundant, with the result that the omission did not prejudice defendants. Accordingly, we affirm the judgment of liability.

Plaintiffs' cross-appeal challenging the method by which the court calculated the damages Dr. Bryan owes. We affirm the damage calculation. Accordingly, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The testimony.*

Thirty-nine year old Mrs. Mayes was morbidly obese. She underwent elective laparoscopic gastric bypass surgery (stomach stapling) at Huntington Memorial Hospital on the afternoon of December 11, 2000. Mrs. Mayes was recovering normally ****17** the next morning and so she was cleared to be discharged.

Around 12:00 noon on December 12, 2000, Mrs. Mayes began to experience pain, nausea, and vomiting, which were not controlled by medication. She was given Tylenol with codeine. Her condition deteriorated throughout the day, the post-operative nurses noted at 7:00 p.m.

Dr. Lourie, Mrs. Mayes's surgeon, visited the patient in the evening of December 12th. She was crying from pain. He concluded that she was feeling ***1081** routine post-operative pain. Around 9:00 p.m., he ordered medication for pain and nausea and postponed her discharge from the hospital. He made no notes and ordered no tests or studies. Despite being medicated, Mrs. Mayes was still suffering fairly severe pain at 11:00 p.m.

Around 12:00 midnight on December 12th, Mrs. Mayes experienced an increase in blood pressure, and upon returning from the bathroom, she complained of difficulty in breathing and chest pain, became pale and weak, and her heart rate increased beyond normal limits. The nurse paged Dr. Higley, a first-year surgical resident. Dr. Higley called Dr. Diamond, a second-year resident, and told him it looked like Mrs. Mayes had a pulmonary embolism. A pulmonary embolism is a small blood clot that travels along a vein into the lungs and blocks off the blood supply to the lungs. It is a common cause of post-operative death in gastric bypass patients. Dr. Diamond's first concern was pulmonary embolism.

At about 1:00 a.m., on December 13th, Dr. Diamond evaluated Mrs. Mayes and found her "dramatically compromised." The speed with which Mrs. Mayes's event occurred, combined with her shortness of breath, fast heart rate, blood pressure, and respiration rate raised concerns that she had a pulmonary embolism or had suffered a "cardiac event." To confirm or rule out pulmonary embolism and other possibilities, the doctors needed more definitive tests. Among the tests they ordered were a chest x-ray, EKG, blood analyses, and a ventilation perfusion lung scan (V–Q scan or lung scan).[2] The lung scan took "[a] little over an hour."

The lab tests showed an elevated white blood-cell count, which might occur after surgery or because of pulmonary embolus, infection, or stress. The tests also indicated that bleeding was a consideration, but that likelihood fell very low on Dr. Diamond's list of possibilities based on the patient's presentation.

In terms of a differential diagnosis, i.e., all the possible things that could explain Mrs. Mayes's symptoms, physical findings, and laboratory results, Dr. Higley listed: pulmonary embolism, bleeding, bowel obstruction, gastric leak, and myocardial infarction, among other things.

***1082** Mrs. Mayes's pain was also symptomatic of deep vein thrombosis, another risk associated with abdominal surgery. Mrs. Mayes did not display abdominal pain associated with a bowel obstruction, but she showed other signs of obstruction or leak, such as tenderness, vomiting, increased heart rate, and fever.

Pulmonary embolism remained at the top of Dr. Diamond's differential diagnosis list. Of the 23 observations, tests, and findings considered, all were consistent with a pulmonary embolism. Dr. Diamond felt Mrs. Mayes's situation was life threatening. At 1:45 a.m., Dr. Lourie thought she had pulmonary embolism. This was ****18** the working diagnosis before the results from the V–Q scan were received.

The lung scan was completed about 2:00 a.m. and the images were transmitted electronically to the home of Dr. Bryan, the on-call radiologist. Dr. Bryan kept no notes about, and has no memory of, his evaluation of the lung scan film. Dr. Higley testified that she spoke to Dr. Bryan on the telephone about 2:00 a.m. *Dr. Bryan told her that the lung scan showed a "high probability" of pulmonary embolism.* Dr. Higley had Dr. Bryan repeat the results for Dr. Diamond, who was standing next to her. *Dr. Higley asked, "does that mean the patient is having a P. E.? " Dr. Bryan responded, "Yes."* (Italics added.)

Dr. Diamond testified, once he was told by Dr. Bryan that the lung scan showed a pulmonary embolism, *he no longer considered that Mrs. Mayes was suffering abdominal bleeding,* despite blood test results that were consistent with post-operative bleeding.

Dr. Diamond called Dr. Lourie to report that "Dr. Bryan says this is a P.E." Told of the test results, including the lung scan interpretation, Dr. Lourie agreed with Dr. Diamond's assessment. The lung scan result, Dr. Lourie felt, was "further confirmation" of overwhelming clinical evidence that Mrs. Mayes had a pulmonary embolism. After receiving Dr. Bryan's analysis, Dr. Lourie decided that pulmonary critical care specialist Dr. Carmody needed to be called to assist in the evaluation of Mrs. Mayes's condition.

***1083** Mrs. Mayes was admitted to the Intensive Care Unit and given two units of blood. Around 2:00 a.m., the doctors considered giving Mrs. Mayes antibiotics. But infection was not high on their list of possible conditions because Mrs. Mayes did not have a temperature.

Told of the lab test results, including Dr. Bryan's reading of the lung scan, at 3:45 a.m., Dr. Carmody diagnosed Mrs. Mayes with a pulmonary embolism. He explained that the "whole ... clinical picture," along with the data, indicated "far [and] away" that Mrs. Mayes had a pulmonary embolism. In particular, *the lung scan convinced him that Mrs. Mayes needed emergency treatment for pulmonary embolism.* Dr. Carmody explained that the "high probability" result for the lung scan "made a very difficult decision easier." Without that information, Dr. Carmody would have discussed the clinical picture with the treating surgeons.

Dr. Carmody treated Mrs. Mayes for pulmonary embolism. She received TPA, a "clot buster" and Heparin to prevent further clots, despite the significant risk of bleeding associated with these medications, and despite obvious indications and the doctors' suspicion that Mrs. Mayes might have active abdominal bleeding or be in septic shock. Dr. Carmody explained that he weighed the risks associated with giving Mrs. Mayes the extreme measure of TPA, even though she was also showing signs of bleeding. Dr. Carmody explained, once Mrs. Mayes had the TPA, her risk of bleeding increased and she would have to be watched. Dr. Lourie concurred with Dr. Carmody's treatment. When she was given the TPA and Heparin, several parameters indicated Mrs. Mayes was improving.

Nonetheless, Mrs. Mayes's condition deteriorated further. Around 8:00 a.m., her white blood-cell count was four times that pre-operatively, and her temperature jumped to over 102.8 degrees, both indicative of infection and septic shock. These symptoms could have also been present with a pulmonary embolism.

At 9:00 a.m., Dr. Andy Wang, a nuclear radiologist along with Dr. Bryan at Hill ****19** Medical Corporation, re-reviewed the lung scan along with the chest x-ray, and concluded there was a "*low probability* " of pulmonary embolism. Dr. Wang did not notify anyone of his finding because a "low probability" scan did not require action and he was not aware of Dr. Bryan's earlier interpretation

of "high probability."

***1084** Mrs. Mayes was in septic shock by 11:30 a.m.

In the early afternoon, a Swan–Ganz catheter, a device that allows for more direct measurement of activity inside the patient's right atrium, was inserted in Mrs. Mayes's heart. The results showed early signs of sepsis, as had Mrs. Mayes's elevated white blood-cell count and early-morning fever.

Dr. Carmody learned that the lung scan showed a "low probability" for pulmonary embolism at about *2:20 in the afternoon.* Around this time, he also received test results that indicated changes and complications in Mrs. Mayes's abdominal area. Within minutes of learning of the scan's re-interpretation, Dr. Carmody gave the order to cease giving Heparin to Mrs. Mayes and indicated in the patient's notes "*expect septic picture.*" (Italics added.) Antibiotics were first administered to Mrs. Mayes at 2:30 p.m., 12 hours after the first sign of infection appeared, and three hours after she had fallen into septic shock.

All along, Mrs. Mayes's condition had been deteriorating as the gastric contents of her stomach leaked into the abdominal cavity. Unless she was taken to surgery to correct it and remove the fluid that had leaked from the stapling line of the stomach, she would continue to deteriorate. She was taken for an operation about 5:00 p.m. The operative findings revealed that she had suffered bleeding and gastric leak after her first operation, causing infection. In the ensuing two months, Mrs. Mayes had 43 exploratory procedures, 11 of which were operations.

Mrs. Mayes died on February 13, 2001, after cardiac arrest and "multi-system organ failure" brought on by a bowel obstruction that caused the contents of her stomach to leak into and contaminate her abdominal cavity.

2. *Plaintiffs' experts.*

Plaintiffs' theory of the case was that Dr. Bryan negligently interpreted and reported the lung scan as showing a "high probability" for pulmonary embolism. Dr. Bryan's incorrect diagnosis led the treating physicians to waste a 12–hour window of opportunity—from the evening of December 12, when ***1085** there was evidence of bowel obstruction, through the morning of December 13—during which time, Mrs. Mayes's condition could have been properly identified and her death averted.

Plaintiffs' expert, surgeon Edward H. Phillips, testified that the death was preventable by the recognition and treatment of the bowel obstruction or early intervention after the gastric leak became obvious in the morning, by washing out the abdomen. Dr. Phillips testified that Mrs. Mayes's condition required an operation before the patient went into shock. Once a patient went into shock, the likelihood of death increased rapidly.

In Dr. Phillips's opinion, there was an 11– or 12–hour window of opportunity to intervene and treat Mrs. Mayes, starting in the evening of December 12th, when there was evidence of bowel obstruction and gastric leak through the morning of December 13th when Mrs. Mayes went into septic shock. Dr. Bryan read the lung scan in the middle of that 12–hour period. Had Mrs. Mayes been properly diagnosed and treated during that window, Dr. Phillips opined that, to a reasonable ****20** degree of medical probability, she would be alive today.

Dr. Phillips explained that Dr. Lourie breached the standard of care in failing to timely order gastro-intestinal tests by 9:00 p.m. on December 12th, about five hours before Dr. Bryan interpreted the lung scan, because bowel obstruction is the most common, serious complication of a gastric bypass surgery. According to Dr. Phillips, Dr. Lourie's failure to order an upper gastro-intestinal x-ray on the night of December 12th, and to diagnose a bowel obstruction was a significant factor in causing her death.

Asked to assume that Dr. Bryan told Dr. Lourie that the V–Q scan showed a "low probability" of pulmonary embolism when the scan was first read in the middle of the night, Dr. Phillips responded that "*at that point it was reasonable and prudent to assume she had a leak* " and do an upper gastro-intestinal exam or operate. (Italics added.)

Dr. John Morse Luce, a pulmonary and critical care physician, testified for plaintiffs that he did not "believe that Tracy Mayes had a pulmonary embolism" "because the symptoms and signs that she showed in the early morning hours of December 13th were compatible with other diagnoses that I think were as likely as pulmonary embolism." Dr. Luce testified he believed the pulmonary embolism diagnosis was false or wrong. Once that diagnosis ***1086** had been made however, Dr. Luce testified, the doctors "were reluctant subconsciously to [ ] give up that diagnosis and entertain possibly other diagnos[es] that might better fit the situation. [¶] ... "because of that the fact the patient was actually septic, that is to say had an infection[,] was overlooked in reading of the ventilation perfusion scan...." According to Dr. Luce, the "entire chain of events leads to the patient not going to surgery until later than she should have

otherwise." Dr. Luce testified that the possibility of pulmonary embolism was "probably intermediate."

Dr. Fredrick A. Birnberg, plaintiffs' expert radiologist, opined that Mrs. Mayes's V–Q scan showed "a low probability" of a pulmonary embolism. But, he also explained why it is important to take a chest x-ray into account when looking at a V–Q lung scan, especially for on-call doctors. Many anatomic defects show up on an x-ray that can help in the interpretation of a V–Q scan.

3. *Defendants' case.*

Defendants took the position that regardless of Dr. Bryan's interpretation, the doctors would have treated Mrs. Mayes for pulmonary embolism, and that the standard of care required Dr. Lourie to evaluate the gastric leak. Dr. Bryan testified as a percipient witness that Mrs. Mayes's lung scan did not show a "high probability," and there was no way he would have read that scan as showing a "high probability" score. He was sure that he called it an "intermediate probability," not a "high probability" of a pulmonary embolism.

Defense expert, Dr. David Winsor, opined that regardless of whether the V–Q scan was called in as a "low," "intermediate," or "high probability," "there is a significant probability that this patient ha[d] a pulmonary embolism."

Defendants also relied on Dr. Birnberg's testimony on cross-examination that if there were a high clinical probability of a pulmonary embolism, and the lung scan probability were "high," then the statistical probability of the patient having the disorder was extremely high. If the clinical probability were high and the V–Q scan probability were "high" or "intermediate," there was still a "substantial chance that ****21** the patient could have a pulmonary embolism." That is, if all the clinical data showed a high likelihood of pulmonary embolism and the V–Q scan revealed an intermediate probability, there was a 66 percent chance of a pulmonary embolism.

***1087** 4. *The verdict.*

The jury returned a verdict finding defendants negligent in the care and treatment of Mrs. Mayes, and that the negligence was a cause of Mrs. Mayes's death. The jury found defendants 20 percent responsible and the settling doctors 80 percent responsible for the total damages. The jury assessed a total of $3 million in non-economic damages, and $1,366,357 in economic damages for a total award of $4,366,357.

After reducing the damages to reflect the allocation of fault, prior settlements, and the cap pursuant to Civil Code section 3333.2 (the Medical Injury Compensation Reform Act or "MICRA") in a manner described more fully *infra,* the court entered judgment against Dr. Bryan in the amount of $867,107, plus statutory costs as prevailing party. The court denied plaintiffs' Code of Civil Procedure section 998 prejudgment interest because their offer of $1 million was more than the amount of the total judgment against the non-settling party. Defendants and plaintiffs filed their timely appeal and cross-appeal, respectively.

DISCUSSION

I. *Defendants' appeal.*

a. *Standard of review.*

[1] When the sole contention on appeal concerns a jury instruction, we do not view the evidence in a light most favorable to the prevailing party. Rather, to assess the instruction's prejudicial impact, we assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor. (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1152, fn. 2, 84 Cal.Rptr.2d 257.) "Accordingly, we state the facts most favorably to the party appealing the instructional error alleged, in accordance with the customary rule of appellate review. [Citation.]" (*Ibid.; Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1224–1225, 12 Cal.Rptr.3d 533.)

[2] Still, "[i]n a civil case an instructional error is prejudicial reversible error only if it is *reasonably probable* the appellant would have received a more ***1088** favorable result in the absence of the error. [Citations.]" (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1248–1249, 132 Cal.Rptr.2d 765, italics added, citing Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) "As the *Soule* court put it, the determination of prejudice depends heavily on 'the particular nature of the error, including its natural and probable effect on a

party's ability to place his full case before the jury. [¶] ... Actual prejudice must be assessed in the context of the individual trial record.' " (*Logacz v. Limansky, supra,* 71 Cal.App.4th at p. 1156, 84 Cal.Rptr.2d 257, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580–581, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

[3] Hence, when evaluating the evidence to assess the likelihood that the trial court's instructional error prejudicially affected the verdict, we "must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 580–581, 34 Cal.Rptr.2d 607, 882 P.2d 298, fn. omitted.)

****22** b. *The "substantial factor" instruction.*

Defendants contend the trial court instructed the jury from an erroneous version of "substantial factor." We conclude that defendants may not raise this issue on appeal, as they invited the error.

1. *Facts.*

According to the court clerk, *both parties* requested and the court gave the following version of the "substantial factor" test from BAJI No. 3.76, with the agreed-upon modifications in italics: "The law defines cause in its own particular way. The cause of an injury or *death* is something *more likely than not a factor in bringing about* the injury *or death.*"[3] (Cf. *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132, 39 Cal.Rptr.2d 658.)

Because draft versions of the Judicial Council of California Civil Jury Instructions (CACI) were issued during this case, *both parties* requested and ***1089** the court instructed from the following version of CACI No. 431 on multiple causes, with the agreed-upon modifications in italics: "A person's negligence may combine with another factor to cause *death.* If you find that Dr. Bryan's negligence was *a cause* of Tracy Mayes's *death,* then Dr. Bryan is responsible for the *death.* Dr. Bryan cannot avoid responsibility just because some other person, condition, or event was also *a cause* of Tracy Mayes's death."[4]

There is no transcript of the proceedings during which the jury instructions were discussed, selected, and modified. We have been provided only with the reporter's transcript from the argument concerning defendants' motion for mistrial. It shows that the following occurred:

After the jury had been deliberating for six hours, counsel for defendants notified the court that she believed that CACI No. 431, as given, was improperly worded. Defendants moved either for mistrial or for an additional instruction about "substantial factor." Defendants claimed that plaintiffs' attorney surreptitiously altered the language of CACI No. 431 by excluding the word "substantial" from the instruction. Defense counsel noted that she had objected during plaintiffs' closing argument but was overruled.[5]

The court responded by recounting its memory of the events. "We had gone over all the jury instructions. This is my recollection.... [¶] In going over instructions, we looked at [BAJI No.] 3.76. We all agreed for medical malpractice case it had to be tailored.... [¶] ... I think there were alternatives posed to the court, one of which was CACI. I said that appears to ****23** be an appropriate instruction to give. So we tailored it. He [plaintiffs' counsel] didn't tailor it. [¶] [Plaintiffs' attorney] brought it in exactly the way we had talked about it *because I compared it.... We had talked about this particular instruction and* [plaintiffs' counsel] *brought it in exactly this way.* [¶] ... It appeared to be [sic] order. It did not appear to be any different and we talked about it. I thereafter read to the jury. No objection whatsoever from defense.... There was no objection whatsoever." (Italics added.)

***1090** Plaintiffs' attorney remembered that the new phrase "more likely than not" in BAJI No. 3.76 was defendants' idea. Plaintiffs' counsel further explained that, once they modified BAJI No. 3.76 defining "substantial factor," then CACI No. 431, which normally includes the phrase "substantial factor" had to be modified. As plaintiffs' attorney stated: "[T]he way the court instructed or ordered that instruction 3.76 be modified required that CACI 431 correlate to it. You can't leave 'substantial factor' in 431 when you have [ ] taken that definition out of 3.76.[¶] [*The defense] was apprised of all of that information, not just in writing, but also in discussions we had and then ultimately the copies that were brought in as was ordered by the court, to give [the defense] a copy. She* [defense counsel] *was going through them as I was doing my argument.* We obviously read 3.76 and CACI 431 because she [defense counsel] got up on argument and used them in argument." (Italics added.)

Defendants' attorney denied having proposed the change and argued that she was unaware until the mistrial motion

that the instruction had been changed. The court responded that the instruction had been tailored exactly as the defense wanted it. The court repeated its recollection of the events: "We talked about a legal cause. *We all agreed. We went over the language. You agreed.* [¶] I read the instructions to the jury. *You agreed. You never once objected.* Now because the jury has been deliberating for some six hours, apparently you are getting nervous about the case. Now you bring this up and want to make an argument about this."[6] The court denied defendants' motion.

2. *Application.*

Defendants contend that the court erred in giving the version of BAJI No. 3.76 on "substantial factor" that it gave.

[4] [5] "It is an elementary principle of appellate law that '[a] party may not complain of the giving of instructions which he has requested. [Citation.]' [Citations.]" (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 255, 259 Cal.Rptr. 311.) "The invited error doctrine applies 'with particular force in the area of jury instructions. Whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities. A civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not "obligated to seek out theories [a party] might have ***1091** advanced, or to articulate for him that which he has left unspoken." [Citations.]' [Citation.]" (*Stevens v. Owens–Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653, 57 Cal.Rptr.2d 525.)

[6] Defendants deny having requested the modifications. As appellants, defendants bear the burden of presenting a ****24** sufficient record to establish that the claimed error was *not* invited by them, or be barred from complaining about it on appeal. (*Phillips v. Noble* (1958) 50 Cal.2d 163, 169, 323 P.2d 385, italics added.) In the absence of a reporter's transcript of the discussions between the court and the parties, we rely on the transcript, above quoted, of the argument on defendants' motion for new trial. That record shows that defense counsel did deny requesting the change to the BAJI No. 3.76 "substantial factor" instruction that was given. The record also shows that the trial court found to the contrary, that the defense had *requested the modifications made.* We may not second-guess the trial court's finding, particularly so when the record is inadequate. Defendants cannot be heard to complain on appeal that the instruction was improperly worded.

[7] In their reply brief, defendants argue they objected to the modified instructions before the jury reached a verdict. Although defendants posed an objection to their own instruction during plaintiffs' closing argument, the objection seemed to the trial court to be directed to plaintiffs' counsel's argument, not to the word choice in the instruction. It appears that defendants first complained that their own instruction was badly worded only after the jury had been deliberating for *six hours.* While appellate courts "have broad discretion to decide whether to consider a tardily raised legal issue[, w]e are more inclined to do so when matters of important public interest or public policy are involved. [Citation.] If the matter is important enough, we may consider it even though the appellant adopted an inconsistent position in the trial court. [Citation.]" (*Stevens v. Owens–Corning Fiberglas Corp., supra,* 49 Cal.App.4th at p. 1654, 57 Cal.Rptr.2d 525.) This case presents no urgent public interest or policy justifying reaching the issue, especially because any error was invited.

More important, the instructions as given did not prejudice defendants. First, the BAJI No. 3.76 instruction adequately provided an alternative meaning of "substantial" factor, i.e., "more likely than not" a factor. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253, 7 Cal.Rptr.2d 101, quoting from Rest.2d Torts, § 433B, com. b. [plaintiff need only show " 'it is more probable that the event was caused by the defendant than that it was not' "].) Second, the instruction did not fail to inform the jury that a substantial factor must be more than "remote or trivial," as *more likely than not* is inherently more than remote or trivial. (Cf. ***1092** *Osborn, supra*, 5 Cal.App.4th 234, 7 Cal.Rptr.2d 101.) Finally, CACI No. 431 as given was not misleading because it used the word "cause"—"if you find that Dr. Bryan's negligence was *a cause of* Tracy Mayes's death"—and "cause" was adequately defined for the jury in the modified BAJI No. 3.76.

c. *The "but for" instruction.*

Defendants contend that the trial court erred in refusing to instruct the jury on "but for" causation. We conclude there was no error, but even if there were, defendants were not prejudiced.

[8] " 'Parties have the "right to have the jury instructed as to the law applicable to all their theories of the case which

were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court." [Citation.] "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]" [Citation.]' [Citation.]." ****25** (*Logacz v. Limansky, supra,* 71 Cal.App.4th at p. 1157, 84 Cal.Rptr.2d 257.)

Defendants requested that the trial court instruct the jury as follows: "Plaintiff must show that one or more of the defendants was a cause of plaintiff's injuries. To be a cause of injury, plaintiff must show that but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result. [ ] Based on *Viner v. Sweet.*"[7] The court rejected defendants' proposed instruction. There is no indication that defendants withdrew their request for, or invited any error with respect to, the "but for" instruction.

According to defendants' theory of the case, Dr. Bryan was not a cause of death because, they argue, the physicians would have treated Mrs. Mayes for pulmonary embolism anyway. That is, defendants argue, Mrs. Mayes would not have obtained a better result even if Dr. Bryan had not breached the standard of care.

1. *The law of causation.*

[9] The proper test for proving causation is the "substantial factor" test. ***1093** (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313, 37 Cal.Rptr.2d 541.) The "causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant's breach of duty ... was a substantial factor in bringing about the plaintiff's harm and (2) that there is no rule of law relieving the defendant of liability." (*Leslie G. v. Perry Associates* (1996) 43 Cal.App.4th 472, 481, 50 Cal.Rptr.2d 785; accord *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1235, 32 Cal.Rptr.2d 136.)

[10] "Conduct can be considered a substantial factor in bringing about harm if it 'has created a force or series of forces which are in continuous and active operation up to the time of the harm' [citation], or stated another way, 'the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another' [citation]." (*Osborn v. Irwin Memorial Blood Bank, supra,* 5 Cal.App.4th at p. 253, 7 Cal.Rptr.2d 101, italics added.)

[11] Causation is proven when "a plaintiff produces sufficient evidence 'to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result. [Citations.]' [Citation.]" (*Espinosa v. Little Co. of Mary Hospital, supra,* 31 Cal.App.4th at pp. 1314–1315, 37 Cal.Rptr.2d 541, quoting from *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216, 6 Cal.Rptr.2d 900.)

In *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1 Cal.Rptr.2d 913, 819 P.2d 872 (*Mitchell*), the parents of a boy who died while with neighbors, sued the neighbors alleging negligence and wrongful death. (*Id.* at pp. 1045–1047, 1 Cal.Rptr.2d 913, 819 P.2d 872.) With respect to causation, the majority in *Mitchell* disapproved as misleading BAJI No. 3.75, which contained a "but for" test of causation (*id.* at pp. 1048–1049, 1 Cal.Rptr.2d 913, 819 P.2d 872), and held that BAJI No. 3.76, which employs the "substantial factor" test of cause in fact (*id.* at p. 1049, 1 Cal.Rptr.2d 913, 819 P.2d 872), should be given in its stead.

Mitchell reasoned that "BAJI Nos. 3.75 and 3.76 are *alternative* instructions that *should not jointly be given in a single* ****26** *lawsuit.* [Citation.]" (*Mitchell, supra,* 54 Cal.3d at p. 1049, 1 Cal.Rptr.2d 913, 819 P.2d 872, original italics, italics added.) After concluding that BAJI No. 3.75 was grammatically confusing and conceptually misleading (*id.* at pp. 1050–1052, 1054, 1 Cal.Rptr.2d 913, 819 P.2d 872), and after noting the praise BAJI No. 3.76 received (*id.* at p. 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872), the Supreme Court held that use of the latter instruction would avoid the confusion inherent in BAJI No. 3.75. (*Id.* at p. 1054, 1 Cal.Rptr.2d 913, 819 P.2d 872.) *Mitchell* reasoned that "*the 'substantial factor' test subsumes the 'but for' test.* 'If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.' [Citation.]" (*Id.* at p. 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872, italics added.) The court explained that while the substantial factor instruction assists in the ***1094** resolution of the problem of independent causes, it is also useful in resolving two other types of cases: (1) " 'where a similar, but not identical result would have followed without the defendants' act;' " and (2) " 'where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. *But in the great majority of cases, it produces the same legal conclusion as the but-for test.*' " (*Id.* at pp. 1052–1053, 1 Cal.Rptr.2d 913,

819 P.2d 872, italics added.) " '[N]o case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.' [Citation.]" (*Ibid.*)[8] Hence, BAJI No. 3.76 was an adequate instruction in *Mitchell* as a substitute for the discarded instruction containing the "but for" test.

More recently, in *Viner v. Sweet* (2003) 30 Cal.4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046 (*Viner*), the Supreme Court held that "[w]hen the alleged malpractice occurred in the performance of transactional [legal] work ... the client [must] prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice[.]" (*Id.* at p. 1235, 12 Cal.Rptr.3d 533.) *Viner* rejected the appellate court's holding that a plaintiff suing an attorney for transactional malpractice need not show that the harm would not have occurred in the absence of the attorney's negligence. (*Id.* at p. 1240, 12 Cal.Rptr.3d 533.) "In a litigation malpractice action, the plaintiff must establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice. ****27** [Citation.]" (*Id.* at p. 1241, 12 Cal.Rptr.3d 533.) *Viner* saw "nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm." (*Id.* at pp. 1240–1241, 12 Cal.Rptr.3d 533, original italics.)[9]

***1095** Defendants cite *Viner* for the proposition that even if plaintiffs demonstrated that defendants' conduct was a *substantial factor* in bringing about Mrs. Mayes's injury, that plaintiffs must also prove "but for" causation. Yet, *Viner,* a legal malpractice case, did not require that a jury be instructed on both the "but for" and "substantial factor" tests. Viner acknowledged that *Mitchell* did not repudiate the "substantial factor" test. (*Viner, supra,* 30 Cal.4th at pp. 1239–1240, 135 Cal.Rptr.2d 629, 70 P.3d 1046, citing *Mitchell, supra,* 54 Cal.3d at p. 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872.) Rather, the Supreme Court has repeatedly restated its view that "*the 'substantial factor' test subsumes the traditional 'but for' test* of causation." (*Ibid.*) They are both tests of causation in fact. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1185, pp. 552–553.)

For this reason, Witkin teaches us, "The first element of legal cause is *cause in fact....* The 'but for' rule has traditionally been applied to determine the cause in fact. [Citations.] [ ] The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' [Citation.]" (6 Witkin, *supra,* Torts, 1185, pp. 552–553, original italics.)

Indeed, the fact that the "but for" test is included in the "substantial factor" definition has been recognized by the Judicial Council in revising CACI No. 430, the new substantial factor instruction. The summer 2005 revision of this instruction reads: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]" (CACI No. 430 (rev. ed. Summer 2005), underlining in original.) The directions for use of CACI No. 430 state clearly, "*As phrased, this definition of 'substantial factor' subsumes the 'but for' test of causation,* e.g., plaintiff must prove that but for defendant's conduct, the same harm would not have occurred. [Citation.] *The first sentence of the instruction accounts for the 'but for' concept.* Conduct does not 'contribute' to harm if the same harm would have occurred without such conduct." (*Ibid., italics added,* citing *Viner, supra,* 30 Cal.4th at pp. 1239–1240, 135 Cal.Rptr.2d 629, 70 P.3d 1046; accord CACI No. 430 (rev. ed. Dec.2005).) There is no requirement in either recent revision of CACI No. 430 that the bracketed language be used *in addition to* the first sentence of the instruction. Rather, both versions of CACI explained that the ****28** additional bracketed ***1096** language "*may* be used...." (*Ibid.,* italics added.)[10] Thus, the trial court is not *required* to instruct from both tests of cause in fact unless the state of the evidence suggests otherwise.

2. *Application of the law to this case; the court did not err in declining to instruct on "but for" and defendants were not prejudiced by the ruling.*

[12] Reviewing the evidence as we must (*Logacz v. Limansky, supra,* 71 Cal.App.4th at p. 1152, fn. 2, 84

Cal.Rptr.2d 257), we conclude the trial court did not err in refusing to instruct the jury on "but for" causation because the jury was instructed on "substantial factor" and "but for" is subsumed under the substantial factor test. (*Mitchell, supra,* 54 Cal.3d at p. 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872; *Viner, supra,* 30 Cal.4th at pp. 1239–1240, 135 Cal.Rptr.2d 629, 70 P.3d 1046.) Hence, a "but for" instruction would have been redundant.

[13] On this record there is no likelihood that, instructed on "but for," the jury could have found Dr. Bryan was *not* a cause in fact of Mrs. Mayes's death. Defendants contend that the clinicians would have treated Mrs. Mayes for pulmonary embolism anyway.[11] They cite Dr. Winsor's testimony that "there is a significant probability that this patient ha[d] a pulmonary embolism" and ***1097** Dr. Birnberg's testimony as support for their assertion that there was a 66 percent chance of a pulmonary embolism.[12] Although Dr. Winsor ****29** found a significant probability that the patient had a pulmonary embolism, *there was no evidence that the clinicians would have treated Mrs. Mayes for that problem if Dr. Bryan had reported a "low" or even "intermediate" probability,* defendants' assertion to the contrary notwithstanding. To the contrary, the testimony from Drs. Carmody, Diamond, and Luce is that the clinicians considered gastric leak and bowel obstruction as possibilities, albeit low on the differential diagnosis list, until they received Dr. Bryan's scan interpretation because that interpretation *conclusively influenced* the decision to treat Mrs. Mayes for pulmonary embolism and to *cease* considering other diagnoses.

There is no evidentiary support for defendants' contention that Mrs. Mayes would have died even had Dr. Bryan not acted negligently. Apart from the many witnesses who testified that the "high probability" analysis persuaded them that Mrs. Mayes had a pulmonary embolism, and Dr. Luce's testimony that the treating physicians were misled by Dr. Bryan's interpretation, Dr. Carmody specifically testified that *without* Dr. Bryan's lung scan analysis of "high probability," he would have discussed the entire clinical picture with the treating doctors. Instead, he rushed in on an emergency basis to give her "clot busting" medication.

Defendants assert that "a low probability interpretation would *not* have yielded the decedent a better result." To the contrary, the evidence shows that immediately upon learning that Dr. Wang re-interpreted Mrs. Mayes's scan and found it to show a "low probability," Dr. Carmody ordered that the treatment for pulmonary embolism be stopped. Asked to assume that Dr. Bryan reported a "low probability" interpretation, Dr. Phillips testified, "at that point it was reasonable to assume she had a leak." The only logical conclusion that the jury could reach from this testimony was that had it not been for Dr. Bryan's negligent interpretation of the V–Q scan, the 12–hour window of opportunity would not have been squandered and Mrs. Mayes could have been properly treated in time.

***1098** In short, the evidence does not support defendants' contention that the clinicians would have treated Mrs. Mayes for pulmonary embolism regardless of Dr. Bryan's negligence.

Moreover, even if, per *Viner,* courts in medical malpractice cases must now instruct juries on both "substantial factor" and "but for," we conclude on the whole record here that no prejudice resulted from the lack of "but for" instruction. (*Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 580–581, 34 Cal.Rptr.2d 607, 882 P.2d 298.) Looking at the instructions on causation given (*id.* at p. 580, 34 Cal.Rptr.2d 607, 882 P.2d 298), the jury was instructed on "substantial factor," and the concept of "but for" is necessarily included within. Not only would a "but for" instruction have been redundant according to *Mitchell, Viner,* and the revised versions of CACI 430 that defendants cite, but the jury impliedly found "but for" causation when it found that Dr. Bryan's negligent interpretation of the lung scan was a substantial factor in causing Mrs. Mayes's death. This is so because for the jury to find that Dr. Bryan was a substantial factor in Mrs. Mayes's mistreatment, it necessarily ****30** concluded that Mrs. Mayes's injury would not have happened without Dr. Bryan's negligence. There was no likelihood that the jury was misled. The verdict was not close; the jury found causation by a ratio of 11 to 1. It did not request a re-reading of the instructions. Nor was anything said in the closing arguments that could be construed as reasonably misleading. Consequently, it is not reasonably probable defendants would have received a more favorable result even had the court instructed on "but for" causation. (*Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 580–581, 34 Cal.Rptr.2d 607, 882 P.2d 298.) The trial court's refusal to instruct on "but for" did not prejudice defendants.

II. *Plaintiffs' cross-appeal.*

Plaintiffs' sole assignment of error lies in the court's calculation of damages, specifically, the computation of non-economic damages. They posited two approaches, either of which, together with costs of $37,146.22, would have permitted plaintiffs to obtain their Code of Civil Procedure section 998 prejudgment interest on their offer of $1 million in settlement.

The jury awarded plaintiffs $3 million in non-economic damages, and $1,366,357 in economic damages, for a total verdict of $4,366,357. The jury determined that defendants' proportionate liability was 20 percent, and the settling parties' was 80 percent. Plaintiffs recovered a total of $650,000 from the settling defendants.[13]

***1099** Following *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 283 Cal.Rptr. 17, and *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 11 Cal.Rptr.2d 498, the trial court computed the award by first reducing the non-economic damage award from $3 million to $250,000 pursuant to MICRA, for a total damage award of $1,616,357 ($1,366,357 + $250,000). Based on this new number, the court then calculated the ratio of economic to total damages to be 84.5 percent ($1,366,357 = 84.5% x $1,616,357). The court then calculated that defendants were entitled to a benefit set off of $549,250 from the economic portion of the proceeds of the settlement with the settling defendants (84.5% x $650,000 = $549,250). The court finally considered the jury's allocation to defendants of 20 percent liability pursuant to Proposition 51 for a total of $50,000 in non-economic damages. The equation looked like this:

1,366,357	Total economic damages awarded
549,250	Econ. portion of settlement subject to setoff
817,107	Defendants' share of remaining econ. damages
50,000	Defendants' 20 percent share of MICRA cap
867,107	Defendants' liability to plaintiffs

[14] Plaintiffs' contention is that it was unfair for the court to first reduce the non-economic verdict of $3 million to the statutory MICRA maximum of $250,000 and then reduce it further under Proposition 51 to reflect the percentage of fault attributed to the settlement plaintiffs received.

The issue here is the interplay between MICRA (Civ.Code, § 3333.2), Proposition 51 (Civ.Code, § 1431.2), and settlements ****31** with other tortfeasors who are subject to MICRA. (Code Civ. Proc., § 877.)

Civil Code section 3333.2, an essential part of MICRA, limits the size of any award of non-economic damages in an action for injury against a health care provider based on professional negligence. (*Johnson v. Superior Court* (2002) 101 Cal.App.4th 869, 878, 124 Cal.Rptr.2d 650.)[14]

Proposition 51 eliminated joint and several liability for non-economic damages but retained it for economic damages. (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 600, 7 Cal.Rptr.2d 238, 828 P.2d 140.) Accordingly, Civil Code section 1431.2, subdivision (a) states, "In any action for personal injury ... based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be ***1100** joint. Each defendant shall be liable only for the

amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

[15] Under section 877, "a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant [and] the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 873, 239 Cal.Rptr. 626, 741 P.2d 124.)[15]

In support of their contention that the court should have applied Proposition 51 before reducing non-economic damages to the $250,000 MICRA cap, plaintiffs rely on *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 264 Cal.Rptr. 71. In a medical malpractice action, the *McAdory* jury found that the plaintiff had suffered non-economic damages of $370,000 and was herself 22 percent comparatively negligent. The appellate court held that the trial court had erred in reducing the non-economic damages to the MICRA limit first and then apportioning each party's fault. *McAdory* explained that MICRA was intended to cap the recovery of non-economic damages rather than the damages the plaintiff actually suffers. The appellate court reasoned that as the result of MICRA, the plaintiff was "already recovering an amount less than the jury determined he or she was damaged by the tortious conduct of others.... No purpose would be served by further reducing that plaintiff's award." (*Id.* at p. 1279, 264 Cal.Rptr. 71.) The *McAdory* court saw "no legitimate or logical reason for reducing [the non-economic damage] award to the $250,000 cap ... *before* reducing it further due to Mrs. McAdory's 22 percent comparative fault." (*Id.* at p. 1281, 264 Cal.Rptr. 71, original italics.)

Atkins v. Strayhorn (1990) 223 Cal.App.3d 1380, 273 Cal.Rptr. 231 followed *McAdory* in holding that the trial court had properly applied the jury's *comparative* ****32** *fault* finding before reducing the non-economic damages under MICRA. (*Id.* at pp. 1392–1393, 273 Cal.Rptr. 231.) *Atkins* also reasoned that the language of Civil Code section 3333.2 limited "the *recovery* rather than the value of noneconomic damages as a means of protecting the insurability of health care providers." (*Id.* at p. 1393, 273 Cal.Rptr. 231.) *McAdory* and *Atkins* involved the interplay between MICRA and the plaintiffs' comparative negligence.

***1101** By contrast, *Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d 121, 283 Cal.Rptr. 17, relied on by the trial court here, construed the relationship between MICRA and Proposition 51. (*Id.* at p. 128, 283 Cal.Rptr. 17.) In *Gilman,* the children of a nursing home patient brought a wrongful death action based on medical malpractice against the operator of the nursing home. The decedent's physician was insolvent and not joined in the action but his fault was assessed. (*Gilman, supra,* at p. 126, 283 Cal.Rptr. 17.) *Gilman* held that the trial court must apply the MICRA cap to the total non-economic damage award before it determined the pro rata liability of each defendant. (*Id.* at pp. 128–130, 283 Cal.Rptr. 17.) The reason, according to *Gilman,* was that because the plaintiff could not recover more than $250,000 in non-economic damages from all health care providers for one injury, the non-economic damages should be apportioned based on the relative fault of each health care provider. (*Id.* at p. 129, 283 Cal.Rptr. 17.)

Gilman distinguished *McAdory* and *Atkins,* explaining that neither case "dealt with the interplay between Proposition 51 and the MICRA cap. Rather, they dealt with the interrelationship between *comparative negligence principles* and MICRA. (*Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at p. 126, 283 Cal.Rptr. 17, italics added; original italics.) By comparison, *Gilman* explained, "Proposition 51 ... implicates very different considerations from those implicated in the *McAdory* and *Atkins* cases. Prior to the adoption of Proposition 51, multiple tortfeasors were ordinarily jointly and severally liable for *all* damages caused to an injured plaintiff where their acts contributed to the injury. This resulted in 'some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of plaintiff's damages if other more culpable tortfeasors were insolvent.' [Citation.]" (*Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at p. 127, 283 Cal.Rptr. 17, original italics, quoting *Evangelatos v. Superior Court* (1998) 44 Cal.3d 1188, 1198, 246 Cal.Rptr. 629, 753 P.2d 585.) In *Gilman,* because more than one responsible defendant was subject to the MICRA, the court apportioned the MICRA limit among them. (*Id.* at pp. 128–129, 283 Cal.Rptr. 17.)[16]

Gilman rejected the plaintiffs' argument that the court should first deduct from the jury's verdict the percentage of fault attributable to the other joint or concurrent tortfeasors and then reduce the amount to $250,000. "[I]t is clear that apportioning damages in this manner would effectively defeat the stated purposes of Proposition 51—to limit the potential liability of an individual ***1102** defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of ****33** fault." (*Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at p. 128, 283 Cal.Rptr. 17.)

The *Gilman* plaintiffs' also argued they should be compensated up to the MICRA limit even if some tortfeasors had not paid their share of the non-economic damages. *Gilman* rejected that argument, stating: "If any of the concurrent tortfeasors is insolvent, the liability of the other tortfeasors remains unchanged." (*Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at p. 129, fn. 10, 283 Cal.Rptr. 17.) Unlike cases involving the comparative liability of the plaintiff, when fashioning an award under both Proposition 51 and MICRA, the court should "not take into account whether *other tortfeasors* paid their proportional share. This is clearly the import of Proposition 51." (*Id.* at p. 130, 283 Cal.Rptr. 17, italics added.) "The express purpose of Proposition 51 was to eliminate the perceived unfairness of imposing 'all the damage' on defendants who were 'found to share [only] a fraction of the fault.' [Citation.]" (*DaFonte v. Up–Right, Inc., supra,* 2 Cal.4th at p. 603, 7 Cal.Rptr.2d 238, 828 P.2d 140.) Hence, under section 1431.2, a " 'defendant['s]' liability for noneconomic damages cannot exceed his or her share of fault *as compared with all fault responsible for the plaintiff's injuries,* not merely that of 'defendant[s]' present in the lawsuit. [Citation.]" (*DaFonte, supra,* at p. 603, 7 Cal.Rptr.2d 238, 828 P.2d 140, italics added.)

In this case, where more than one defendant shares responsibility for plaintiffs' injury, and plaintiffs were not at fault, the trial court properly followed the *Gilman* approach. As in *Gilman,* this case involves the interplay between MICRA and the percentages of fault of the various defendants under Proposition 51. *McAdory* and *Atkins* are irrelevant because neither case involved the allocation of fault to multiple defendants at issue here, and both cases involved an offset to damages for *the plaintiff's own comparative fault,* whereas comparative negligence principles are not implicated here.

Applying the reasoning of *Gilman,* each defendant is only responsible for the percentage of non-economic damages in proportion to his or her proportionate fault. The $250,000 MICRA maximum for non-economic damages must be apportioned according to Proposition 51. (*Gilman v. Beverly California Corp., supra,* 231 Cal.App.3d at pp. 127–128, 283 Cal.Rptr. 17.) Defendants are not responsible for making up the amounts the settling parties did not pay. (*Id.* at p. 129, 283 Cal.Rptr. 17.) Hence, the trial court here properly reduced the non-economic verdict to the $250,000 MICRA cap before it applied the Proposition 51 percentage to the settlement.

***1103** Plaintiffs proposed that the proportion of economic damages to the total should be calculated *before* the MICRA cap is imposed. Hence, the proportion would be 31.31 percent ($1,366,367 total pre-MICRA divided by $4,366,357) times the settlement of $650,000 (31.31 x $650,000 = $203,450). Their math looks like this:

1,366,357	Economic damages
203,450	Econ. portion of settlement subject to set off.
50,000	MICRA cap reduced by defendants' 20 percent fault
1,212,907	

However, as noted, this computation runs afoul of the care of *Gilman* to assure that the liability of an individual defendant for noneconomic damages was limited to an amount commensurate with that defendant's personal share of fault.

Alternatively, plaintiffs posited a "common-sense

approach" under which they added the economic damages of $1,366,357 and the MICRA non-economic damages of $250,000 for a total of $1,616,357. They ****34** then subtracted *the entire $650,000 settlement with co-defendants,* yielding a total of $966,357.

+	1,366,357	Economic damages
+	250,000	Non-economic damages
-	650,000	Offset of entire settlement with the other defendants
=	966,357	

This proposal ignores the Proposition 51 requirement that defendants' liability for noneconomic damages not exceed their 20 percent share based on the jury's determination that they were only 20 percent at fault.

Plaintiffs' "common-sense approach" offends Proposition 51. Plaintiffs should bear the burden of undercontribution of the settling parties. (*DaFonte v. Up-Right, Inc., supra,* 2 Cal.4th at p. 604, fn. 6, 7 Cal.Rptr.2d 238, 828 P.2d 140.) By comparison, the computation that the trial court employed here maximizes plaintiffs' recovery in that they recover all of the nonsettling defendants' 20 percent responsibility for noneconomic damages, but no more. In sum, plaintiffs have shown no error in the calculation of noneconomic damages. Consequently, plaintiffs may not recover their prejudgment interest based on their Code of Civil Procedure section 998 offer to compromise.

***1104** DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal and cross-appeal.

We concur: CROSKEY, Acting P.J., and KITCHING, J.

All Citations

139 Cal.App.4th 1075, 44 Cal.Rptr.3d 14, 2006 Daily Journal D.A.R. 6447

Footnotes

1 Plaintiffs also sued surgeon David Joseph Lourie, M.D., Comprehensive Surgical Specialists, pulmonary and critical care physician John Carmody, M.D., Foothill Pulmonary Critical Consultants Medical Group, surgical resident Daniel Scott Diamond, M.D., and Huntington Memorial Hospital. By the time the jury commenced deliberations, all of the defendants except Dr. Bryan and Hill Medical Corporation had settled with plaintiffs.

2 A V–Q scan or ventilation perfusion scan produces an image of the chest that can aid doctors in evaluating the possibility of a pulmonary embolism.

3 In 2003, BAJI No. 3.76 read: "The law defines cause in its own particular way. A cause of [injury], [damage], [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury], [damage], [loss] [or] [harm]."

4 In 2003, CACI No. 431 reads: "A person's negligence may combine with another factor to cause harm. If you find that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, then [*name of defendant*] is responsible for the harm. [*Name of defendant*] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [*name of plaintiff*]'s harm."

5 Defendants did object to a statement made by plaintiffs' attorney during closing argument. "[PLAINTIFFS' ATTORNEY]: [Defendants' attorney] when she was up here, put a document up and then read something different. If cause of injury or death is something more likely than not a factor. Sometimes prepositions are very important. They are there for a reason. 'A factor.' [¶] [DEFENDANTS' ATTORNEY]: I object. That is misstatement of the law. [¶] THE COURT: He [plaintiffs' attorney] is just reading it," i.e., reading the instruction as modified by the court and parties.

6 Defense counsel insisted she had proposed two instructions, to which the court replied that defense counsel's two proposed instructions were scribbled on. The court returned them to the clerk as appropriate.

7 Defendants also submitted the following alternative instruction: "Plaintiff must show that one or more of the defendants was a cause of plaintiff's injuries. This requires the plaintiff to prove through expert testimony that *but for* the defendant(s) [*sic*] negligence, it is more likely than not the plaintiff would not have sustained her claimed injuries."

8 *Mitchell* also observed that the word "substantial" in 3.76 was susceptible of misuse. (*Mitchell, supra,* 54 Cal.3d at p. 1053, 1 Cal.Rptr.2d 913, 819 P.2d 872.) *Mitchell* noted the concern of others that new uses for BAJI 3.76 have been created. An example was where a defendant's conduct, while clearly a "but for" cause of injury, did not substantially contribute to the harm. In such a case, the "substantial factor" test "undermines the principles of comparative negligence...." (*Ibid.*) Here, however, we are not faced with this problem because the jury found that Dr. Bryan's negligence was a substantial factor in bringing about Mr. Mayes's harm.

9 This case does not involve concurrent independent causes, plaintiffs' suggestion to the contrary notwithstanding. Plaintiffs have not shown that each of the negligent acts individually caused Mrs. Mayes's death. Rather, plaintiffs' theory of the case was that the death was brought about by a combination of Dr. Bryan's negligent interpretation of the lung scan and the surgeon's failure to recognize a gastric leak. Hence, *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 359, 168 Cal.Rptr. 571, does not apply. (*Viner, supra,* 30 Cal.4th at p. 1240, 135 Cal.Rptr.2d 629, 70 P.3d 1046.)

10 In arguing that the jury should have been instructed on both "substantial factor" *and* "but for," defendants focus on a footnote *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 8 Cal.Rptr.3d 363, which cites *Viner*. *Jennings* concerning the admissibility of expert testimony in medical malpractice case. That testimony was struck because, among other things, it was too speculative to satisfy the standard that it was "*more probable than not* that the negligent act was a cause-in-fact of the plaintiff's injury." (*Id.* at p. 1118, 8 Cal.Rptr.3d 363.) In the *footnote* defendants cite, *Jennings* stated, the plaintiff "correctly notes that liability attaches if negligence is a substantial factor in causing the injury, and [the expert] testified the retained retractor *either caused or contributed to the infection.* However, on the facts of this case, this is a distinction without a difference. Proof that a negligent act was a substantial factor in causing the injury does not relieve the plaintiff of the burden of proving the negligent act was a cause-in-fact of the injury [citation], and therefore we must test the propriety of the trial court's order striking [the expert's] opinion by assuming he sought to opine the retained retractor was a cause-in-fact of the infection." (*Id.* at p. 1114, fn. 3, 8 Cal.Rptr.3d 363, italics added, citing *Viner v. Sweet, supra,* 30 Cal.4th at pp. 1239–1244, 135 Cal.Rptr.2d 629, 70 P.3d 1046.) That is, the expert's testimony in *Jennings* did not demonstrate cause-in-fact, no matter how causation was phrased. (*Jennings, supra,* 114 Cal.App.4th at pp. 1118–1121, 8 Cal.Rptr.3d 363.) *Jennings* does not stand for the proposition that when admissible evidence of causation in fact has been adduced, the jury must be instructed on both "substantial factor" *and* "but for" causation. *Jennings* does not undermine the conclusion that the court is not required to instruct from both tests of cause-in-fact unless the state of the evidence suggests otherwise.

11 Defendants argue that Dr. Bryan's analysis was "a preliminary interpretation" that differed from "the formal interpretation made later that morning" by Dr. Wang. The evidence does not support this gloss in any measure. Rather, it shows that Dr. Bryan's analysis was the formal one as it was the analysis that persuaded the clinicians to treat Mrs. Mayes for pulmonary embolism and no longer to consider any of the other disorders on the differential diagnoses.

12 Defendants argue that "plaintiffs' experts admitted [that] an interpretation of the VQ scan as an intermediate probability for pulmonary embolism would have been within the standard of care." Dr. Birnberg did agree on cross-examination that if the *clinical* probability of pulmonary embolism is high and the *V–Q scan* probability is *high or intermediate,* there is a substantial or 66 percent chance of pulmonary embolism. However, defendants have given us no citation to the record where any *expert opined that a reading of "intermediate probability" for Mrs. Mayes's lung scan fell within the standard of care.* Nor do they cite testimony

that *had the treating physicians received a reading of "intermediate probability* " from Dr. Bryan, that they would have treated Mrs. Mayes for pulmonary embolism anyway.

13 Plaintiffs settled with Dr. Diamond and Huntington Memorial Hospital for $200,000; with Dr. Carmody and Foothill Pulmonary and Critical Care Consultants Medical Group for $150,000; and Dr. Lourie and Comprehensive Surgical Specialists, Inc. for $300,000, for an aggregate of $650,000.

14 Section 3333.2, subdivisions (a) and (b) read, "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. [ ](b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."

15 Code of Civil Procedure section 877 reads in relevant part, "Where a release ... is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: [¶] (a) It shall ... reduce the claims against the others in the amount stipulated by the release ... or in the amount of the consideration paid for it whichever is greater."

16 *Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 26 Cal.Rptr.3d 501, cited by plaintiffs is likewise inapposite. There, only one defendant was subject to the MICRA limit. (*Id.* at p. 1389, 26 Cal.Rptr.3d 501.) By contrast, as in *Gilman,* more than one defendant here shared responsibility for plaintiffs' injury was subject to MICRA, necessitating, hence, the apportionment of the $250,000 MICRA limit.

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LEGAL AUTHORITY AA-95

140 S.Ct. 2452
Supreme Court of the United States.

Jimcy MCGIRT, Petitioner
v.
OKLAHOMA

No. 18-9526
|
Argued May 11, 2020
|
Decided July 9, 2020

Synopsis
Background: Following defendant's conviction for three serious sexual offenses in state court, defendant, an enrolled member of an American Indian tribe, applied for postconviction relief, arguing that only federal courts had jurisdiction under the federal Major Crimes Act (MCA). The Oklahoma District Court, Wagoner County, denied the application. Defendant appealed. The Oklahoma Court of Criminal Appeals affirmed. Defendant's petition for a writ of certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] Congress established a reservation for Creek Nation;

[2] government's allotment agreement with Creek Nation did not terminate Creek Reservation;

[3] Congress's intrusions on Creek Nation's promised right of self-governance did not disestablish Creek Reservation;

[4] historical practices, demographics, and other extratextual evidence were insufficient to prove disestablishment of Creek Reservation;

[5] Creek Nation originally holding fee title to land did not make land "dependent Indian community," rather than reservation;

[6] eastern Oklahoma is not exempt from the MCA; and

[7] potential for transformative effects was insufficient justification to disestablish Creek Reservation.

Judgment of the Court of Criminal Appeals reversed.

Chief Justice Roberts filed dissenting opinion in which Justice Alito and Justice Kavanaugh joined, and in which Justice Thomas joined in part.

Justice Thomas filed dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (31)

[1] **Indians**🔑State court or authorities

State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." 18 U.S.C.A. § 1153(a).

1 Cases that cite this headnote

[2] **Indians**🔑Reservations or Grants to Indian Nations or Tribes
Indians🔑Federal court or authorities

Congress established a reservation for Creek Nation, as relevant to determining whether area of land was "Indian Country" under federal Major Crimes Act (MCA); even though early treaties did not refer to Creek lands as "reservation," treaties "solemnly guarantied" land and established boundary lines to secure "permanent home" to Creek Nation, later treaty that reduced size of land restated commitment that remaining land would "be forever set apart" as home for Creek Nation and referred to lands as "reduced Creek reservation," and Creek were assured right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. 18 U.S.C.A. § 1151(a); Treaty with the Creek Nation of Indians, Arts. 3, 9, June 14, 1866, 14 Stat. 786; Treaty with the Creek Nation of Indians, Arts. 4, 15, 1856, 11 Stat. 700; Treaty with the Creek Nation of Indians, Arts. 3, 9, 1833, 7 Stat. 418, 420; Treaty with the Creek Nation of Indians,

Arts. 1, 12, 14, 15, 1832, 7 Stat. 366, 367, 368.

1 Cases that cite this headnote

[3] **Indians**Government of Indian Country, Reservations, and Tribes in General

To determine whether a tribe continues to hold a reservation, there is only one place a court may look: the Acts of Congress.

[4] **Indians**Authority over and regulation of tribes in general
IndiansAlteration or abrogation in general

The Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties; but that power belongs to Congress alone. U.S. Const. art. 1, § 8.

[5] **Indians**Authority over and regulation of tribes in general
IndiansAlteration or abrogation in general

A court will not lightly infer that Congress breached its own promises and treaties once Congress has established a reservation. U.S. Const. art. 1, § 8.

[6] **Indians**Lands included and boundaries; appropriation and diminishment
IndiansState regulation

States have no authority to reduce federal reservations lying within their borders. U.S. Const. art. 1, § 8; U.S. Const. art. 6, cl. 2.

[7] **Indians**Lands included and boundaries; appropriation and diminishment

Courts have no proper role in the adjustment of reservation borders.

[8] **Indians**Lands included and boundaries; appropriation and diminishment
IndiansDisestablishment and termination

Only Congress can divest a reservation of its land and diminish its boundaries.

2 Cases that cite this headnote

[9] **Indians**Authority over and regulation of tribes in general

It is no matter how many other promises to a tribe the federal government has already broken, if Congress wishes to break the promise of a reservation, it must say so.

[10] **Indians**Disestablishment and termination

Disestablishment of a reservation has never required any particular form of words, but it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.

2 Cases that cite this headnote

[11] **Indians** Disestablishment and termination
Indians Operation and effect

Government's allotment agreement with Creek Nation, which established procedures for allotting 160-acre parcels to individual Tribe members, did not terminate Creek Reservation; even if allotment was first step in plan aimed at disestablishment of reservations, agreement did not evince anything like a present and total surrender of all tribal interests in affected lands, private land ownership within reservation boundaries was contemplated by statute, and Congress was able to allow tribes to continue to exercise governmental functions over land even if they no longer owned it communally. 18 U.S.C.A. § 1151(a).

1 Cases that cite this headnote

[12] **Indians** Disestablishment and termination

Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.

[13] **Indians** Disestablishment and termination

Congress's intrusions on Creek Nation's promised right of self-governance, during period in which Congress sought to pressure tribes to parcel their lands into smaller lots owned by individual tribe members, did not disestablish Creek Reservation; even though Congress abolished the Creeks' tribal courts, required presidential approval of tribal ordinances, and empowered President to remove and replace principal chief, among other incursions on tribal autonomy, Congress left Tribe with significant sovereign functions over lands, such as power to collect taxes, operate schools, legislate, and oversee the federally mandated allotment process, Congress never withdrew its recognition of the tribal government, and eventually Congress enabled Creek government to resume previously suspended functions. Act of June 26, 1936, § 3, 49 Stat. 1967; Act of May 24, 1924, ch. 181, 43 Stat. 139; Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; Act of May 27, 1908, § 13, 35 Stat. 316; Five Civilized Tribes Act, §§ 6, 10, 11, 27, 28, 34 Stat. 139-141, 148; Curtis Act of 1898, § 28, 30 Stat. 504-505.

1 Cases that cite this headnote

[14] **Indians** Disestablishment and termination

Historical practices, demographics, and other extratextual evidence were insufficient to prove disestablishment of Creek Nation's reservation, as relevant to state court jurisdiction under federal Major Crimes Act (MCA), in light of Congress's failure to explicitly disestablish reservation, even if state had long historical prosecutorial practice of asserting jurisdiction over Indians in state court, many people had thought reservation system would be disbanded soon, and non-Indians swiftly moved on to reservation, such that Tribe members constituted small fraction of those now residing on land. 18 U.S.C.A. § 1153(a).

[15] **Indians** Disestablishment and termination

When interpreting Congress's work in the arena of disestablishment of reservations, no less than any other, a court's charge is usually to ascertain and follow the original meaning of the law before it.

1 Cases that cite this headnote

[16] **Statutes** Contemporary and Historical Circumstances

If during the course of the Supreme Court's work an ambiguous statutory term or phrase emerges, the Court will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment.

2 Cases that cite this headnote

[17] **Statutes** Contemporary and Historical Circumstances

A court may not favor contemporaneous or later practices instead of the laws Congress passed.

2 Cases that cite this headnote

[18] **Indians** Reservations or Grants to Indian Nations or Tribes

Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

[19] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
Statutes Extrinsic Aids to Construction

There is no need to consult extratextual sources when the meaning of a statute's terms is clear.

[20] **Statutes** Language
Statutes Extrinsic Aids to Construction

Extratextual sources may not overcome the terms of a statute.

[21] **Statutes** Extrinsic Aids to Construction

The only role extratextual materials can properly play is to help clear up, not create, ambiguity about a statute's original meaning.

1 Cases that cite this headnote

[22] **Indians** Construction and operation
Indians Disestablishment and termination

Disestablishment of a reservation may not be lightly inferred, and treaty rights are to be construed in favor, not against, tribal rights.

[23] **Indians** Disestablishment and termination
Indians Federal court or authorities

Creek Nation originally holding fee title to land did not make land "dependent Indian community," rather than reservation, for purposes of evaluating disestablishment and a state court's jurisdiction under federal Major Crimes Act (MCA); even though Creek Tribe did not hold usual Indian right of occupancy, President was authorized not only to solemnly assure that United States would forever secure and guaranty to Tribe the country so exchanged with them, but also to cause patent or grant to be made and executed to Tribe as additional protection, Creek Nation insisted on fee title when negotiating treaty and received land patent, and land was reserved from sale in sense that government could not give tribal lands to others or appropriate them without engaging in act of confiscation. 18 U.S.C.A. §§ 1151(b), 1153; Indian Removal Act of 1830, § 3, 4 Stat. 412; Treaty with the Creek Nation of Indians, Art. 3, 1833, 7 Stat. 419.

[24] **Indians**🔑Reservations or Grants to Indian Nations or Tribes
Indians🔑Disestablishment and termination

Just as there is no particular form of words required when it comes to disestablishing a reservation, there are no particular form of words required when it comes to establishing one.

[25] **Indians**🔑Federal court or authorities

Eastern Oklahoma is not exempt from the federal Major Crimes Act's (MCA) provision allowing only the federal government to try certain crimes committed by American Indians in Indian country. 18 U.S.C.A. §§ 1151, 1153(a).

1 Cases that cite this headnote

[26] **Indians**🔑State court or authorities
Indians🔑Federal court or authorities

The Supreme Court has long required a clear expression of the intention of Congress before the state or federal government may try Indians for conduct on their lands.

1 Cases that cite this headnote

[27] **Indians**🔑Disestablishment and termination
Indians🔑Federal court or authorities

Potential for transformative effects was insufficient justification to disestablish Creek Nation's reservation, for purposes of state court's jurisdiction under federal Major Crimes Act (MCA), despite contentions that half Oklahoma's land and roughly 1.8 million of its residents could wind up within Indian country, and that thousands of state-court convictions of Native Americans would be upset; number of people who would challenge jurisdictional basis of their state-court convictions was speculative, contrary decision would have called into question every federal conviction obtained for crimes committed on trust lands and restricted Indian allotments, and only question was statutory definition of "Indian country" under MCA. 18 U.S.C.A. § 1153(a).

[28] **Indians**🔑Non-Indian Defendant
Indians🔑Crime committed in Indian country or on reservation

Aside from certain crimes committed in Indian country by Indian defendants and a broader range of crimes by or against Indians in Indian country, as addressed by the federal Major Crimes Act (MCA), states are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. 18 U.S.C.A. §§ 1152, 1153.

1 Cases that cite this headnote

[29] **Federal Courts**🔑Review of state courts

Oklahoma's general rule that issues that were not raised previously on direct appeal, but which could have been raised, were waived for further review, did not bar United States Supreme Court from addressing defendant's claim that federal Major Crimes Act (MCA) precluded state court jurisdiction; Oklahoma Court of Criminal Appeals, after noting potential state-law obstacle, proceeded to address merits of defendant's federal MCA claim anyway, and Oklahoma Court's opinion fairly appeared to rest primarily on federal law or to be interwoven with federal law and lacked any plain statement that it was relying on a state-law ground. 18

U.S.C.A. § 1153(a).

5 Cases that cite this headnote

[30] **Courts** Previous Decisions as Controlling or as Precedents

The magnitude of a legal wrong is no reason to perpetuate it.

2 Cases that cite this headnote

[31] **Statutes** Implied amendment

Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.

*Syllabus**

The Major Crimes Act (MCA) provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." § 1151. Petitioner Jimcy McGirt was convicted by an Oklahoma state court of three serious sexual offenses. He unsuccessfully argued in state postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. He seeks a new trial, which, he contends, must take place in federal court.

Held: For MCA purposes, land reserved for the Creek Nation since the 19th century remains "Indian country." Pp. 2460 – 2482.

(a) Congress established a reservation for the Creek Nation. An 1833 Treaty fixed borders for a "permanent home to the whole Creek Nation of Indians," 7 Stat. 418, and promised that the United States would "grant a patent, in fee simple, to the Creek nation of Indians for the [assigned] land" to continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them," *id.*, at 419. The patent formally issued in 1852.

Though the early treaties did not refer to the Creek lands as a "reservation," similar language in treaties from the same era has been held sufficient to create a reservation, see, *e.g.*, *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697, and later Acts of Congress—referring to the "Creek reservation"—leave no room for doubt, see, *e.g.*, 17 Stat. 626. In addition, an 1856 Treaty promised that "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State," 11 Stat. 700, and that the Creeks would have the "unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property, *id.*, at 704. Pp. 2460 – 2462.

(b) Congress has since broken more than a few promises to the Tribe. Nevertheless, the Creek Reservation persists today. Pp. 2461 – 2474.

(1) Once a federal reservation is established, only Congress can diminish or disestablish it. Doing so requires a clear expression of congressional intent. Pp. 2461 – 2463.

(2) Oklahoma claims that Congress ended the Creek Reservation during the so-called "allotment era"—a period when Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribal members. Missing from the allotment-era agreement with the Creek, see 31 Stat. 862–864, however, is any statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. And this Court has already rejected the argument that allotments automatically ended reservations. Pp. 2462 – 2466.

(3) Oklahoma points to other ways Congress intruded on the Creeks' promised right to self-governance during the allotment era, including abolishing the Creeks' tribal courts, 30 Stat. 504–505, and requiring Presidential approval for certain tribal ordinances, 31 Stat. 872. But these laws fall short of eliminating all tribal interest in the contested lands. Pp. 2462 – 2468.

(4) Oklahoma ultimately claims that historical practice and demographics are enough by themselves to prove disestablishment. This Court has consulted contemporaneous usages, customs, and practices to the extent they shed light on the meaning of ambiguous statutory terms, but Oklahoma points to no ambiguous language in any of the relevant statutes that could plausibly be read as an act of cession. Such extratextual considerations are of " 'limited interpretive value,' " *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1082, 194 L.Ed.2d 152, and the "least compelling" form of evidence, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356, 118 S.Ct. 789, 139 L.Ed.2d 773. In the end, Oklahoma resorts to the State's long historical practice of prosecuting Indians in state court for serious crimes on the contested lands, various statements made during the allotment era, and the speedy and persistent movement of white settlers into the area. But these supply little help with the law's meaning and much potential for mischief. Pp. 2467 – 2468.

(c) In the alternative, Oklahoma contends that Congress never established a reservation but instead created a "dependent Indian community." To hold that the Creek never had a reservation would require willful blindness to the statutory language and a belief that the land patent the Creek received somehow made their tribal sovereignty easier to divest. Congress established a reservation, not a dependent Indian community, for the Creek Nation. Pp. 2474 – 2476.

(d) Even assuming that the Creek land is a reservation, Oklahoma argues that the MCA has never applied in eastern Oklahoma. It claims that the Oklahoma Enabling Act, which transferred all non-federal cases pending in the territorial courts to Oklahoma's state courts, made the State's courts the successors to the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations. That argument, however, rests on state prosecutorial practices that defy the MCA, rather than on the law's plain terms. Pp. 2476 – 2478.

(e) Finally, Oklahoma warns of the potential consequences that will follow a ruling against it, such as unsettling an untold number of convictions and frustrating the State's ability to prosecute crimes in the future. This Court is aware of the potential for cost and conflict around jurisdictional boundaries. But Oklahoma and its tribes have proven time and again that they can work successfully together as partners, and Congress remains free to supplement its statutory directions about the lands in question at any time. Pp. 2478 – 2482.

Reversed.

GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined, except as to footnote 9. THOMAS, J., filed a dissenting opinion.

***2456** ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

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Opinion

Justice GORSUCH delivered the opinion of the Court.

***2459** On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a

new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt's arguments rejected them, so he now brings them here.

[1]Mr. McGirt's appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 102–103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993).

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? A neighboring provision of the MCA defines the term to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." § 1151(a). Mr. McGirt submits he can satisfy ***2460** this condition because he committed his crimes on land reserved for the Creek since the 19th century.

The Creek Nation has joined Mr. McGirt as *amicus curiae*. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt's personal interests wind up implicating the Tribe's. No one disputes that Mr. McGirt's crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute. But, in seeking to defend the state-court judgment below, Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today.

At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy v. Royal*, 875 F.3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. 589 U. S. ——, 138 S.Ct. 2026, 201 L.Ed.2d 27 (2018).

II

[2]Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. The government's promises weren't made gratuitously. Rather, the 1832 Treaty

acknowledged that "[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi" and, in service of that goal, required the Creeks to cede all lands in the East. Arts. I, XII, 7 Stat. 366, 367. Nor were the government's promises meant to be delusory. Congress twice assured the Creeks that "[the] Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States." 1832 Treaty, Art. XV, *id.*, at 368; see 1833 Treaty, Art. IX, 7 Stat. 420 ("agreement shall be binding and obligatory" upon ratification). Both treaties were duly ratified and enacted as law.

Because the Tribe's move west was ostensibly voluntary, Congress held out another assurance as well. In the statute that precipitated these negotiations, Congress authorized the President "to assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the bill continued, "the United States will cause a patent or grant to be made and executed to them for the same; *Provided always*, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Ibid.* If agreeable to all sides, a tribe would not only enjoy the government's solemn treaty promises; it would hold legal title to its lands.

***2461** It was an offer the Creek accepted. The 1833 Treaty fixed borders for what was to be a "permanent home to the whole Creek nation of Indians." 1833 Treaty, preamble, 7 Stat. 418. It also established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty." Art. III, *id.*, at 419. That grant came with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *Ibid.* The promised patent formally issued in 1852. See *Woodward v. De Graffenried*, 238 U.S. 284, 293–294, 35 S.Ct. 764, 59 L.Ed. 1310 (1915).

These early treaties did not refer to the Creek lands as a "reservation"—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation. See *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (grant of land " 'for a home, to be held as Indian lands are held,' " established a reservation). And later Acts of Congress left no room for doubt. In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, *id.*, at 786, 788.[1] Throughout the late 19th century, many other federal laws also expressly referred to the Creek Reservation. See, *e.g.*, Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV, *id.*, at 704. So the Creek were promised not only a "permanent home" that would be ***2462** "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation.

So in what sense, if any, can we say that the Creek Reservation persists today?

[3] [4] [5]To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568, 23 S.Ct. 216, 47 L.Ed. 299 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

[6]Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

[7] [8] [9] [10]Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161. So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be " 'restored to the public domain.' " *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). ***2463** Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.' " *Nebraska* v. *Parker*, 577 U. S. 481, —— – ——, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

B

[11]In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called "allotment era." Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. See 1 F. Cohen, Handbook of Federal Indian Law § 1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388. Some allotment advocates hoped that the policy would create a class of assimilated, landowning, agrarian Native Americans. See Cohen § 1.04; F. Hoxie, A Final Promise: The Campaign To Assimilate 18–19 (2001). Others may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own. See *id.*, at 14–15; cf. General Allotment Act of 1887, § 5, 24 Stat. 389–390.

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645–646. A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894). At that time, before this Court's decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report

seriously and turned their attention to allotment rather than cession.[2]

The Commission's work culminated in an allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain pre-existing town sites and other special matters, the Agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, *id*., at 862–864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, *id*., at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

***2464** Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

[12]In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U.S., at 497, 93 S.Ct. 2245 ("[A]llotment under the ... Act is completely consistent with continued reservation status"); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (holding that allotment act "did no more than open the way for non-Indian settlers to own land on the reservation"); *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079–1080 ("[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement.... Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted)).

It isn't so hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 3 E. Washburn, American Law of Real Property *521–*524. And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms. Cf. *Seymour*, 368 U.S., at 357–358, 82 S.Ct. 424.[3]

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz*, Congress's expressed policy at the time "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." 412 U.S. at 496, 93 S.Ct. 2245. Then, "[w]hen all the lands had been allotted and ***2465** the trust expired, the reservation could be abolished." *Ibid.* This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this is why Congress at the turn of the 20th century "believed to a man" that "the reservation system would cease" "within a generation at most." *Solem*, 465 U.S., at 468, 104 S.Ct. 1161. Still, just as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.[4]

Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also

lying within modern-day Oklahoma, and then provided "further, That the reservation lines of the said ... reservations ... are hereby abolished." Act of Apr. 21, 1904, § 8, 33 Stat. 217–218 (emphasis deleted); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–440, n. 22, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (collecting other examples). Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act. That doesn't make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day.[5]

C

[13]If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. Separately, ***2466** the Creek Allotment Agreement provided that tribal ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof " would not be valid until approved by the President of the United States. § 42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§ 39, 40, 42, *id.*, at 871–872; *Buster v. Wright*, 135 F. 947, 949–950, 953–954 (C.A.8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

Much more ominously, the 1901 allotment agreement ended by announcing that the Creek tribal government "shall not continue" past 1906, although the agreement quickly qualified that statement, adding the proviso "subject to such further legislation as Congress may deem proper." § 46, 31 Stat. 872. Thus, while suggesting that the tribal government *might* end in 1906, Congress also necessarily understood it had not ended in 1901. All of which was consistent with the Legislature's general practice of taking allotment as a first, not final, step toward disestablishment and dissolution.

When 1906 finally arrived, Congress adopted the Five Civilized Tribes Act. But instead of dissolving the tribal government as some may have expected, Congress "deem[ed] proper" a different course, simply cutting away further at the Tribe's autonomy. Congress empowered the President to remove and replace the principal chief of the Creek, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of tribal schools. §§ 6, 10, 28, 34 Stat. 139–140, 148. The Act also provided for the handling of the Tribe's funds, land, and legal liabilities in the event of dissolution. §§ 11, 27, *id.*, at 141, 148. Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek's "tribal existence and present tribal governmen[t]" and "continued [them] in full force and effect for all purposes authorized by law." § 28, *id.*, at 148.

In the years that followed, Congress continued to adjust its arrangements with the Tribe. For example, in 1908, the Legislature required Creek officials to turn over all "tribal properties" to the Secretary of the Interior. Act of May 27, 1908, § 13, 35 Stat. 316. The next year, Congress sought the Creek National Council's release of certain money claims against the U. S. government. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805. And, further still, Congress offered the Creek Nation a one-time opportunity to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation." Act of May 24, 1924, ch. 181, 43 Stat. 139; see, *e.g.*, *United States v. Creek Nation*, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.

***2467** Indeed, with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted "away from assimilation policies and toward more tolerance and respect for

traditional aspects of Indian culture." 1 Cohen § 1.05. Few in 1900 might have foreseen such a profound "reversal of attitude" was in the making or expected that "new protections for Indian rights," including renewed "support for federally defined tribalism," lurked around the corner. *Ibid.*; see also M. Scherer, Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945–1995, pp. 2–4, (1999). But that is exactly what happened. Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, § 3, 49 Stat. 1967, enabling the Creek government to resume many of its previously suspended functions. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442–1447 (C.A.D.C. 1988).[6]

The Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government. *Ibid.*; see Muscogee Creek Nation (MCN) Const., Arts. V, VI, and VII. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 36–39. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. See *Hodel*, 851 F.2d at 1442, 1446–1447 (confirming Tribe's authority to do so). The territorial jurisdiction of these courts extends to any Indian country within the Tribe's territory as defined by the Treaty of 1866. MCN Stat. 27, § 1–102(A). And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994. See *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (Apr. 18, 2019), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. It seems, for example, that at least certain Members of Congress hesitated about disestablishment in 1906 because they feared any reversion of the Creek lands to the public domain would trigger a statutory commitment to hand over portions of these lands to already powerful railroad interests. See, *e.g.*, 40 Cong. Rec. 2976 (1906) (Sen. McCumber); *Id.*, at 3053 (Sen. Aldrich). Many of those who advanced the reorganization efforts of the 1930s may have done so more out of frustration with efforts to assimilate Native Americans than any disaffection with assimilation ***2468** as the ultimate goal. See 1 Cohen § 1.05; Scherer, Imperfect Victories, at 2–4. But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.[7]

D

[14]Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

[15] [16] [17] [18]This is mistaken. When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. *New Prime Inc.* v. *Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed. As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161 (citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

Still, Oklahoma reminds us that *other* language in *Solem* isn't so constrained. In particular, the State highlights a passage suggesting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." 465 U.S. at 471, 104 S.Ct. 1161. While acknowledging that resort to subsequent

demographics was "an unorthodox and potentially unreliable method of statutory interpretation," the Court seemed nonetheless taken by its "obvious practical advantages." *Id.*, at 472, n. 13, 471, 104 S.Ct. 1161.

Out of context, statements like these might suggest historical practices or current demographics can suffice to disestablish or diminish reservations in the way Oklahoma envisions. But, in the end, *Solem* itself found these kinds of arguments provided "no help" in resolving the dispute ***2469** before it. *Id.*, at 478, 104 S.Ct. 1161. Notably, too, *Solem* suggested that whatever utility historical practice or demographics might have was "demonstrated" by this Court's earlier decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). See *Solem*, 465 U.S., at 470, n. 10, 104 S.Ct. 1161. And *Rosebud Sioux* hardly endorsed the use of such sources to find disestablishment. Instead, based on the statute at issue there, the Court came "to the firm conclusion that congressional intent" was to diminish the reservation in question. 430 U.S. at 603, 97 S.Ct. 1361. At that point, the Tribe sought to cast doubt on the clear import of the text by citing subsequent historical events—and the Court rejected the Tribe's argument *exactly because* this kind of evidence could not overcome congressional intent as expressed in a statute. *Id.*, at 604–605, 97 S.Ct. 1361.

This Court has already sought to clarify that extratextual considerations hardly supply the blank check Oklahoma supposes. In *Parker*, for example, we explained that "[e]vidence of the subsequent treatment of the disputed land ... has 'limited interpretive value.' " 577 U. S., at ——, 136 S.Ct., at 1082 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998)).[8] *Yankton Sioux* called it the "least compelling" form of evidence. *Id.*, at 356, 118 S.Ct. 789. Both cases emphasized that what value such evidence has can only be *interpretative*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment.

[19] [20] [21]To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161 (citing *Celestine*, 215 U.S., at 285, 30 S.Ct. 93); see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain") (citation and internal quotation marks omitted).

[22]The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence ***2470** as a matter of course. *Post*, at 2487 – 2488. But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. *Solem*, 465 U.S., at 472, 104 S.Ct. 1161.[9]

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit's *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F.3d 896. Second, they offer statements from various sources to show that "everyone" in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a "vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors." Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 15. All this history, we are told, supplies "compelling" evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State's argument about its longstanding practice of

asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, § 1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in § 1151(c), the statute does the same for major crimes committed by Indians on "Indian allotments, the Indian titles of which have not been extinguished." Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, ***2471** until state courts finally disavowed the practice in 1989. See *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla.Crim. 111, 61 P.2d 1139 (1936)); see also *United States v. Sands*, 968 F.2d 1058, 1062–1063 (C.A.10 1992). And if the State's prosecution practices disregarded § 1151(c) for so long, it's unclear why we should take those same practices as a reliable guide to the meaning and application of § 1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn't Indian country at all, to Oklahoma it just didn't matter. In the State's view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern half of the State where the Creek lands can be found. By Oklahoma's own admission, then, for decades its historical practices in the area in question didn't even *try* to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken, yet one more error in historical practice that even the dissent does not attempt to defend. See Part V, *infra*.[10]

To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. See, *e.g.*, *Negonsott*, 507 U.S., at 106–107, 113 S.Ct. 1119 ("[I]n practice, Kansas had exercised jurisdiction over all offenses committed on Indian reservations involving Indians" (quoting memorandum from Secretary of the Interior, H. R. Rep. No. 1999, 76th Cong., 3d Sess., 4 (1940)); Scherer, Imperfect Victories, at 18 (describing "nationwide jurisdictional confusion" as a result of the MCA); Cohen § 6.04(4)(a) ("Before 1942 the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations, but a federal court decision in that year raised questions about the validity of state jurisdiction"); Brief for United States as *Amicus Curiae* in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 7a–8a (Letter from Secretary of the Interior, Mar. 27, 1963) (noting that many States have asserted criminal jurisdiction over Indians without an apparent basis in a federal law).[11]

***2472** Oklahoma next points to various statements during the allotment era which, it says, show that even the Creek understood their reservation was under threat. And there's no doubt about that. By 1893, the leadership of the Creek Nation saw what the federal government had in mind: "They [the federal government] do not deny any of our rights under treaty, but say they will go to the people themselves and confer with them and urge upon them the necessity of a change in their present condition, and upon their refusal will force a change upon them." P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893). Not a decade later, and as a result of these forced changes, the leadership recognized that " '[i]t would be difficult, if not impossible to successfully operate the Creek government now.' " App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). Surely, too, the future looked even bleaker: " 'The remnant of a government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled.' " *Ibid*.

But note the nature of these statements. The Creek Nation recognized that the federal government *will* seek to get popular support or otherwise *would* force change. Likewise, the Tribe's government *would* continue for only so long. These were prophesies, and hardly groundbreaking ones at that. After all, the 1901 Creek Allotment Agreement explicitly said that the tribal government "shall not continue" past 1906. § 46, 31 Stat. 872. So what might statements like these tell us that isn't already evident from the statutes themselves? Oklahoma doesn't suggest they shed light on the meaning of some disputed and ambiguous statutory direction. More nearly, the State seeks to render the Creek's fears self-fulfilling.[12]

We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government "operated" on the "understanding" that the reservation was disestablished. *Post,* at 2499. In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that " 'all offenses by or against Indians' in the former Indian Territory 'are subject to State laws.' " *Ibid.* (quoting App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). But that statement is incorrect. As we have just seen, Oklahoma's courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. See *Klindt*, 782 P.2d at 403–404. And the dissent does not dispute that Oklahoma is ***2473** without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation. All of which highlights the pitfalls of elevating commentary over the law.[13]

Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to think about the question. Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. A. Debo, And Still the Waters Run 86–87, 117–118 (1940). And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. *Id*., at 104–106, 233–234; Brief for Historians et al. as *Amici Curiae* 26–30. Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.[14]

***2474** In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

IV

[23]Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place. Over all the years, from the federal government's first guarantees of land and self-government in 1832 and through the litany of promises that followed, the Tribe never received a reservation. Instead, what the Tribe has had all this time qualifies only as a "dependent Indian community."

Even if we were to accept Oklahoma's bold feat of reclassification, however, it's hardly clear the State would win this case. "Reservation[s]" and "Indian allotments, the Indian titles to which have not been extinguished," qualify as Indian country under subsections (a) and (c) of § 1151. But "dependent Indian communities" *also* qualify as Indian country under subsection (b). So Oklahoma lacks jurisdiction to prosecute Mr. McGirt whether the Creek lands happen to fall in one category or another.

About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem*'s rule that only Congress may disestablish a reservation. And to achieve that, the State has to persuade us not only that the Creek lands constitute a "dependent Indian community" rather than a reservation. It *also* has to convince us that we should announce a rule that dependent Indian community status can be lost more easily than reservation status, maybe even by the happenstance of shifting demographics.

To answer this argument, it's enough to address its first essential premise. Holding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes. Perhaps that is why the Solicitor General, who supports Oklahoma's disestablishment argument, refuses to endorse this alternative effort. It also may be why Oklahoma introduced this argument for affirmance only for the first time in this Court. And it may be why the dissent makes no attempt to defend Oklahoma here. What are we to make of the federal government's repeated treaty promises that the land would be "solemnly guarantied to the Creek Indians," that it would be a "permanent home," "forever set apart," in which the Creek would be "secured in the unrestricted right of self-government"? What about Congress's repeated references to a ***2475** "Creek reservation" in its statutes? No one doubts that this kind of language normally suffices to establish a federal reservation. So what could possibly make this case different?

Oklahoma's answer only gets more surprising. *The* reason that the Creek's lands are not a reservation, we're told, is that the Creek Nation originally held fee title. Recall that the Indian Removal Act authorized the President not only to "solemnly ... assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them," but also, "if they prefer it, ... the United States will cause a patent or grant to be made and executed to them for the same." 4 Stat. 412. Recall that the Creek insisted on this additional protection when negotiating the Treaty of 1833, and in fact received a land patent pursuant to that treaty some 19 years later. In the eyes of Oklahoma, the Tribe's choice on this score was a fateful one. By asking for (and receiving) fee title to their lands, the Creek inadvertently made their tribal sovereignty easier to divest rather than harder.

The core of Oklahoma's argument is that a reservation must be land "reserved from sale." *Celestine*, 215 U.S., at 285, 30 S.Ct. 93. Often, that condition is satisfied when the federal government promises to hold aside a particular piece of federally owned land in trust for the benefit of the Tribe. And, admittedly, the Creek's arrangement was different, because the Tribe held "fee simple title, not the usual Indian right of occupancy." *United States v. Creek Nation*, 295 U.S. 103, 109, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). Still, as we explained in Part II, the land *was* reserved from sale in the very real sense that the government could not "give the tribal lands to others, or to appropriate them to its own purposes," without engaging in " 'an act of confiscation.' " *Id.*, at 110, 55 S.Ct. 681.

[24]It's hard to see, too, how any difference between these two arrangements might work to the detriment of the Tribe. Just as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never done so when it comes to establishing one. See *Minnesota v. Hitchcock*, 185 U.S. 373, 390, 22 S.Ct. 650, 46 L.Ed. 954 (1902) ("[I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been there results a certain defined tract appropriated to certain purposes"). As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status. *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900).

By now, Oklahoma's next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between. See, *e.g.*, Act of July 31, 1882, ch. 360, 22 Stat. 179 (referring to Creek land as "Indian country" as opposed to an "Indian reservation"); S. Doc. No. 143, 59th Cong., 1st. Sess., 33 (1906) (Chief of Choctaw Nation—which had an arrangement similar to the Creek's—testified that both Tribes "object to being classified with the reservation Indians"); Dept. of Interior, Census Office, Report on Indians Taxed and Indians Not Taxed in the U. S. 284 (1894) (Creeks and neighboring Tribes were "not on the ordinary Indian reservation, but on lands patented to them by the United States"). Oklahoma stresses that this Court even once called the Creek lands a "dependent Indian community," ***2476** though it used that phrase in passing and only to show that the Tribe's "property and affairs were subject to the control and management of that government"—a point that would also be true if the lands were a reservation. *Creek Nation*, 295 U.S., at 109, 55 S.Ct. 681. Unsurprisingly given the Creek Nation's nearly 200-year occupancy of these lands, both sides have turned up a few clues suggesting the label "reservation" either did or did not apply. One thing everyone can agree on is this history is long and messy.

But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe's fee title to its land, no one would question that these treaties and statutes created a reservation. So the State's argument inescapably boils down to the untenable suggestion that, when the federal government agreed to

offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.

V

That leaves Oklahoma to attempt yet another argument in the alternative. We alluded to it earlier in Part III. Now, the State accepts for argument's sake that the Creek land is a reservation and thus "Indian country" for purposes of the Major Crimes Act. It accepts, too, that this would normally mean serious crimes by Indians on the Creek Reservation would have to be tried in federal court. But, the State tells us, none of that matters; everything the parties have briefed and argued so far is beside the point. It's all irrelevant because it turns out the MCA just doesn't apply to the eastern half of Oklahoma, and it never has. That federal law may apply to other States, even to the western half of Oklahoma itself. But eastern Oklahoma is and has always been exempt. So whether or not the Creek have a reservation, the State's historic practices have always been correct and it remains free to try individuals like Mr. McGirt in its own courts.

[25]Notably, the dissent again declines to join Oklahoma in its latest twist. And, it turns out, for good reason. In support of its argument, Oklahoma points to statutory artifacts from its territorial history. The State of Oklahoma was formed from two territories: the Oklahoma Territory in the west and Indian Territory in the east. Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons ... irrespective of race." *Ibid.* A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. And, Oklahoma says, sending Indians to federal court and all others to state court would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

[26]Here again, however, arguments along these and similar lines have been "frequently raised" but rarely "accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (C.A.10 1992) (Kelly, J.). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). Chief Justice Marshall, for example, ***2477** held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not only acknowledged, but guarantied by the United States," a power dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); see also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168–169, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030 (1883).

Oklahoma cannot come close to satisfying this standard. In fact, the only law that speaks expressly here speaks *against* the State. When Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms. That statute, as phrased at the time, provided exclusive federal jurisdiction over qualifying crimes by Indians in "*any Indian reservation*" located within "the boundaries of *any State*." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (emphasis added); see also 18 U.S.C. § 1151 (defining "Indian country" even more broadly). By contrast, every one of the statutes the State directs us to merely discusses the assignment of cases among courts in the *Indian Territory*. They say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union. And however enlightened the State may think it was for territorial law to apply to all persons irrespective of race, some Tribe members may see things differently, given that the same policy entailed the forcible closure of tribal courts in defiance of treaty terms.

Left to hunt for some statute that might have rendered the MCA inapplicable in Oklahoma after statehood, the best the State can find is the Oklahoma Enabling Act. Congress adopted that law in preparation for Oklahoma's admission in 1907. Among its many provisions sorting out the details associated with Oklahoma's transition to statehood, the Enabling Act transferred all nonfederal cases pending in territorial courts to Oklahoma's new state courts. Act of June 16, 1906, § 20, 34 Stat. 277; see also Act of Mar. 4, 1907, § 3, 34 Stat. 1287 (clarifying treatment of cases to which United States was a party). The State says this transfer made its courts the inheritors

of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations.

But, at best, this tells only half the story. The Enabling Act not only sent all nonfederal cases pending in territorial courts to state court. It *also* transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to federal district courts. § 16, 34 Stat. 277. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act). Nor did the statute make any distinction between cases arising in the former eastern (Indian) and western (Oklahoma) territories. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State.

Maybe that's right, Oklahoma acknowledges, but that's not what happened. Instead, ***2478** for many years the State continued to try Indians for crimes committed anywhere within its borders. But what can that tell us? The State identifies not a single ambiguous statutory term in the MCA that its actions might illuminate. And, as we have seen, its own courts have acknowledged that the State's historic practices deviated in meaningful ways from the MCA's terms. See *supra,* at 2470 – 2471. So, once more, it seems Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do.

That takes Oklahoma down to its last straw when it comes to the MCA. If Oklahoma lacks the jurisdiction to try Native Americans it has historically claimed, that means at the time of its entry into the Union *no one* had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress abolished the tribal courts in 1898. Curtis Act, § 28, 30 Stat. 504–505. Whatever one thinks about the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant "jurisdictional gap" to open at the moment Oklahoma achieved statehood.

But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, *e.g.*, *Duro v. Reina*, 495 U.S. 676, 704–706, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong. See *supra*, at 2471 – 2472.

With time, too, Congress has filled many of the gaps Oklahoma worries about. One way Congress has done so is by reauthorizing tribal courts to hear minor crimes in Indian country. Congress chose exactly this course for the Creeks and others in 1936. Act of June 26, 1936, § 3, 49 Stat. 1967; see also *Hodel*, 851 F.2d at 1442–1446. Another option Congress has employed is to allow affected Indian tribes to consent to state criminal jurisdiction. 25 U.S.C. §§ 1321(a), 1326. Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, *e.g.*, 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.

VI

[27]In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially "transform[ative]" effects of a loss today. Brief for Respondent 43. Here, at least, the State is finally rejoined by the dissent. If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent ***2479** warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.

It's hard to know what to make of this self-defeating

argument. Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, *e.g.*, Brief for National Congress of American Indians Fund as *Amicus Curiae* 26–28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan); see also *Parker*, 577 U. S., at —— – ——, 136 S.Ct., at 1081–1082 (holding Pender, Nebraska, to be within Indian country despite tribe's absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.

[28]What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 U.S., at 624. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

[29]Still, Oklahoma and the dissent fear, "[t]housands" of Native Americans like Mr. McGirt "wait in the wings" to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]

***2480** [30]In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, see *Ramos* v. *Louisiana*, 590 U. S. ——, —— – ——, 140 S.Ct. 1390, 1406–1408, 206 L.Ed.2d 583 (2020) (plurality opinion), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.

What's more, a decision for *either* party today risks upsetting some convictions. Accepting the State's argument that the MCA never applied in Oklahoma would preserve the state-court convictions of people like Mr. McGirt, but simultaneously call into question every *federal* conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago. See *supra*, at 2470. It's a consequence of their own arguments that Oklahoma and the dissent choose to ignore, but one which cannot help but illustrate the difficulty of trying to guess how a ruling one way or the other might affect past cases rather than simply proceeding to apply the law as written.

Looking to the future, Oklahoma warns of the burdens federal and tribal courts will experience with a wider jurisdiction and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the

MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U.S.C. §§ 601, 606, historical preservation, 54 U.S.C. § 302704, schools, 20 U.S.C. § 1443, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, 25 U.S.C. § 1616e–1, housing assistance, § 4131, nutritional programs, 7 U.S.C. §§ 2012, 2013, disability programs, 20 U.S.C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

The dissent isn't so sanguine—it assures us, without further elaboration, that the ***2481** consequences will be "drastic precisely because they depart from ... more than a century [of] settled understanding." *Post,* at 2502. The prediction is a familiar one. Thirty years ago the Solicitor General warned that "[l]aw enforcement would be rendered very difficult" and there would be "grave uncertainty regarding the application" of state law if courts departed from decades of "long-held understanding" and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as *Amicus Curiae* in *Oklahoma* v. *Brooks*, O.T. 1988, No. 88–1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.[16] And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any ***2482** time. It has no shortage of tools at its disposal.

*

[31]The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The judgment of the Court of Criminal Appeals of Oklahoma is

Reversed.

Chief Justice ROBERTS, with whom Justice ALITO and

Justice KAVANAUGH join, and with whom Justice THOMAS joins except as to footnote 9, dissenting.

In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt. Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.

Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

None of this is warranted. What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents. *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016).

Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." *Id.*, at ——, 136 S.Ct., at 1079 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

***2483** Applying the broader inquiry our precedents require, a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him. I respectfully dissent.

I

The Creek Nation once occupied what is now Alabama and Georgia. In 1832, the Creek were compelled to cede these lands to the United States in exchange for land in present day Oklahoma. The expanse set aside for the Creek and the other Indian nations that composed the "Five Civilized Tribes"—the Cherokees, Chickasaws, Choctaws, and Seminoles—became known as Indian Territory. See F. Cohen, Handbook of Federal Indian Law § 4.07(1)(a), pp. 289–290 (N. Newton ed. 2012) (Cohen). Each of the Five Tribes formed a tripartite system of government. See *Marlin v. Lewallen*, 276 U.S. 58, 60, 48 S.Ct. 248, 72 L.Ed. 467 (1928). They "enact[ed] and execut[ed] their own laws," "punish[ed] their own criminals," and "rais[ed] and expend[ed] their own revenues." *Atlantic & Pacific R. Co. v. Mingus*, 165 U.S. 413, 436, 17 S.Ct. 348, 41 L.Ed. 770 (1897).

The Five Tribes also enjoyed unique property rights. While many tribes held only a "right of occupancy" on lands owned by the United States, *United States* v. *Creek Nation*, 295 U.S. 103, 109, 55 S.Ct. 681, 79 L.Ed. 1331 (1935), each of the Five Tribes possessed title to its lands in communal fee simple, meaning the lands were "considered the property of the whole." *E.g.*, Treaty with the Creeks, Arts. III and IV, Feb. 14, 1833, 7 Stat. 419; see *Marlin*, 276 U.S., at 60, 48 S.Ct. 248. Congress promised the Tribes that their lands would never be "included within, or annexed to, any Territory or State," see, *e.g.*, Treaty with Creeks and Seminoles, Art. IV, Aug. 7, 1856, 11 Stat. 700 (1856 Treaty), and that their new homes would be "forever secure," Indian Removal Act, § 3, 4 Stat. 412; see also Treaty with the Creeks, Arts. I and XIV, Mar. 24, 1832, 7 Stat. 368.

Forever, it turns out, did not last very long, because the Civil War disrupted both relationships and borders. The Five Tribes, whose members collectively held at least 8,000 slaves, signed treaties of alliance with the Confederacy and contributed forces to fight alongside Rebel troops. See Gibson, Native Americans and the Civil War, 9 Am. Indian Q. 4, 385, 388–389, 393 (1985); Doran, Negro Slaves of the Five Civilized Tribes, 68 Annals Assn. Am. Geographers 335, 346–347, and Table 3 (1978); Cohen § 4.07(1)(a), at 289. After the war, the United States and the Tribes formed new treaties, which required each Tribe to free its slaves and allow them to

become tribal citizens. *E.g.*, Treaty with the Creek Indians, Art. II, June 14, 1866, 14 Stat. 786 (1866 Treaty); see Cohen § 4.07(1)(a), at 289, and n. 9. The treaties also stated that the Tribes had "ignored their allegiance to the United States" and "unsettled the [existing] treaty relations," thereby rendering themselves "liable to forfeit" all "benefits and advantages enjoyed by them"—including their lands. *E.g.*, 1866 Treaty, Preamble, 14 Stat. 785. Due to "said liabilities," the treaties departed from prior promises and required each Tribe to give up the "west half" of its "entire domain." *E.g.*, Preamble and Art. III, *id.*, at 785–786. These western lands became the Oklahoma Territory. As before, the new treaties promised that the reduced Indian Territory would be "forever set apart as a home" for the Tribes. *E.g.*, Art. III, *id.,* at 786.[1]

***2484** Again, however, it was not to last. In the wake of the war, a renewed "determination to thrust the nation westward" gripped the country. Cohen § 1.04, at 71. Spurred by new railroads and protected by the repurposed Union Army, settlers rapidly transformed vast stretches of territorial wilderness into farmland and ranches. See *id.*, at 71–74. The Indian Territory was no exception. By 1900, over 300,000 settlers had poured in, outnumbering members of the Five Tribes by over 3 to 1. See H. R. Rep. No. 1762, 56th Cong., 1st Sess., 1 (1900). There to stay, the settlers founded "[f]lourishing towns" along the railway lines that crossed the territory. S. Rep. No. 377, 53d Cong., 2d Sess., 6 (1894).

Coexistence proved complicated. The new towns had no municipal governments or the things that come with them—laws, taxes, police, and the like. See H. R. Doc. No. 5, 54th Cong., 1st Sess., 89 (1895). No one had meaningful access to private property ownership, as the unique communal titles of the Five Tribes precluded ownership by Indians and non-Indians alike. Despite the millions of dollars that had been invested in the towns and farmlands, residents had no durable claims to their improvements. *Ibid.* Members of the Tribes were little better off, as the Tribes failed to hold the communal lands for the "equal benefit" of all members. *Woodward v. De Graffenried*, 238 U.S. 284, 297, 35 S.Ct. 764, 59 L.Ed. 1310 (1915). Instead, a few "enterprising citizens" of the Tribes "appropriate[d] to their exclusive use almost the entire property of the Territory that could be rendered profitable." Id., at 297, 299 35 S.Ct. 764 (internal quotation marks omitted). As a result, "the poorer class of Indians [were] unable to secure enough lands for houses and farms," and "the great body of the tribe derive[d] no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri." *Id.*, at 299–301, n. 1, 35 S.Ct. 764 (emphasis deleted; internal quotation marks omitted).

Attuned to these new realities, Congress decided that it could not maintain an Indian Territory predicated on "exclusion of the Indians from the whites." S. Rep. No. 377, at 6. Congress therefore set about transforming the Indian Territory into a State.

Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U. S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority. Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma.

In taking these transformative steps, Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes' territory and, in one report after another, explained that it was creating a homogenous population led by a common government. That contemporaneous understanding was shared by the tribal leadership and the State of Oklahoma. The tribal leadership acknowledged that its only remaining power was to parcel out the last of its land, and the State assumed jurisdiction over criminal cases ***2485** that, if a reservation had continued to exist, would have belonged in federal court.

A century of practice confirms that the Five Tribes' prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes' prior holdings the "former" Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those "reservations were destroyed" when "Oklahoma entered the Union." S. Rep. No. 101–216, pt. 2, p. 47 (1989).

II

Much of this important context is missing from the Court's opinion, for the Court restricts itself to viewing each of the statutes enacted by Congress in a vacuum. That approach is wholly inconsistent with our precedents on reservation disestablishment, which require a highly contextual inquiry. Our "touchstone" is congressional "purpose" or "intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. *Solem v. Bartlett*, 465 U.S. 463, 470–472, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. *Ante*, at 2467 – 2468. Any label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length.[2]

In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), a unanimous Court summarized the appropriate methodology. "Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Id.*, at 470, 104 S.Ct. 1161 (internal quotation marks and alterations omitted). This inquiry first considers the "statutory language used to open the Indian lands," which is the "most probative evidence of congressional intent." *Ibid.* "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* But "explicit language of cession and unconditional compensation are not prerequisites" for a ***2486** finding of disestablishment. *Id.*, at 471, 104 S.Ct. 1161.

Second, we consider "events surrounding the passage of [an] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Ibid.* When such materials "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," we will "infer that Congress shared the understanding that its action would diminish the reservation," even in the face of "statutory language that would otherwise suggest reservation boundaries remained unchanged." *Ibid.*

Third, to a "lesser extent," we examine "events that occurred after the passage of [an] Act to decipher Congress' intentions." *Ibid.* "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with [the areas]." *Ibid.* In addition, "we have recognized that who actually moved onto opened reservation lands is also relevant." *Ibid.* "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Ibid.* This "subsequent demographic history" provides an "additional clue as to what Congress expected would happen." *Id.*, at 471–472, 104 S.Ct. 1161.

Fifteen years later, another unanimous Court described the same methodology more pithily in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct.789, 139 L.Ed.2d 773 (1998). First, the Court reiterated that the "most probative evidence of diminishment is, of course, the statutory language." *Id.*, at 344, 118 S.Ct. 789 (internal quotation marks omitted). The Court continued that it would also consider, second, "the historical context surrounding the passage of the ... Acts," and third, "the subsequent treatment of the area in question and the pattern of settlement there." *Ibid.* (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958).

The Court today treats these precedents as aging relics in need of "clarif[ication]." *Ante*, at 2468 – 2469. But these precedents have been clear enough for some time. Just a few Terms ago, the same inquiry was described as "well settled" by the unanimous Court in *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016). First, the Court explained, "we start with the statutory text." *Ibid.* "Under our precedents," the Court continued, "we also 'examine all the circumstances surrounding the opening of a reservation.' " *Id.*, at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). Thus, second and third, we "look to any unequivocal evidence of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State." 577 U. S., at ——, 136 S. Ct., at 1079 (internal quotation marks omitted). These inquiries include, respectively, the "history surrounding the passage of the [relevant] Act" as well as the subsequent "demographic history" and "treatment" of the lands at

issue. *Id.*, at ——, ——, 136 S.Ct., at 1080, 1081.

Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional "intent," *ante*, at 2462 – 2463, but the Court then declines to examine the categories of evidence that our precedents demand we consider. Instead, the Court argues at length that allotment alone is not ***2487** enough to disestablish a reservation. *Ante*, at 2462 – 2465. Then the Court argues that the "many" "serious blows" dealt by Congress to tribal governance, and the creation of the new State of Oklahoma, are each insufficient for disestablishment. *Ante*, at 2465 – 2467. Then the Court emphasizes that "historical practices or current demographics" do not "by themselves" "suffice" to disestablish a reservation. *Ante*, at 2467 – 2468.

This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation. "[O]ur traditional approach *...requires* us" to determine Congress's intent by "examin[ing] *all* the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S., at 412, 114 S.Ct. 958 (emphasis added). Yet the Court refuses to confront the cumulative import of all of Congress's actions here.

The Court instead announces a new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent. The Court states that such "extratextual sources" may be considered in "only" one narrow circumstance: to help " 'clear up' " ambiguity in a particular "statutory term or phrase." *Ante*, at 2467 – 2468, 2469 – 2470 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011), and citing *New Prime Inc.* v. *Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019)).

But, if that is the right approach, what have we been doing all these years? Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because, while it is well established that Congress's "intent" must be "clear," *ante,* at 2469 – 2470 (quoting *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789), in this area we have expressly held that the appropriate inquiry does not focus on the statutory text alone.

Today the Court suggests that only the text can satisfy the longstanding requirement that Congress "explicitly indicate[ ]" its intent. *Ante,* at 2469 – 2470 (quoting *Solem*, 465 U.S., at 470, 104 S.Ct. 1161). The Court reiterates that a reservation persists unless Congress "said otherwise," *ante*, at 2459; if Congress wishes to disestablish a reservation, "it must say so," with the right "language." *Ante*, at 2462 – 2463, 2468; see *ante*, at 2481 – 2482 (same). Our precedents disagree. They explain that disestablishment can occur "[e]ven in the absence of a clear expression of congressional purpose in the text of [the] Act." *Yankton Sioux Tribe*, 522 U.S., at 351, 118 S.Ct. 789. The "notion" that "express language in an Act is the *only* method by which congressional action may result in disestablishment" is "quite inconsistent" with our precedents. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 588, n. 4, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); see *Solem*, 465 U.S., at 471, 104 S.Ct. 1161 (intent may be discerned from a "widely held, contemporaneous understanding," "notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged"); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973).

These are not "stiche[d] together quotes" but rather plain language reflecting a consistent theme running through ***2488** our precedents. *Ante*, at 2470, n. 9. They make clear that the Court errs in focusing on whether "a statute" alone "required" disestablishment, *ante,* at 2469 – 2470; under these precedents, we cannot determine what Congress "required" without first considering evidence in addition to the relevant statutes. Oddly, the Court claims these precedents actually support its new approach because they "emphasize that '[t]he focus of our inquiry is congressional intent.' " *Ante,* at 2470, n. 9 (quoting *Rosebud Sioux Tribe*, 430 U.S., at 588, n. 4, 97 S.Ct. 1361, and citing *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789). But in this context that intent is determined by examining a broad array of evidence—"all the circumstances." *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). Unless the Court is prepared to overrule these precedents, it should follow them.

The Court appears skeptical of these precedents, but does not address the compelling reasons they give for considering extratextual evidence. At the turn of the century, the possibility that a reservation might persist in the absence of "tribal ownership" of the underlying lands

was "unfamiliar," and the prevailing "assumption" was that "Indian reservations were a thing of the past." *Solem*, 465 U.S., at 468, 104 S.Ct. 1161. Congress believed "to a man" that "within a short time" the "Indian tribes would enter traditional American society and the reservation system would cease to exist." *Ibid.* As a result, Congress—while intending disestablishment—did not always "detail" precise changes to reservation boundaries. *Ibid.* Recognizing this distinctive backdrop, our precedents determine Congress's intent by considering a broader variety of evidence than we might for more run-of-the-mill questions of statutory interpretation. See *id.*, at 468–469, 104 S.Ct. 1161; *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079; *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789. See also Cohen § 2.02(1), at 113 ("The theory and practice of interpretation in federal Indian law differs from that of other fields of law.").

The Court next claims that *Parker* "clarif[ied]" that evidence of the subsequent treatment of the disputed land by government officials " 'has limited interpretive value.' " *Ante*, at 2457 (quoting *Parker*, 577 U. S., at ——, 136 S.Ct., at 1082). But *Parker* held that the subsequent evidence *in that case* "ha[d] 'limited interpretive value,' " as in the case that *Parker* relied on. 577 U. S., at —— – ——, 136 S.Ct., at 1081–1083 (quoting *Yankton Sioux Tribe*, 522 U. S., at 355, 118 S.Ct. 789). The adequacy of evidence in a particular case says nothing about whether our precedents require us to consider such evidence in others.[3]

The Court finally resorts to torching strawmen. No one relying on our precedents ***2489** contends that "practical advantages" require "ignoring the written law." *Ante*, at 2474. No one claims a State has "authority to reduce federal reservations." *Ante*, at 2462. No one says the role of courts is to "sav[e] the political branches" from "embarrassment." *Ibid.* No one argues that courts can "adjust[ ]" reservation borders. *Ibid.* Such notions have nothing to do with our precedents. What our precedents do provide is the settled approach for determining whether Congress disestablished a reservation, and the Court starkly departs from that approach here.

III

Applied properly, our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood.

A

The statutory texts are the "most probative evidence" of congressional intent. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958). The Court appropriately examines the Original Creek Agreement of 1901 and a subsequent statute for language of disestablishment, such as "cession," "abolish[ing]" the reservation, "restor[ing]" land to the "public domain," or an "unconditional commitment" to "compensate" the Tribe. *Ante*, at 2462 – 2465 (internal quotation marks omitted). But that is only the beginning of the analysis; there is no "magic words" requirement for disestablishment, and each individual statute may not be considered in isolation. See *supra,* at 2487 – 2488; *Hagen*, 510 U.S., at 411, 415–416, 114 S.Ct. 958 (when two statutes "buil[d]" on one another in this area, "[both] statutes—as well as those that came in between—must therefore be read together"); see also *Rosebud Sioux Tribe*, 430 U.S., at 592, 97 S.Ct. 1361 (recognizing that a statute "cannot, and should not, be read as if it were the first time Congress had addressed itself to" disestablishment when prior statutes also indicate congressional intent). In this area, "we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *Id.*, at 597, 97 S.Ct. 1361 (quoting *Johnson v. United States*, 163 F. 30, 32 (C.A.1 1908) (Holmes, J.)). Rather, we recognize that the language Congress uses to accomplish its objective is adapted to the circumstances it confronts.

For example, "cession" is generally what a tribe does when it conveys land to a fellow sovereign, such as the United States or another tribe. See *Mitchel v. United States*, 9 Pet. 711, 734, 9 L.Ed. 283 (1835); *e.g.*, 1856 Treaty, Art. I, 11 Stat. 699. But here, given that Congress sought direct allotment to tribe members in order to enable private ownership by both Indians and the 300,000 settlers in the territory, it would have made little sense to "cede" the lands to the United States or "restore" the lands to the "public domain," as Congress did on other occasions. So too with a "commitment" to "compensate" the Tribe. Rather than buying land from the Creek, Congress provided for allotment to tribe members who could then "sell their land to Indians and non-Indians alike." *Ante*, at 2463; see *Hagen*, 510 U.S., at 412, 114

S.Ct. 958 (a "definite payment" is not required for disestablishment). That other allotment statutes have contained various "hallmarks" of disestablishment tells us little about Congress's intent here. Contra, *ante,* at 2465 – 2466, and n. 5. "[W]e have never required any particular form of words" to disestablish a reservation. *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. There are good reasons the statutes here do not include the language the Court looks for, and those reasons have nothing to do with ***2490** a failure to disestablish the reservation. Respect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions.

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place.

First, Congress supplanted the Creek legal system with a legal code and court system that applied equally to Indians and non-Indians. In 1890, Congress subjected the Indian Territory to specified federal criminal laws. Act of May 2, 1890, § 31, 26 Stat. 96. For offenses not covered by federal law, Congress did what it often did when establishing a new territorial government. It provided that the criminal laws from a neighboring State, here Arkansas, would apply. § 33, *id.*, at 96–97. Seven years later, Congress provided that the laws of the United States and Arkansas "shall apply to *all* persons" in Indian Territory, "*irrespective of race*." Act of June 7, 1897 (1897 Act), 30 Stat. 83 (emphasis added). In the same Act, Congress conferred on the U. S. Courts for the Indian Territory "exclusive jurisdiction" over "all civil causes in law and equity" and "all criminal causes" for the punishment of offenses committed by "any person" in the Indian Territory. *Ibid.*

The following year, the 1898 Curtis Act "abolished" all tribal courts, prohibited all officers of such courts from exercising "any authority" to perform "any act" previously authorized by "any law," and transferred "all civil and criminal causes then pending" to the U. S. Courts for the Indian Territory. Act of June 27, 1898 (Curtis Act), § 28, *id.,* at 504–505. In the same Act, Congress completed the shift to a uniform legal order by banning the enforcement of tribal law in the newly exclusive jurisdiction of the U. S. Courts. See § 26, *id.*, at 504 ("[T]he laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."). Congress reiterated yet again in 1904 that Arkansas law "continued" to "embrace *all* persons and estates" in the territory—"whether Indian, freedmen, or otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (emphasis added). In this way, Congress replaced tribal law with local law in matters at the core of tribal governance, such as inheritance and marital disputes. See, *e.g.*, *George v. Robb*, 4 Ind.T. 61, 64 S.W. 615, 615–616 (1901); *Colbert v. Fulton*, 74 Okla. 293, 157 P. 1151, 1152 (1916).

In addition, the Curtis Act established municipalities to govern both Indians and non-Indians. It authorized "any city or town" with at least 200 residents to incorporate. § 14, 30 Stat. 499. The Act gave incorporated towns "all the powers" and "all the rights" of municipalities under Arkansas law. *Ibid.* "All male inhabitants," including Indians, were deemed qualified to vote in town elections. *Ibid.* And "all inhabitants"—"*without regard to race*"—were made subject to "all" town laws and were declared to possess "*equal* rights, privileges, and protection." *Id.*, at 499–500 (emphasis added). These changes reorganized the approximately 150 towns in the territory—including Tulsa, Muscogee, and 23 others within the Creek Nation's former territory—that were home to tens of thousands of people and nearly one third of the territory's population at the time, ***2491** laying the foundation for the state governance that was to come. See H. R. Doc. No. 5, 57th Cong., 2d Sess., pt. 2, pp. 299–300, Table 1 (1903); Depts. of Commerce and Labor, Bureau of Census, Population of Oklahoma and Indian Territory 1907, pp. 8, 30–33.

Second, Congress systematically dismantled the governmental authority of the Creek Nation, targeting all three branches. As noted, Congress dissolved the Tribe's judicial system. Congress also specified in the Original Creek Agreement that the Creek government would "not continue" past March 1906, essentially preserving it only as long as Congress thought necessary for the Tribe to wind up its affairs. § 46, 31 Stat. 872. In the meantime, Congress radically curtailed tribal legislative authority, providing that no statute passed by the council of the Creek Nation affecting the Nation's lands, money, or property would be valid unless approved by the President of the United States. § 42, *id.*, at 872. When 1906 came around, the Five Tribes Act provided for the "final disposition of the affairs of the Five Civilized Tribes." Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137. Along with "abolish[ing]" all tribal taxes, the Act directed the Secretary of the Interior to assume control over the collection of the Nation's remaining revenues and to

distribute them among tribe members on a per capita basis. §§ 11, 17, *id.*, at 141, 143–144. Thus, by the time Oklahoma became the 46th State in 1907, there was little left of the Creek Nation's authority: No tribal courts. No tribal law. No tribal fisc. And any lingering authority was further reduced in 1908, when Congress amended the Five Tribes Act to require tribal officers and members to surrender all remaining tribal property, money, and records. Act of May 27, 1908, § 13, 35 Stat. 316.

The Court stresses that the Five Tribes Act separately stated that the Creek government was "continued" in "full force and effect for all purposes authorized by law." *Ante*, at 2466 (quoting § 28, 34 Stat. 148). By that point, however, such "authorized" purposes were nearly nonexistent, and the Act's statement is readily explained by the need to maintain a tribal body to wrap up the distribution of Creek lands. Indeed, the Court does not cite any examples of the Creek Nation exercising significant government authority in the wake of the statutes discussed above. Instead, the Court alludes to subsequent changes in the 1920s to the general "federal outlook towards Native Americans," and it observes that in the 1930s Congress authorized the Creek Nation to reconstitute its tribal courts and adopt a constitution and bylaws. *Ante*, at 2466 – 2467. That, however, simply highlights the drastic extent to which Congress erased the Nation's authority at the turn of the century.

Third, Congress destroyed the foundation of sovereignty by stripping the Creek Nation of its territory. The communal title held by the Creek Nation, which "did not recognize private property in land," "presented a serious obstacle to the creation of [a] State." *Choate v. Trapp*, 224 U.S. 665, 667, 32 S.Ct. 565, 56 L.Ed. 941 (1912). Well aware of this impediment, Congress established the Dawes Commission and directed it to negotiate with the Five Tribes for "the extinguishment of the national or tribal title to any lands" within the Indian Territory. Act of Mar. 3, 1893, § 16, 27 Stat. 645. That extinguishment could be accomplished through "cession" of the tribal lands to the United States, "allotment" of the lands among the Indians, or any other agreed upon method. *Ibid.* The Commission initially sought cession, but ultimately sought to extinguish the title through allotment. See *ante*, at 2463.

***2492** In the Original Creek Agreement of 1901, Congress did just that. The agreement provided that "*[a]ll lands* belonging to the Creek tribe," except town sites and lands reserved for schools and public buildings, "shall be allotted among the citizens of the tribe." §§ 2, 3, 31 Stat. 862 (emphasis added). Town sites, rather than being allotted, were made available for purchase by the non-Indians residing there. §§ 11–16, *id.*, at 866–867. Unclaimed lots were to be sold at public auction, with the proceeds divvied up among the Creeks. §§ 11, 14, *id.*, at 866. The agreement required that the deeds for the allotments and town site purchases convey "all right, title, and interest of the Creek Nation and of all other [Creek] citizens," and that the deeds be executed by the leader of the Creek Nation (the "principal chief"). § 23, *id.*, at 867–868. The conveyances were then approved by the Secretary of the Interior, who in turn "relinquish[ed] to the grantee ... all the right, title, and interest of the United States" in the land. *Id.*, at 868. In this way, Congress provided for the complete termination of the Creek Nation's interest in the lands, as well as the interests of individual Creek members apart from their personal allotments. Indeed, the language Congress used in the Original Creek Agreement resembles what the Court regards as model disestablishment language. See *ante*, at 2462 – 2463, 2463 – 2464 (looking for language evincing "the present and total surrender of all tribal interests in the affected lands" (internal quotation marks omitted)). And, making even more clear its intent to place Indian-held land under the same laws as all other property, Congress subsequently eliminated restrictions on the alienation of allotments, freeing tribe members "to sell their land to Indians and non-Indians alike." *Ante*, at 2463.

In addition, while the Original Creek Agreement did not allot lands reserved for schools and tribal buildings, the Creek Nation's interest in those lands was subsequently terminated by the Five Tribes Act. That Act directed the Secretary of the Interior to take possession of—and sell off—"all" tribal buildings and underlying lands, whether used for "governmental" or "other tribal purposes." § 15, 34 Stat. 143. The Secretary was also ordered to assume control of all tribal schools and the underlying property until the federal or state governments established a public school system. See § 10, *id.*, at 140–141.

These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court's portrayal, this is not a scenario in which Congress allowed a tribe to "continue to exercise governmental functions over land" that it "no longer own[ed] communally." *Ante*, at 2464. From top to bottom, these statutes, which divested the Tribes and the United States of their interests while displacing tribal governance, "strongly suggest[ ] that Congress meant to divest" the lands of reservation status. *Solem*, 465 U.S., at 470, 104 S.Ct. 1161.

Finally, having stripped the Creek Nation of its laws, its powers of self-governance, and its land, Congress

incorporated the Nation's members into a new political community. Congress made "every Indian" in the Oklahoma territory a citizen of the United States in 1901—decades before conferring citizenship on all native born Indians elsewhere in the country. Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. In the Oklahoma Enabling Act of 1906—the gateway to statehood—Congress confirmed that members of the Five Tribes would participate in equal measure alongside non-Indians in the choice regarding statehood. The Act gave Indians the right to vote on delegates to a constitutional convention ***2493** and ultimately on the state constitution that the delegates proposed. §§ 2, 4, 34 Stat. 268, 271. Fifteen members of the Five Tribes were elected as convention delegates, many of them served on significant committees, and a member of the Chickasaw Nation even served as president of the convention. See Brief for Seventeen Oklahoma District Attorneys et al. as *Amici Curiae* 9–13.

The Enabling Act also ensured that Indians and non-Indians would be subject to uniform laws and courts. It replaced Arkansas law, which had applied to all persons "irrespective of race," 1897 Act, 30 Stat. 83, with the laws of the adjacent Oklahoma Territory until the new state legislature provided otherwise. Enabling Act §§ 2, 13, 21, 34 Stat. 268–269, 275, 277–278; see *Jefferson v. Fink*, 247 U.S. 288, 294, 38 S.Ct. 516, 62 L.Ed. 1117 (1918). All of the pending cases in the territorial courts arising under federal law were transferred to the newly created U. S. District Courts of Oklahoma. See § 16, 34 Stat. 276. Pending cases not involving federal law, including those that involved Indians on Indian land and had arisen under Arkansas law, were transferred to the new Oklahoma state courts. §§ 16, 17, 20, *id.*, at 276–277. To dispel any potential confusion about the distribution of criminal cases, Congress amended the Enabling Act the following year, clarifying that all cases for crimes that would have fallen under federal jurisdiction had they been committed in a State would be transferred to the U. S. District Courts. Act of Mar. 4, 1907, § 1, *id.*, at 1286–1287. All other pending criminal cases would be "prosecuted to a final determination in the State courts of Oklahoma." § 3, *id.*, at 1287. As for civil cases, the new state courts were immediately empowered to resolve even disputes that previously lay at the core of tribal self-governance. *E.g.*, *Palmer v. Cully*, 52 Okla. 454, 463–469, 153 P. 154, 157–158 (1915) (*per curiam*) (marital dispute).[4]

In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us, defines the Creek territory as "lands that would lie outside both the legal jurisdiction and geographic boundaries of any State" and on which a tribe was "assured a right to self-government." *Ante*, at 2462. That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. "Under any definition," that was disestablishment. *Ibid.*

In the face of all this, the Court claims that recognizing Congress's intent would permit disestablishment in the absence of ***2494** "a statute requir[ing] that result." *Ante*, at 2470. Hardly. The numerous statutes discussed above demonstrate Congress's plain intent to terminate the reservation. The Court resists the cumulative force of these statutes by attacking each in isolation, first asking whether allotment alone disestablished the reservation, then whether restricting tribal governance was sufficient, and so on. But the Court does not consider the full picture of what Congress accomplished. Far from justifying its blinkered approach, the Court repeatedly tells the reader to wait until the "*next* section" of the opinion—where the Court will again nitpick discrete aspects of Congress's disestablishment effort while ignoring the full picture our precedents require us to honor. *Ante*, at 2465, n. 5, 2468, n. 7; see *supra,* at 2487 – 2488, 2489.

The Court also hypothesizes that Congress may have taken significant steps toward disestablishment but ultimately could not "complete[ ]" it; perhaps Congress just couldn't "muster the will" to finish the job. *Ante*, at 2462 – 2463, 2466 – 2467. The Court suggests that Congress sought to "tiptoe to the edge of disestablishment," fearing the "embarrassment of disestablishing a reservation" but hoping that judges would "deliver the final push." *Ante*, at 2462. This is fantasy. The congressional Acts detailed above do not evince any unease about extinguishing the Creek domain, or any shortage of "will." Quite the opposite. Through an open and concerted effort, Congress did what it set out to do: transform a reservation into a State. "Mustering the broad social consensus required to pass new legislation is a deliberately hard business," as the Court reminds us. *Ibid.* Congress did that hard work here, enacting not one but a steady progression of major statutes. The Court today does not give effect to the cumulative significance of Congress's actions, because Congress did not use

explicit words of the sort the Court insists upon. But Congress had no reason to suppose that such words would be required of it, and this Court has held that they were not. See *Hagen*, 510 U.S., at 411–412, 114 S.Ct. 958; *Yankton Sioux Tribe*, 522 U.S., at 351, 118 S.Ct. 789; *Solem*, 465 U.S., at 471, 104 S.Ct. 1161.

B

Under our precedents, we next consider the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands at issue. The Court, however, declines to consider such evidence because, in the Court's view, the statutes clearly do not disestablish any reservation, and there is no "ambiguity" to "clear up." *Ante*, at 2469 – 2470 (internal quotation marks omitted). That is not the approach demanded by our precedent, *supra*, at 2487 – 2489, and, in any event, the Court's argument fails on its own terms here. I find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress had no intent to disestablish the territorial reservation. At the very least, the statutes leave some ambiguity, and thus "extratextual sources" ought to be consulted. *Ante*, at 2469 – 2470.

Turning to such sources, our precedents direct us to "examine all the circumstances" surrounding Congress's actions. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). This includes evidence of the "contemporaneous understanding" of the status of the reservation and the "history surrounding the passage" of the relevant Acts. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1080 (internal quotation marks omitted); see *Yankton Sioux Tribe*, 522 U.S., at 351–354, 118 S.Ct. 789; *Solem*, 465 U.S., at 471, 104 S.Ct. 1161. The available evidence overwhelmingly confirms that Congress ***2495** eliminated any Creek reservation. That was the purpose identified by Congress, the Dawes Commission, and the Creek Nation itself. And that was the understanding demonstrated by the actions of Oklahoma, the United States, and the Creek.

According to reports published by Congress leading up to Oklahoma statehood, the Five Tribes had failed to hold the lands for the equal benefit of all Indians, and the tribal governments were ill equipped to handle the largescale settlement of non-Indians in the territories. See *supra*, at 2483 – 2484; *Woodward*, 238 U.S., at 296–297, 35 S.Ct. 764. The Senate Select Committee on the Five Tribes explained that it was "imperative[ ]" to "establish[ ] a government over [non-Indians] and Indians" in the territory "in accordance with the principles of our constitution and laws." S. Rep. No. 377, at 12–13. On the eve of the Original Creek Agreement, the House Committee on Indian Affairs emphasized that "[t]he independent self-government of the Five Tribes ha[d] practically ceased," "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population [wa]s being rapidly carried out," and all Indians "should at once be put upon a level and equal footing with the great population with whom they [were] intermingled." H. R. Rep. No. 1188, 56th Cong., 1st Sess., 1 (1900).

The Dawes Commission understood Congress's intent in the same way. The Commission explained that the "object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the Tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H. R. Doc. No. 5, 58th Cong., 2d Sess., pt. 2, p. 5 (1903). Accordingly, the Commission's aim—"in all [its] endeavors"—was a "uniformity of political institutions to lay the foundation for an ultimate common government." H. R. Doc. No. 5, 56th Cong., 2d Sess., 163 (1900).

The Creek shared the same understanding. In 1893, the year Congress formed the Dawes Commission, the Creek delegation to Washington recognized that Congress's "unwavering aim" was to " 'wipe out the line of political distinction between an Indian citizen and other citizens of the Republic' " so that the Tribe could be " 'absorbed and become a part of the United States.' " P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893) (quoting Senate Committee Report); see also S. Doc. No. 111, 54th Cong., 2d Sess., 5, 8 (1897) (resolution of the Creek Nation "recogniz[ing]" that Congress proposed to "disintegrat[e] the land of our people" and "transform[ ]" "our domestic dependent states" "into a State of the Union").

Particularly probative is the understanding of Pleasant Porter, the principal Chief of the Creek Nation. He described Congress's decisions to the Creek people and legislature in messages published in territorial newspapers during the run-up to statehood. Following the extinguishment of the Nation's title, dissolution of tribal courts, and curtailment of lawmaking authority, he told his people that "[i]t would be difficult, if not impossible

to successfully operate the Creek government now." App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). The "remnant of a government" had been reduced to a land office for finalizing the distribution of allotments and would be "maintained only until" the ***2496** Tribe's "landed and other interests ... have been settled." App. to Brief for Respondent 8a. He reiterated this understanding following the Five Tribes Act of 1906, which stated that the tribal government would "continue[ ] in full force and effect for all purposes authorized by law." § 28, 34 Stat. 148. While the Court believes that meant Congress decided against disestablishing the reservation, see *ante*, at 2466 – 2467, Chief Porter saw things differently. From his vantage point as the contemporaneous leader of the government at issue, Congress had temporarily continued the tribal government but left it with only "limited and circumscribed" authority: The council could "pass[ ] resolutions respecting our wishes" regarding the property "now in the process of distribution," but the council no longer had any authority to "mak[e] laws for our government." App. to Brief for Respondent 14a (Message to Creek National Council (Oct. 18, 1906), reprinted in The New State Tribune (Oct. 18, 1906)). Apart from distributing the Nation's property, Chief Porter maintained that "all powers over the governing even of our landed property will cease" once the new state government was established. App. to Brief for Respondent 15a; see also S. Rep. No. 5013, 59th Cong., 2d Sess., pt. 1, p. 885 (1907) (Choctaw governor mourning that his "only" remaining authority was "to sign deeds").

The Creek remained of that view after Oklahoma was officially made a State through the Enabling Act. At that point, the new principal Chief confirmed that it was "utterly impossible" to resume "our old tribal government." App. to Brief for Respondent 16a–17a (Address by Moty Tiger to Creek National Council (Oct. 8, 1908), reprinted in The Indian Journal (Oct. 9, 1908)). And any "appeal to the government at Washington to alter its purpose to wipe out all tribal government among the five civilized tribes" would "be to no purpose." App. to Brief for Respondent 16a. "[C]ontributions" for such efforts would be "just that much money thrown away," and "all attorneys at Washington or elsewhere who encourage and receive any part of such contributions do it knowing that they can give no return or service for same and that they take such money fraudulently and dishonestly." *Id.*, at 17a.[5]

In addition to their words, the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist. Had the land been a reservation, the federal government—not the new State—would have had jurisdiction over serious crimes committed by Indians under the Major Crimes Act of 1885. See § 9, 23 Stat. 385. Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court. At argument, McGirt's counsel acknowledged that he could not cite a single example of federal prosecutions for such crimes. Tr. of Oral Arg. 17–18. Rather, the record demonstrates that case after case was transferred to state court or filed there outright ***2497** by Oklahoma after 1907—without objection by anyone. See, *e.g.*, *Bigfeather v. State*, 7 Okla.Crim. 364, 123 P. 1026 (1912) (manslaughter); *Rollen v. State*, 7 Okla.Crim. 673, 125 P. 1087 (1912) (assault with intent to kill); *Jones v. State*, 3 Okla.Crim. 593, 107 P. 738 (1910) (murder); see also Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 40–41 (collecting more cases). These prosecutions were lawful, the Oklahoma Supreme Court recognized at the time, because Congress had not intended to "except out of [Oklahoma] an Indian reservation" upon its admission as a State. *Higgins v. Brown*, 20 Okla. 355, 419, 94 P. 703, 730, 1 Okla.Crim. 33 (1908).

Instead of explaining how everyone at the time somehow missed that a reservation still existed, the Court resorts to misdirection. It observes that Oklahoma state courts have held that they erroneously entertained prosecutions for crimes committed by Indians on the small number of remaining restricted allotments and tribal trust lands from the 1930s until 1989. But this Court has not addressed that issue, and regardless, it would not tell us whether the State properly prosecuted major crimes committed by Indians on the lands at issue here—the unrestricted fee lands that make up more than 95% of the Creek Nation's former territory. Perhaps most telling is that the State's jurisdiction over crimes on Indian allotments was hotly contested from an early date, whereas nobody raised objections based on a surviving reservation. See, *e.g.*, *Ex parte Nowabbi*, 60 Okla.Crim. 111, 61 P.2d 1139 (1936), overruled by *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); see also *ante*, at 2470 ("no court" suggested the "possibility" that "the Creek lands really were part of a reservation" until 2017).[6]

Lacking any other arguments, the Court suspects uniform lawlessness: The State must have "overstepped its authority" in prosecuting thousands of cases for over a century. *Ante*, at 2471. Perhaps, the Court suggests, the State lacked "good faith." *Ibid.* In the Court's telling, the

federal government acquiesced in this extraordinary alleged power grab, abdicating its responsibilities over the purported reservation. And, all the while, the state and federal courts turned a blind eye.

But we normally presume that government officials exercise their duties in accordance with the law. Certainly the presumption may be strained from time to time in this area, but not so much as to justify the Court's speculations, which posit that government officials at every level either conspired to violate the law or uniformly misunderstood the fundamental structure of their society and government. Whatever the imperfections of our forebears, neither option seems tenable. And it is downright inconceivable that this could occur without prompting objections—from anyone, including from the Five Tribes themselves. Indians frequently asserted their rights during this period. The cases above, for example, involve criminal appeals brought by Indians, and Indians raised numerous objections to land graft in the former Territory. See Brief for Historians et al. as *Amici Curiae* 28–31. Yet, according to the extensive record compiled over several years for this case and a similar case, *Sharp* v. *Murphy*, *post*, p. ***2498** —— (*per curiam*), Indians and their counsel did not raise a single objection to state prosecutions on the theory that the lands at issue were still a reservation. It stretches the imagination to suggest they just missed it.

C

Finally, consider "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S., at 344, 118 S.Ct. 789. This evidence includes the "subsequent understanding of the status of the reservation by members and nonmembers as well as the United States and the [relevant] State," and the "subsequent demographic history" of the area. *Parker*, 577 U. S., at ——, ——, 136 S.Ct., at 1079, 1081; see *Solem*, 465 U.S., at 471, 104 S.Ct. 1161. Each of the indicia from our precedents—subsequent treatment by Congress, the State's unquestioned exercise of jurisdiction, and demographic evidence—confirms that the Creek reservation did not survive statehood.

First, "Congress' own treatment of the affected areas" strongly supports disestablishment. *Id.*, at 471, 104 S.Ct. 1161. After statehood, Congress enacted several statutes progressively eliminating restrictions on the alienation and taxation of Creek allotments, and Congress subjected even restricted lands to state jurisdiction. Since Congress had already destroyed nearly all tribal authority, these statutes rendered Creek parcels little different from other plots of land in the State. See Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239. This is not a scenario where Congress merely opened land for "purchase ... by non-Indians" while allowing the Tribe to "continue to exercise governmental functions over [the] land," *ante*, at 2464, and n. 3; rather, Congress eliminated both restrictions on the lands here and the Creek Nation's authority over them. Such developments would be surprising if Congress intended for all of the former Indian Territory to be reservation land insulated from state jurisdiction in significant ways. The simpler and more likely explanation is that they reflect Congress's understanding through the years that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. No. 1232, 74th Cong., 1st Sess., 6 (1935), and that "Indian reservations [in the Indian Territory] were destroyed" when "Oklahoma entered the union," S. Rep. No. 101–216, p. 47 (1989).

That understanding is now woven throughout the U. S. Code, which applies numerous statutes to the land here by extending them to the "*former* reservation[s]" "in Oklahoma"—underscoring that no reservation exists today. 25 U.S.C. § 2719(a)(2)(A)(i) (emphasis added) (Indian Gaming Regulatory Act); see Brief for United States as *Amicus Curiae* 23; 23 U.S.C. § 202(b)(1)(B)(v) (road grants; "former Indian reservations in the State of Oklahoma"); 25 U.S.C. § 1452(d) (Indian Financing Act; "former Indian reservations in Oklahoma"); § 2020(d) (education grants; "former Indian reservations in Oklahoma"); § 3103(12) (National Indian Forest Resources Management Act; "former Indian reservations in Oklahoma"); 29 U.S.C. § 741(d) (American Indian Vocational Rehabilitation Services Act; "former Indian reservations in Oklahoma"); 33 U.S.C. § 1377(c)(3)(B) (waste treatment grants; "former Indian reservations in Oklahoma"); 42 U.S.C. § 5318(n)(2) (urban development grants; "former Indian reservations in Oklahoma").[7]

***2499** Second, consider the State's "exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of " the Enabling Act, which deserves "weight" as "an indication of the intended purpose of the Act." *Rosebud Sioux Tribe*, 430 U.S., at 599, n. 20, 604, 97 S.Ct. 1361. As discussed above, for 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions). See

Brief for Respondent 4, 40. The same goes for major cities in Oklahoma. Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation. See Brief for City of Tulsa as *Amicus Curiae* 27–28.

All the while, the federal government has operated on the same understanding. Brief for United States as *Amicus Curiae* 24. No less than Felix Cohen, whose authoritative treatise the Court repeatedly cites, agreed while serving as Acting Solicitor of the Interior in 1941 that "all offenses by or against Indians" in the former Indian Territory "are subject to State laws." App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). In the view of the Department of the Interior, such state jurisdiction was appropriate because the reservations in the Territory "lost their character as Indian country" by the time Oklahoma became a State. App. to Brief for United States as *Amicus Curiae* 4a (Letter from O. Chapman, Assistant Secretary of the Interior, to the Attorney General (Aug. 17, 1942)); see also *supra,* at 2497, n. 6.

Indeed, far from disputing Oklahoma's jurisdiction, the Five Tribes themselves have repeatedly and emphatically agreed that no reservation exists. After statehood, tribal leaders and members frequently informed Congress that "there are no reservations in Oklahoma." App. to Brief for Respondent 19a (Testimony of Hon. Bill Anoatubby, Governor, Chickasaw Nation, Hearings before the Subcommittee on Indian, Insular and Alaska Native Affairs of the House Committee on Natural Resources (Feb. 24, 2016)).[8] They took the ***2500** same position before federal courts. Before this litigation started, the Creek Nation represented to the Tenth Circuit that there is only " 'checkerboard' Indian country within its *former* reservation boundaries." Reply Brief in No. 09–5123, p. 5 (emphasis added). And the Nation never once contended in this Court that a sprawling reservation still existed in the more than a century that preceded the present disputes.

Like the Creek, this Court has repeatedly described the area in question as the "former" lands of the Creek Nation. See *Grayson v. Harris*, 267 U.S. 352, 353, 45 S.Ct. 317, 69 L.Ed. 652 (1925) (lands "lying within the former Creek Nation"); *Woodward*, 238 U.S., at 285, 35 S.Ct. 764 (lands "formerly part of the domain of the Creek Nation"); *Washington v. Miller*, 235 U.S. 422, 423, 35 S.Ct. 119, 59 L.Ed. 295 (1914) (lands "within what until recently was the Creek Nation"). Yet today the Court concludes that the lands have been a Creek reservation all along—contrary to the position shared for the past century by this Court, the United States, Oklahoma, and the Creek Nation itself.

Under our precedent, Oklahoma's unquestioned, century-long exercise of jurisdiction supports the conclusion that no reservation persisted past statehood. See *Yankton Sioux Tribe*, 522 U.S., at 357, 118 S.Ct. 789; *Hagen*, 510 U.S., at 421, 114 S.Ct. 958; *Rosebud Sioux Tribe*, 430 U.S., at 604–605, 97 S.Ct. 1361. "Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.' " *Id.*, at 603–604, 97 S.Ct. 1361 (citations omitted).

Third, consider the "subsequent demographic history" of the lands at issue, which provides an " 'additional clue' " as to the meaning of Congress's actions. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081 (quoting *Solem*, 465 U.S., at 472, 104 S.Ct. 1161). Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian. See Brief for Respondent 43; *Murphy v. Royal*, 875 F.3d 896, 965 (C.A.10 2017). "[T]hose demographics signify a diminished reservation." *Yankton Sioux Tribe*, 522 U. S., at 357, 118 S.Ct. 789. The Court questions whether the consideration of demographic history is appropriate, *ante*, at 2468 – 2469, 2473 – 2474, but we have determined that it is a "*necessary* expedient." *Solem*, 465 U.S., at 472, and n. 13, 104 S.Ct. 1161 (emphasis added); see *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081. And for good reason. Our precedents recognize that disestablishment cases call for a wider variety of tools than more workaday questions of statutory interpretation. *Supra*, at 2488. In addition, the use of demographic data addresses the practical concern that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S., at 471–472, n. 12, 104 S.Ct. 1161.

Here those burdens—the product of a century of settled understanding—are extraordinary. Most immediately, the Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to the potential release of numerous individuals

***2501** found guilty under state law of the most grievous offenses.[9] Although the federal government may be able to reprosecute some of these crimes, it may lack the resources to reprosecute all of them, and the odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses. See Brief for United States as *Amicus Curiae* 37–39. No matter, the court says, these concerns are speculative because "many defendants may choose to finish their state sentences rather than risk reprosecution in federal court." *Ante*, at 2479. Certainly defendants like McGirt—convicted of serious crimes and sentenced to 1,000 years plus life in prison—will not adopt a strategy of running out the clock on their state sentences. At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future.

Not to worry, the Court says, only about 10%–15% of Oklahoma citizens are Indian, so the "majority" of prosecutions will be unaffected. *Ibid.* But the share of serious crimes committed by 10%–15% of the 1.8 million people in eastern Oklahoma, or of the 400,000 people in Tulsa, is no small number.

Beyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma. The Court, despite briefly suggesting that its decision concerns only a narrow question of criminal law, ultimately acknowledges that "many" federal laws, triggering a variety of rules, spring into effect when land is declared a reservation. *Ante*, at 2480 – 2481.

State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 144–145, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.[10]

***2502** In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[ ] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 565–566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); see Cohen § 6.02(2)(a), at 506–507. Tribes may also impose certain taxes on non-Indians on reservation land, see *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985), and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 18, n. 6. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. Recognizing the significant "potential for cost and conflict" caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the "spirit" of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. *Ante*, at 2481. But those agreements are small potatoes compared to what will be necessary to address the disruption inflicted by today's decision.

The Court responds to these and other concerns with the truism that significant consequences are no "license for us to disregard the law." *Ibid.* Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis.

* * *

As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute McGirt. I respectfully dissent.

Justice THOMAS, dissenting.

I agree with THE CHIEF JUSTICE that the former Creek Nation Reservation was disestablished at statehood and Oklahoma therefore has jurisdiction to prosecute petitioner for sexually assaulting his wife's granddaughter. *Ante*, at 2482 – 2483 (dissenting opinion). I write separately to note an additional defect in the Court's decision: It reverses a state-court judgment that it has no jurisdiction to review. "[W]e have long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' " *Michigan v. Long*, 463 U.S. 1032, 1038, n. 4, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935)). Under this well-settled rule, we lack jurisdiction to review the Oklahoma Court of Criminal Appeals' decision, because it rests on an adequate and independent state ground.

***2503** In his application for state postconviction relief, petitioner claimed that Oklahoma lacked jurisdiction to prosecute him because his crime was committed on Creek Nation land and thus was subject to the exclusive jurisdiction of the Federal Government under the Major Crimes Act, 18 U.S.C. § 1153. In support of his argument, petitioner cited the Tenth's Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (2017).

The Oklahoma Court of Criminal Appeals concluded that petitioner's claim was procedurally barred under state law because it was "not raised previously on direct appeal" and thus was "waived for further review." 2018 OK CR 1057 ¶2, —— P. 3d ——, —— (citing Okla. Stat., Tit. 22, § 1086 (2011)). The court found no grounds for excusing this default, explaining that "[p]etitioner [had] not established any sufficient reason why his current grounds for relief were not previously raised." —— P. 3d, at ——. This state procedural bar was applied independent of any federal law, and it is adequate to support the decision below. We therefore lack jurisdiction to disturb the state court's judgment.

There are two possible arguments in favor of jurisdiction, neither of which hold water. First, one might claim that the state procedural bar is not an "adequate" ground for decision in this case. In *Murphy*, the Tenth Circuit suggested that Oklahoma law permits jurisdictional challenges to be raised for the first time on collateral review. 875 F.3d at 907, n. 5 (citing *Wallace v. State*, 1997 OKCR 18, 935 P.2d 366). But the Oklahoma Court of Criminal Appeals did not even hint at such grounds for excusing petitioner's default here. More importantly, however, we may not go beyond "the four corners of the opinion" and delve into background principles of Oklahoma law to determine the adequacy of the independent state ground. *Long*, 463 U.S., at 1040, 103 S.Ct. 3469. This Court put an end to that approach in *Long*, noting that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Id.*, at 1039, 103 S.Ct. 3469. Moreover, such second-guessing disrespects "the independence of state courts," *id.*, at 1040, 103 S.Ct. 3469, and the State itself, *Coleman v. Thompson*, 501 U.S. 722, 738–739, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Second, one might argue, as the Court does, that we have jurisdiction because the decision below rests on federal, not state, grounds. See *ante,* at 2479, n. 15. It is true that the Oklahoma Court of Criminal Appeals briefly recited the procedural history of *Murphy* and recognized that the Tenth Circuit's decision—which we granted certiorari to review—is not yet final. But contrary to the Court's assertion that brief discussion of federal case law did not come close to "address[ing] the merits of [petitioner's] federal [Major Crimes Act] claim." *Ante*, at 2479, n. 15. The state court did not analyze the relevant statutory text or this Court's decisions in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), and *Nebraska* v. *Parker*, 577 U. S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016). It reads far too much into the opinion to claim that the court's brief reference to the Tenth Circuit's decision in *Murphy* transformed the state court's decision into one that "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law," *Long*, *supra*, at 1040–1041, 103 S.Ct. 3469; see also *ante,* at 2479, n. 15. Nothing in the court's opinion suggests that its judgment was at all based on federal law. Thus, even if we were to set aside the fact that the state court "clearly and expressly state[d] ***2504** that [its decision] was based on state procedural grounds," we could not presume jurisdiction here. *Coleman*, *supra*, at 735–736, 111 S.Ct. 2546 (internal quotation marks omitted).

The Court might think that, in the grand scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this federal question sooner or later. See *Royal* v. *Murphy*, 584 U. S. ——, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018). But our desire to decisively "settle [important disputes] for the sake of convenience and efficiency" must yield to the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Hollingsworth v. Perry*, 570 U.S. 693, 704–705, 133 S.Ct.

2652, 186 L.Ed.2d 768 (2013) (internal quotation marks omitted). Because the Oklahoma court's "judgment does not depend upon the decision of any federal question[,] we have no power to disturb it." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 61 L.Ed. 644 (1917).

I agree with THE CHIEF JUSTICE that the Court misapplies our precedents in granting petitioner relief. *Ante*, at 2484 – 2502 (dissenting opinion). But in doing so, the Court also overrides Oklahoma's statutory procedural bar, upsetting a violent sex offender's conviction without the power to do so. The State of Oklahoma deserves more respect under our Constitution's federal system. Therefore, I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Not admitted in D.C.; supervised by principals of the Firm.

1 The dissent by THE CHIEF JUSTICE (hereinafter the dissent) suggests that the Creek's intervening alliance with the Confederacy " 'unsettled' " and " 'forfeit[ed]' " the longstanding promises of the United States. *Post,* at 2483. But the Treaty of 1866 put an end to any Civil War hostility, promising mutual amnesty, "perpetual peace and friendship," and guaranteeing the Tribe the "quiet possession of their country." Art. I, 14 Stat. 786. Though this treaty expressly reduced the size of the Creek Reservation, the Creek were compensated for the lost territory, and otherwise "retained" their unceded portion. Art. III, *ibid*. Contrary to the dissent's implication, nothing in the Treaty of 1866 purported to repeal prior treaty promises. Cf. Art. XII, *id.,* at 790 (the United States expressly "reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before" the Civil War).

2 The dissent stresses, repeatedly, that the Dawes Commission was charged with seeking to extinguish the reservation. *Post,* at 2491– 2492, 2495. Yet, the dissent fails to mention the Commission's various reports acknowledging that those efforts were unsuccessful precisely because the Creek refused to cede their lands.

3 The dissent not only fails to acknowledge these features of the statute and our precedents. It proceeds in defiance of them, suggesting that by moving to eliminate communal title and relaxing restrictions on alienation, "Congress destroyed the foundation of [the Creek Nation's] sovereignty." *Post*, at 2491. But this Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status. See *Seymour*, 368 U.S., at 357–358, 82 S.Ct. 424.

4 The dissent seemingly conflates these steps in other ways, too, by implying that the passage of an allotment Act *itself* extinguished title. *Post,* at 2491 – 2492. The reality proved more complicated. Allotment of the Creek lands did not occur overnight, but dragged on for years, well past Oklahoma's statehood, until Congress finally prohibited any further allotments more than 15 years later. Act of Mar. 2, 1917, 39 Stat. 986.

5 The dissent doesn't purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement. Instead, the dissent tries to excuse their absence by saying that it would have made "little sense" to find such language in an Act transferring the Tribe's lands to private owners. *Post*, at 2489. But the dissent's account is impossible to reconcile with history and precedent. As we have noted, plenty of allotment agreements during this era included precisely the language of cession and compensation that the dissent says it would make "little sense" to find there. And this Court has confirmed time and again that allotment agreements without such language do not necessarily disestablish or diminish the reservation at issue. See *Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). The dissent's only answer is to suggest that allotment combined with *other* statutes limiting the Creek Nation's governing authority amounted to disestablishment—in other words that it's the arguments in the *next* section that really do the work.

6 The dissent calls it "fantasy" to suggest that Congress evinced "any unease about extinguishing the Creek domain" because Congress "did what it set out to do: transform a reservation into a State." *Post,* at 2494. The dissent stresses, too, that the Creek were afforded U. S. citizenship and the right to vote. *Post,* at 2492 – 2493. But the only thing implausible here is the suggestion that "creat[ing] a new State" or enfranchising Native Americans implies an "intent to terminate" any and all reservations within a State's boundaries. *Post,* at 2490. This Court confronted—and rejected—that sort of argument long ago in *United States v.*

Sandoval, 231 U.S. 28, 47–48, 34 S.Ct. 1, 58 L.Ed. 107 (1913). The dissent treats that case as a one-off: special because "the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands." *Post*, at 2493, n. 4. But *Sandoval* is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.

7 The dissent ultimately concedes what Oklahoma will not: that no "individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation." *Post*, at 2487. Instead we're told we must consider "all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence." *Ibid*. So, once again, the dissent seems to suggest that it's the arguments in the *next* section that will get us across the line to disestablishment.

8 The dissent suggests *Parker* meant to say only that evidence of subsequent treatment had limited interpretative value "*in that case*." *Post,* at 2488. But the dissent includes just a snippet of the relevant passage. Read in full, there is little room to doubt *Parker* invoked a general rule:
"This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to 'rewrite' the 1882 Act in light of this subsequent demographic history. *DeCoteau*, 420 U.S., at 447 [, 95 S.Ct. 1082]. After all, evidence of the changing demographics of disputed land is 'the least compelling' evidence in our diminishment analysis, for '[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.' *Yankton Sioux*, 522 U. S., at 356 [118 S.Ct. 789].... Evidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.' *Id.*, at 355 [118 S.Ct. 789]." 577 U. S., at ——, 136 S.Ct., at 1082.

9 In an effort to support its very different course, the dissent stitches together quotes from *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *Post,* at 2487 – 2488. But far from supporting the dissent, both cases emphasize that "[t]he focus of our inquiry is congressional intent," *Rosebud*, 430 U.S., at 588, n. 4, 97 S.Ct. 1361; see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789, and merely acknowledge that extratextual sources may help resolve ambiguity about Congress's directions. The dissent's appeal to *Solem* fares no better. As we have seen, the extratextual sources in *Solem* only confirmed what the relevant statute already suggested—that the reservation in question was not diminished or disestablished. 465 U.S. at 475–476, 104 S.Ct. 1161.

10 The dissent tries to avoid this inconvenient history by distinguishing fee allotments from reservations, noting that the two categories are legally distinct and geographically incommensurate. *Post,* at 2496 – 2497. But this misses the point: The *reason* that Oklahoma thought it could prosecute Indians for crimes on restricted allotments applied with equal force to reservations. And it hardly "stretches the imagination" to think that reason was wrong, *post*, at 2497, when the dissent itself does not dispute our rejection of it in Part V.

11 Unable to answer Oklahoma's admitted error about the very federal criminal statute before us, the dissent travels far afield, pointing to the fact an Oklahoma court heard a civil case in 1915 about an inheritance—involving members of a different Tribe—as "evidence" Congress disestablished the Creek Reservation. See *post,* at 2493 (citing *Palmer v. Cully*, 52 Okla. 454, 455–465, 153 P. 154, 155–157 (1915) (*per curiam*)). But even assuming that Oklahoma courts exercised civil jurisdiction over Creek members, too, the dissent never explains why this jurisdiction implies the Creek Reservation must have been disestablished. After all, everyone agrees that the Creeks were prohibited from having their own courts at the time. So it should be no surprise that some Creek might have resorted to state courts in hope of resolving their disputes.

12 The dissent finds the statements of the Creek leadership so probative that it cites them not just as evidence about the meaning of treaties the Tribe signed but even as evidence about the meaning of general purpose laws the Creek had no hand in. See *post,* at 2496 (citing Chief Porter's views on the legal effects of the Oklahoma Enabling Act). That is quite a stretch from using tribal statements as "historical evidence of 'the manner in which [treaties were] negotiated' with the ... Tribe." *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)).

13 Part of the reason for Cohen's error might be explained by a portion of the memorandum the dissent leaves unquoted. Cohen concluded that Oklahoma was free to try Indians anywhere in the State because, among other things, the Oklahoma Enabling Act "transfer[red] ... jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma." App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). Yet, as we explore below, the Oklahoma Enabling Act did *not* send cases covered by the federal MCA to state court. See Part V, *infra*. Other, contemporaneous Interior Department memoranda acknowledged that Oklahoma state courts had simply "assumed jurisdiction" over cases arising on restricted allotments without any clear authority in the Oklahoma Enabling Act or the MCA, and much the same appears to have occurred here. App. to Supp. Reply Brief for Respondent in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum from N. Gray, Dept. of Interior, for Mr. Flanery (Aug. 12, 1942)). So rather than Oklahoma and the United States having a "shared understanding" that Congress had disestablished the Creek Reservation, *post*, at 2496 – 2497, it seems more accurate to say that for many years much uncertainty remained about whether the MCA applied in eastern Oklahoma.

14 The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. *Post*, at 2498 – 2499. It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. *Post,* at 2499, n. 7. The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. *Post*, at 2498, 2499 – 2500. It highlights three occasions on which this Court referred to something like a "former Creek Nation," though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. *Grayson v. Harris*, 267 U.S. 352, 357, 45 S.Ct. 317, 69 L.Ed. 652 (1925); *Woodward v. De Graffenried*, 238 U.S. 284, 289–290, 35 S.Ct. 764, 59 L.Ed. 1310 (1915); *Washington v. Miller*, 235 U.S. 422, 423–425, 35 S.Ct. 119, 59 L.Ed. 295 (1914). The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, *post,* at 2499, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes.

15 For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. Indeed, Justice THOMAS contends that this state-law limitation on collateral review prevents us from considering even the case now before us. *Post,* at 2503 (dissenting opinion). But while that state-law rule may often bar our way, it doesn't in this case. After noting a potential state-law obstacle, the Oklahoma Court of Criminal Appeals (OCCA) proceeded to address the merits of Mr. McGirt's federal MCA claim anyway. Because the OCCA's opinion "fairly appears to rest primarily on federal law or to be interwoven with federal law" and lacks any "plain statement" that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us. See *Michigan v. Long*, 463 U.S. 1032, 1040–1041, 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

16 This sense of cooperation and a shared future is on display in this very case. The Creek Nation is supported by an array of leaders of other Tribes and the State of Oklahoma, many of whom had a role in negotiating exactly these agreements. See Brief for Tom Cole et al. as *Amici Curiae* 1 ("Amici are a former Governor, State Attorney General, cabinet members, and legislators of the State of Oklahoma, and two federally recognized Indian tribes, the Chickasaw Nation and Choctaw Nation of Oklahoma") (brief authored by Robert H. Henry, also a former State Attorney General and Chief Judge of the Tenth Circuit).

1 I assume that the Creek Nation's territory constituted a "reservation" at this time. See *ante*, at 2461 – 2462. The State contends that no reservation existed in the first place because the territory instead constituted a "dependent Indian communit[y]." Brief for Respondent 8 (quoting 18 U.S.C. § 1151(b)). The United States disagrees and states that defining the territory as a dependent Indian community could disrupt the application of various federal statutes. Tr. of Oral Arg. 79–80. I do not address this debate because, regardless, I conclude that any reservation was disestablished.

2 Our precedents have generally considered whether Congress disestablished or diminished a reservation by enacting "surplus land Acts" that opened land to non-Indian settlement. Here Congress did much more than that, as I will explain. Even so, there is broad agreement among the parties, the United States, the Creek Nation, and even the Court that our precedents on surplus land Acts provide the governing framework for this case, so I proceed on the same course. See Brief for Petitioner 1; Brief for Respondent 29, 35, 40; Brief for United States as *Amicus Curiae* 4–5; Brief for Muscogee (Creek) Nation as *Amicus Curiae* 1–2; *ante*, at 2462 – 2463, 2468 – 2469.

3 The Court rejects this reading of *Parker* based on a quotation that ends with what sounds like a general principle that "[e]vidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.' " *Ante*, at 2469, n. 8 (quoting *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081). But that sentence was actually the topic sentence of a new paragraph that addressed the *particular* evidence of subsequent treatment of the *particular* land by the *particular* government officials in that case. *Id.*, at 2464 – 2465, 136 S.Ct. at 1081–1083. It is clear that *Parker* merely concluded that the evidence cited by the parties provided a "mixed record of subsequent treatment" that did not move the needle either way. *Ibid.* (internal quotation marks omitted). *Parker* did not silently overturn our precedents requiring us to consider—and accord "weight" to—subsequent evidence that plainly favors, or undermines, disestablishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); see *supra,* at 2484 – 2487.

4 The Court, citing *United States v. Sandoval*, 231 U.S. 28, 47–48, 34 S.Ct. 1, 58 L.Ed. 107 (1913), argues that including a tribe within a new State is not necessarily incompatible with the continuing existence of a reservation. *Ante*, at 2467, n. 6. But the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands—which Congress explicitly extinguished here. 231 U.S. at 47, 34 S.Ct. 1. More fundamentally, the Court's argument suffers from the same flaw that runs through its entire approach, which maintains that each of Congress's actions alone would not be enough for disestablishment but never confronts the import of all of them.

5 The Court discounts the views of the principal chiefs as mere predictions about what Congress "*would*" do, *ante,* at 2472, but the Court ignores statements made after statehood, describing what Congress *did* do. The Court also asserts that the chiefs' views

cannot serve as "evidence" of the "meaning" of laws enacted by Congress. *Ante*, at 2472, n. 12. That is inconsistent with our precedent, which specifically instructs us to determine Congress's intent by considering the "understanding of the status of the reservation by members" of the affected tribe. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079. The contemporaneous understanding of the leaders of the tribe is highly probative.

6 The Court claims that the Oklahoma courts' reasons for treating restricted allotments as Indian country must apply with "equal force" to the unrestricted fee lands at issue here, but the Court ultimately admits the two types of land are "legally distinct." *Ante*, at 2471, n. 10. And any misstep with regard to the small number of restricted allotments hardly means the Oklahoma courts made the far more extraordinary mistake of failing to notice that the Five Tribes' reservations—encompassing 19 million acres—continued to exist.

7 The Court suggests that these statutes only show that there are some "former reservations" in Oklahoma, not that the Five Tribes' former domains are necessarily among them. *Ante*, at 2473 – 2474, n. 14. History says otherwise. For example, the Five Tribes actively lobbied for inclusion of this language in the Indian Gaming Regulatory Act. See Hearing on S. 902 et al. before the Senate Select Committee on Indian Affairs, 99th Cong., 2d Sess., 299–300 (1986). They observed that the term "reservation," as originally defined, did not pertain to the "eastern Oklahoma tribes, including the Five Civilized Tribes." *Ibid.*(statement of Charles Blackwell, representative of the Chickasaw Nation of Oklahoma). Accordingly, they "recommend[ed] inclu[ding] ... the wording 'or in the case of Oklahoma tribes, their *former* jurisdictional and/or reservation boundaries in Oklahoma.' " *Id.*, at 300 (emphasis added). The National Indian Gaming Association, which proposed the language on which the final act was ultimately modeled, made the same point, observing that in Oklahoma "reservation boundaries have been extinguished for most purposes" so the statute should refer to "former reservation[s] in Oklahoma." *Id.*, at 312 (Memorandum from the National Indian Gaming Assn. to the Senate Select Committee on Indian Affairs (June 17, 1986)).

8 See App. to Brief for Respondent 18a–19a (excerpting various statements before Congress, including: "[w]e are not a reservation tribe" (Principal Cherokee Chief, 1982), "Oklahoma, ... of course, is not a reservation State" (Chickasaw Governor, 1988), "Oklahoma is not [a reservation State]" and "[w]e have no surface reservations in Oklahoma" (Chickasaw advisor, 2011), as well as references to the boundaries and lands of "former reservation[s]" (Chickasaw nominee for Assistant Secretary of Indian Affairs, 2012; Inter-Tribal Council of the Five Civilized Tribes, 2016)).

9 The Court suggests that "well-known" "procedural obstacles" could prevent challenges to state convictions. *Ante*, at 2479 – 2480. But, under Oklahoma law, it appears that there may be little bar to state habeas relief because "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Murphy v. Royal*, 875 F.3d 896, 907, n. 5 (C.A.10 2017) (quoting *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997)).

10 See, *e.g.*, *White Mountain Apache Tribe*, 448 U.S., at 148–151, 100 S.Ct. 2578 (barring State from imposing motor carrier license tax and fuel use taxes on non-Indian logging companies that harvested timber on a reservation); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690–692, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) (barring State from taxing income earned by a non-Indian who operated a trading post on a reservation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (barring State from regulating hunting and fishing by non-Indians on a reservation); see also *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 448, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinion of Stevens, J.) (arguing that it is "impossible to articulate precise rules that will govern whenever a tribe asserts that a land use approved by a county board is pre-empted by federal law").

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LEGAL AUTHORITY AA-96

2014 WL 12513422
Only the Westlaw citation is currently available.
(Not for Publication)
United States Court of Federal Claims.

The MEYER GROUP, LTD, Plaintiff,
v.
The UNITED STATES, Defendant.

No. 12-488C
|
(Filed: April 23, 2014)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION IN LIMINE IN PART

WILLIAMS, Judge.

***1** In this contract dispute, Plaintiff, The Meyer Group, Ltd. ("Meyer"), claims that the Postal Regulatory Commission ("PRC") breached an exclusive real estate brokerage agreement executed in 2004. Under this contract, Meyer agreed to assist PRC in obtaining office space in the Washington, D.C. area, and PRC agreed to condition its acceptance of any resulting lease upon the lessor providing Plaintiff a commission. Plaintiff contends that, under the brokerage agreement, it was the procuring cause of any prospective locations it "submitted" during the term of the agreement. Plaintiff claims that PRC breached this agreement by failing to recognize Plaintiff as the procuring cause of certain rental locations and by refusing to aid Plaintiff in obtaining commissions from these transactions.

Plaintiff seeks $402,185.76 in damages for procuring a January 2012 amendment to an April 2005 lease on 901 New York Avenue, N.W., and damages, in an amount to be determined, for PRC's failure to recognize Plaintiff as the procuring cause of a May 2011 sublease for office space on the fifth floor of 901 New York Avenue, an August 2011 amendment to the May 2011 sublease for additional space on the fourth floor of that same building, and a July 2012 amendment of the fifth floor sublease.

Before the Court is Defendant's motion in limine to exclude, in part, the expert report and testimony of David E. Kaplan, Plaintiff's proffered commercial real estate expert. Defendant requests that this Court exclude the following opinions from Mr. Kaplan's report and testimony:

> (1) by custom and practice of the Industry, the May 5, 2004 Agreement between Meyer and [PRC] remained in effect after the signing of [PRC]'s 2005 lease, and indeed under the Agreement Meyer was obligated to cooperate with PRC in maintaining the relationship;
>
> ...
>
> (3) per the explicit terms of the Agreement, Meyer would be considered the procuring cause of the 901 New York Avenue Leased Spaces; and
>
> (4) it is appropriate under the facts of this case for Meyer to receive commissions on the transactions at issue, notwithstanding the passage of time after termination.

App. to Def.'s Mot. in Limine A9.

For the reasons stated below, the motion in limine is **GRANTED IN PART**. Mr. Kaplan may not interpret the brokerage agreement at issue or opine on whether Plaintiff is owed commissions here, as those matters implicate pure legal issues. Mr. Kaplan will be permitted to testify on the customary and usual meaning of the terminology in the exclusive brokerage agreement as used in the Washington, D.C. commercial real estate industry and may give examples of their usage and application.

Discussion

A motion in limine "is a useful tool to prevent a party before trial from encumbering the record with irrelevant, immaterial or cumulative matters." Baskett v. United States, 2 Cl. Ct. 356, 367-68 (1983). It is a preliminary motion that enables the Court to remove from further review evidentiary submissions that would clearly be inadmissible at trial. PR Contractors, Inc. v. United States, 69 Fed. Cl. 468, 469 (2006) (citing Jonasson v. Lutheran Child & Family Servs., 115 F.3d 436, 440 (7th Cir. 1997)).

***2** Under Federal Rule of Evidence ("FRE") 702, the Court may hear a qualified expert's testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FRE 702. Under this rule, the trial judge is required to ensure that all proffered expert testimony is relevant and reliable. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993)). "A trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion." Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1292 (Fed. Cir. 2002) (citing Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138-39 (1997)).

Evidence of industry practice and custom helps the Court determine a contract's meaning. Metric Constructors, Inc. v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999). Such evidence "illuminates the contemporaneous circumstances of the time of contracting, giving life to the intentions of the parties. It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain." Id. Expert testimony on the meaning of contract terms according to industry practice and custom, therefore, may assist the Court in determining how it should interpret a contract. Kona Tech. Corp. v. S. Pac. Transp. Co., 225 F.3d 595, 611 (5th Cir. 2000) (finding that trial court properly admitted expert testimony on the customary and usual meaning of disputed contract terms in the railway transportation industry); WH Smith Hotel Servs., Inc. v. Wendy's Int'l, Inc., 25 F.3d 422, 429 (7th Cir. 1994) (upholding trial court's use of expert testimony concerning the customary and usual meaning of percentage rent provisions in commercial real estate leases); see also Sparton Corp. v. United States, 77 Fed. Cl. 1, 8 (2007) (noting that federal courts have permitted expert testimony where the meaning of contract terms depends on industry practice and custom).

Here, Mr. Kaplan's expert report and opinions go beyond providing the Court with the customary and usual meaning of terminology used in commercial real estate brokerage agreements. Rather than limiting his explanation to how the terms used in the contract are employed in the commercial real estate brokerage industry in the District of Columbia locality, Mr. Kaplan interprets the parties' contract by declaring that the brokerage agreement in dispute was in effect after the signing of the 2005 lease and that Plaintiff was the procuring cause of and entitled to commissions for the subsequent lease and sublease transactions—ultimate legal issues here. Expert opinions concerning a question of law may be excluded as unhelpful. Stobie Creek Invs. LLC v. United States, 608 F.3d 1366, 1383-84 (Fed. Cir. 2010); see also Sparton Corp., 77 Fed. Cl. at 8 ("[E]xpert testimony on the law may be excluded ... in a bench trial ... [because] it invades the province of the court and is not helpful."). Expert testimony that merely provides legal analysis or applies the law to the facts at hand is not helpful. While testimony may embrace an ultimate issue under FRE 704, expert testimony that is offered to instruct the Court on how to rule is impermissible. Sparton Corp., 77 Fed. Cl. at 7-8.

Conclusion

***3** For the foregoing reasons, Defendant's motion in limine is **GRANTED IN PART**. In accordance with the pretrial colloquy and the parties' moving papers, the following is a non-exhaustive list of permissible testimony:

> 1. With respect to Opinion 1, Mr. Kaplan may testify on whether the signing of a single lease would operate to terminate an exclusive real estate brokerage agreement under custom and practice of the Washington, D.C. commercial real estate brokerage industry, when the agreement otherwise provided a mechanism to effect termination. Mr. Kaplan is free to provide examples but may not opine on how long the parties' agreement remained in effect based on the facts of this case.
>
> 2. With respect to Opinion 3, Mr. Kaplan may state generally what a "procuring cause" is under custom and practice of the Washington, D.C. commercial real estate brokerage industry, and what would render a real estate broker the "procuring cause" of a transaction after the termination of an exclusive brokerage agreement pursuant to an extension clause under that industry custom and practice. Mr. Kaplan is free to provide examples but may not testify on whether Plaintiff was the procuring cause of the disputed transactions in this case.

3. With respect to Opinion 4, Mr. Kaplan may testify as to what would be a reasonable time frame for a real estate broker to receive a commission after the termination of a brokerage agreement by custom and practice of the Washington, D.C. commercial real estate industry, and he is free to provide examples to the Court. Mr. Kaplan may address how long after termination of an exclusive real estate brokerage agreement an agent would be entitled to compensation as the "procuring cause" of a lease submitted prior to termination of the agreement, where the agreement does not specify a time limit in its extension clause. Mr. Kaplan, however, may not opine on whether Plaintiff is entitled to a commission under the facts of this case.

All Citations

Not Reported in Fed.Cl., 2014 WL 12513422

LEGAL AUTHORITY AA-97

356 Fed.Appx. 2
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

Raymond REUDY, and Kevin Hicks, doing business as Advertising Display Systems; and ADS–1, a California limited liability company, Plaintiffs–Appellants,
v.
CLEAR CHANNEL OUTDOOR, INC., a Delaware corporation; William Hooper, an individual; CBS Corporation, a Delaware corporation; Patrick Roche, an individual, Defendants–Appellees.

No. 08–15072.
|
Argued and Submitted June 9, 2009.
|
Filed July 8, 2009.

Synopsis

Background: Sellers of seven outdoor advertising sign billboards sued buyers, claiming private or public nuisance in violation of state law. The United States District Court for the Northern District of California, Samuel Conti, J., dismissed. Sellers appealed.

Holdings: The Court of Appeals held that:

[1] claims were barred by broad release in purchase agreement;

[2] claims were barred under doctrine of res judicata; and

[3] even if claims were not barred, sellers lacked interest in real property and different harm than suffered by general public, as required for nuisance claims.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (3)

[1] Compromise, Settlement, and Release Torts and personal injuries

Sellers' claims of private or public nuisance, in violation of California law, against buyers of seven outdoor advertising sign billboards, were barred by broad release of all known and unknown claims entered into by sellers and buyers in conjunction with purchase agreement.

[2] Judgment What constitutes identical causes

Sellers' action asserting claims of private or public nuisance against buyers of seven outdoor advertising sign billboards was barred, under doctrine of res judicata, by seller's prior action raising nuisance claims against same buyer.

[3] Nuisance Persons entitled to sue
Nuisance Special annoyance, injury, or danger to individuals

Even if sellers' action asserting claims of private or public nuisance against buyers of seven outdoor advertising sign billboards was not barred by release in purchase agreement or by doctrine of res judicata, sellers' nuisance claims were precluded, under California law, since sellers lacked any interest in real property, as required for private nuisance claim, and had not suffered different harm than suffered by general public, as required for public nuisance claim. Restatement (Second) of Torts § 821C(1); West's Ann.Cal.Civ.Code § 3480.

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Appeal from the United States District Court for the Northern District of California, Samuel Conti, District Judge, Presiding. D.C. No. CV–06–05409–SC.

Before: SCHROEDER, TASHIMA and BEA, Circuit Judges.

MEMORANDUM*

****1** Plaintiffs–Appellants Raymond Reudy and Kevin Hicks, dba Advertising Display Systems, and ADS–1 appeal the district court's dismissal of their action against CBS Corp., Patrick Roche, Clear Channel Outdoor, Inc., and William Hooper. We affirm.

[1] Plaintiffs' claims against CBS and Roche, are barred by the broad release of all known and unknown claims entered into by Plaintiffs and CBS in conjunction with CBS's purchase of seven outdoor advertising sign billboards from Plaintiffs. Plaintiffs present no allegation of fraud, duress, undue influence, or unconscionability with respect to the purchase agreement or the release signed by the Plaintiffs. That purely commercial transaction does not warrant a court's intervention to remake the parties' agreement. *See CAZA Drilling (California), Inc. v. TEG Oil & Gas, U.S.A., Inc.,* 142 Cal.App.4th 453, 48 Cal.Rptr.3d 271, 286 (2006) ("In the majority of commercial situations, courts have upheld contractual limitations on liability, even against claims that the breaching party violated a law or regulations.").

[2] Plaintiffs' claims against Clear Channel and Hooper are barred on the basis of res judicata, because the nuisance claims were raised against Clear Channel in a separate action. *See Fed. Trade Comm'n v. Garvey,* 383 F.3d 891, 897 (9th Cir.2004).

[3] Even if Plaintiffs' claims were not barred by either the release or res judicata, Plaintiffs failed to state a cause of action for either private or public nuisance because plaintiffs lack any interest in real property. California law requires a disturbance of rights in land before a plaintiff may maintain a cause of action for private nuisance. *Venuto v. Owens–Corning Fiberglas Corp.,* 22 Cal.App.3d 116, 99 Cal.Rptr. 350, 355 (Cal.Ct.App.1971). Plaintiffs' alleged interests are insufficient to state a cause of action for private nuisance. ***4** *See Trinkle v. Cal. State Lottery,* 71 Cal.App.4th 1198, 84 Cal.Rptr.2d 496, 500 (1999) (rejecting private nuisance claim where plaintiff owned vending machines installed in third-party business establishments but had no interest in the real property of those businesses). In order to state a claim for public nuisance, "one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." *Ileto v. Glock, Inc.,* 349 F.3d 1191, 1211 (9th Cir.2003) (applying California law) (citing Restatement (Second) of Torts § 821C(1)); *see also* Cal. Civ.Code. § 3480. The harm must be one emanating from the same cause, such as diminution in safety or aesthetics, however. Nuisance law is not designed to benefit disadvantaged competitors.

AFFIRMED.

All Citations

356 Fed.Appx. 2, 2009 WL 2015258

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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LEGAL AUTHORITY AA-98

cussing and scheduling the next steps in this case.

SECURITIES AND EXCHANGE COMM'N, Plaintiff,

v.

Charles JOHNSON, Jr., et al., Defendants.

Civil Action No. 05–36 (GK).

United States District Court, District of Columbia.

Nov. 29, 2007.

Background: Securities and Exchange Commission (SEC) brought enforcement action against executive-level employees of two corporations, alleging that employees had engaged in fraudulent scheme to improperly inflate revenues of one of the corporations. Employees moved to exclude testimony of SEC's proposed expert witness, an economist and expert in Internet marketing.

Holdings: The District Court, Gladys Kessler, J., held that:

(1) expert's proposed testimony regarding meaning of corporation's contract was supported by reliable principles and methods, and

(2) contract testimony was helpful to jury concerning terms used in industry practice, but not in relation to meaning of contract as between parties.

Motion denied.

1. Evidence ⚿508, 555.2

In determining admissibility of proposed expert testimony, trial court must determine whether: (1) expert's testimony is based on scientific knowledge, and (2) testimony will assist trier of fact to understand or determine fact in issue. Fed. Rules Evid.Rule 702, 28 U.S.C.A.

2. Evidence ⚿555.2

In Securities and Exchange Commission (SEC) fraud enforcement action alleging fraudulent scheme to improperly inflate Internet marketing corporation's revenues, proposed testimony by SEC expert in Internet marketing and e-commerce, regarding meaning of corporation's contract for auction integration work, was supported by reliable principles and methods, as required for admissibility; expert had many years of experience in field, and derived his opinions from significant research, even though his analysis was not premised upon hard science. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3. Evidence ⚿518

In Securities and Exchange Commission (SEC) fraud enforcement action alleging fraudulent scheme to improperly inflate Internet marketing corporation's revenues, proposed contract-interpretation testimony by SEC expert in Internet marketing and e-commerce, concerning corporation's contract for auction integration work, was helpful to jury and thus admissible insofar as it related to meaning of contract terms when meaning depended on industry practice, but was not helpful and not admissible insofar as it related to meaning of contract as between parties to contract. Fed.Rules Evid.Rule 702, U.S.C.A.

David J. Gottesman, Richard Hong, U.S. Securities & Exchange Commission, Washington, DC, for Plaintiff.

David Sidney Steuer, Jared Lee Kopel, Nicole Suzanne Miller Healy, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA, Nicholas Ian Porritt, Wilson Sonsini Goodrich & Rosati, PC, Danny C. Onorato, David Schertler, Carroll Virginia Crumbaugh Love, Habib F. Ilahi, Schertler & Onorato, L.L.P., Mark Joseph Hulkower, Bruce Charles Bishop, Jonathan Charles Drimmer, Marc Elliot Levin, Suzanne Dallas Reider, Steptoe & Johnson, L.L.P., Henry Winchester Asbill, Kerri L. Ruttenberg, Dewey & Leboeuf, LLP, Vincent H. Cohen, Jr., Washington, DC, Terrance G. Reed, Vernon Thomas Lankford, William Francis Coffield, IV, Lankford, Coffield & Reed, PLLC, Alexandria, VA, Paul S. Hugel, Clayman & Rosenberg, New York, NY, for Defendants.

MEMORANDUM OPINION

GLADYS KESSLER, District Judge.

Plaintiff Securities and Exchange Commission ("SEC") brings this action against four individual Defendants (John Tuli, Kent Wakeford, Christopher Benyo, and Michael Kennedy, collectively "Defendants"), alleging a fraudulent scheme to materially and improperly inflate the announced and reported revenues of PurchasePro.com, Inc. ("PurchasePro"). This matter is before the Court on Defendants' Joint Motion to Exclude the Testimony of Ward. D. Hanson. Upon consideration of the Motion, Opposition, Reply, and the entire record herein, and for the reasons stated below, Defendants' Joint Motion to Exclude the Testimony of Ward D. Hanson [Dkt. No. 182] is **denied without prejudice.**

I. BACKGROUND

Defendants in this case are former executive-level employees of PurchasePro, a Nevada corporation, and America Online, Inc. ("AOL"). The SEC alleges that between November 2000 and June 2001, Defendants participated in a scheme to commit securities fraud. The alleged purpose of the scheme was to improperly inflate PurchasePro's reported revenues and to otherwise misrepresent PurchasePro's business activities for the last quarter of 2000 and the first quarter of 2001. According to the SEC, to further their scheme, Defendants back-dated sale documentation so that $3.65 million in revenue would be recognized in the fourth quarter of 2000 and the first quarter of 2001, although that revenue was not actually earned in those quarters.[1] The SEC claims that PurchasePro improperly included those back-dated transactions in revenue information announced in an April 26, 2001 national press release, an April 26, 2001 conference call, and in PurchasePro's Form 10–Q for the first quarter of 2001, filed with the SEC on May 29, 2001.

In this case, the SEC has announced its intention to include as part of its case in chief at trial opinion testimony from Ward D. Hanson, a well-published expert in Internet marketing and eCommerce with a Ph.D. and M.A. in Economics from Stanford University. Opp. at 3. Hanson wrote a textbook on Internet marketing which is used by 200 universities worldwide. *Id.* at 4. He is Policy Forum Director at the Stanford Institute for Economic Policy Research, and has taught various Internet marketing, eCommerce, and Economics of the Internet courses at Stanford Universi-

1. The sales documentation at the heart of the SEC's case is a document known as the "Statement of Work" ("SOW"), which Defendants contend was created to reflect a portion of auction integration work PurchasePro was performing for AOL during the first quarter of 2001. Ultimately it was discovered that the SOW had been forged and backdated, a fact which both parties acknowledge.

ty and the Stanford Graduate School of Business. *Id.* at 3.

The SEC seeks to present the expert testimony of Ward D. Hanson on: (1) issues related to the industry in which PurchasePro operated; (2) the types of contracts entered into between PurchasePro, AOL, and AuctioNet; and (3) the types of software application integration discussed in the various contracts between PurchasePro, AOL, and AuctioNet. *See* Hanson Report at 4. In addition, Hanson has been asked to "evaluate the capabilities expected from completion of the Statement of Work document" and to evaluate whether providing a World Wide Web link from the PurchasePro corporate web site to the AuctioNet web site satisfies the expectations created by the Statement of Work. *Id.* at 5.

Defendants do not contest Hanson's qualifications as an expert; rather, they contend that his opinions are premised on an unreliable methodology, are the product of an unreliable application of that methodology, and fall within the province of the jury. On October 17, 2007, Defendants jointly filed a motion to exclude Hanson's testimony.

II. LEGAL FRAMEWORK

The admissibility of expert testimony is governed by the analysis set forth by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the Federal Rules of Evidence. In *Daubert*, the Supreme Court described the trial judge's gatekeeping function and her responsibility "to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589, 113 S.Ct. 2786. As our Court of Appeals has recognized, *Daubert* lowered the threshold for admissibility of scientific evidence, envisioning a "limited gatekeeper role" for trial judges.[2] *Ambrosini v. Labarraque*, 101 F.3d 129, 134 (D.C.Cir.1996)(quotations omitted). In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court clarified that the trial judge's gatekeeping function applies not only to proffered expert scientific testimony, but also to "testimony based on 'technical' and 'other specialized' knowledge." The Court emphasized that in exercising their gatekeeping function, district judges have broad discretionary authority "to determine [the] reliability [of an expert's testimony] in light of the particular facts and circumstances of the particular case." *Id.* at 158, 119 S.Ct. 1167.

[1] *Daubert* requires the trial court to undertake a two-prong analysis that centers on evidentiary reliability and relevancy. *Ambrosini*, 101 F.3d at 133. The trial court must determine "first whether the expert's testimony is based on 'scientific knowledge'; and second, whether the testimony 'will assist the trier of fact to understand or determine a fact in issue.' " *Id.* (quoting *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786).

The first prong of the *Daubert* analysis requires the trial court to assess the methodology employed by the expert as a means of ensuring evidentiary reliability. *Id.* Although *Daubert* identified four factors a district court may consider in as-

2. In 2000, Federal Rule of Evidence 702 was amended in response to *Daubert* and its progeny. The Rule now provides that an expert witness with "scientific, technical, or other specialized knowledge" may testify in the form of an expert opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

sessing scientific validity, the Court emphasized that the inquiry is a "flexible one," and that the factors it discussed were not necessarily applicable in every case, dispositive, or exhaustive. *Id.* (citing *Daubert*, 509 U.S. at 593–95, 113 S.Ct. 2786). Rather than mandating the mechanical application of a set list of factors, the Court cautioned in *Kumho* that *Daubert* factors "do not constitute a 'definitive checklist or test,' " 526 U.S. at 150, 119 S.Ct. 1167, and that "whether *Daubert's* specific factors are, or are not, a reasonable measure of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153, 119 S.Ct. 1167. The Court cautioned that in applying the first prong of the *Daubert* analysis, the trial court must focus "solely on principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786.

The second prong of the *Daubert* test concerns relevance or "fit," which, the Supreme Court warned, "is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id.* at 591, 113 S.Ct. 2786. The dispositive question with respect to "fit" or relevance is whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 591, 113 S.Ct. 2786 (quoting Federal Rule of Evidence 702) (quotations omitted). As our Court of Appeals has explained, a judge is not required to become an expert in the field of the proffered expert in order to assess "fit"; rather, "once an expert has explained his or her methodology, and has withstood . . . evidence suggesting that the methodology is not derived from the scientific method, the expert's testimony, so long as it 'fits' an issue in the case, is admissible under Rule 702 for the trier of fact to weigh." *Ambrosini*, 101 F.3d at 134.

III. ANALYSIS

[2] Defendants object to the admission of Hanson's opinions, arguing that they: (1) fall within the jury's province because they are essentially common sense for which no expert testimony is needed; and (2) are not the product of reliable principles and methods. Although Defendants' contention that Hanson's conclusions are not the product of reliable principles and methods lacks merit,[3] Hanson's opinions regarding the proper interpretation of the Statement of Work present a more difficult legal issue. As Defendants' and Plaintiff's briefs make clear, some tension exists in the applicable precedent over the extent to which an expert may testify about the proper interpretation of a contract.

[3] Defendants object to Hanson's testimony that the work required of Pur-

3. Defendants argue that Hanson's testimony should be excluded because he does not describe a particular methodology through which he reaches his conclusions. Hanson's report and the conclusions therein are drawn from many years of experience in Internet marketing and eCommerce, and are derived from significant research. The studies and data upon which Hanson bases his conclusions are outlined in his report, *see* Hanson Report at 6–12, leaving no doubt as to the validity of the methodology leading to his conclusion that the business-to-business marketplace was highly volatile from 1999–2001. With respect to his other conclusions, Hanson's report details the resources he reviewed and how he reached his conclusions. *See* Hanson Report at 13–32. Although Hanson's analysis is not premised upon hard science, there is no question that, when relevant, testimony regarding industry custom and practice are permissible forms of testimony under *Daubert*, *Kumho*, and their progeny. *See, e.g., Minebea Co., Ltd. v. Papst*, No. 97–0590, 2005 WL 1459704, at *8–9, 2005 U.S. Dist. LEXIS 11946, at *26 (D.D.C. Jun. 21, 2005); *Iacobelli Constr. v. County of Monroe*, 32 F.3d 19 (2d Cir.1994).

chasePro under the Statement of Work is best described in Article 5.1, rather than Article 4.1A, of the Statement of Work. Mot. at 5. Defendants also argue for the exclusion of Hanson's conclusion that the work completed by PurchasePro by the end of March 2001 was insufficient to satisfy the Statement of Work. *Id.* Defendants contend that such testimony is improper because it (1) interprets a document that is unambiguous on its face; (2) improperly opines on the legal obligations of the parties; and (3) impermissibly tells the jury what result to reach.

While Defendants are correct that Hanson should not be permitted to testify regarding the meaning of the contract as between the parties, *see Minebea*, 2005 WL 1459704, at *8–9, 2005 U.S. Dist. LEXIS 11946, at *25–26, he is permitted to testify regarding the meaning of contract terms when the meaning depends on industry practice, *see* Opp. at 8 (citing supporting cases from the Second, Fifth, Seventh, and Eighth Circuits). Indeed, in *Minebea*, the opinion Defendants cite as support for excluding Hanson's testimony, Judge Friedman observes that expert testimony, while not permissible for the meaning of the contract as between the parties, would be useful with respect to general industry observances in negotiating, drafting, reviewing, and interpreting contracts. *Minebea*, 2005 WL 1459704, at *8–9, 2005 U.S. Dist. LEXIS 11946, at *26. Therefore, although Hanson will be prohibited from addressing the specific meaning of this contract as between the parties, his testimony will be allowed in order to aid the jury in understanding the meaning of terms employed in the contract and industry practice with respect to such contracts.

The parties' papers have led the Court to believe that there will be a fuller discussion of the facts and law relevant to Hanson's opinions in the dispositive motions presently pending before the Court.[4] The Court may well wish to revisit the merits of Defendants' motion after reading and ruling on those summary judgment motions.

IV. CONCLUSION

For the foregoing reasons, Defendants' Joint Motion to Exclude the Testimony of Ward D. Hanson [Dkt. No. 182] is **denied without prejudice.**

An Order will issue with this Memorandum Opinion.

SECURITIES AND EXCHANGE COMM'N, Plaintiff,

v.

Charles JOHNSON, Jr., et al., Defendants.

Civil Action No. 05–36 (GK).

United States District Court, District of Columbia.

Nov. 29, 2007.

Background: Securities and Exchange Commission (SEC) brought enforcement action against executive-level employees of two corporations, alleging that employees had engaged in fraudulent scheme to improperly inflate revenues of one of the corporations. Employees moved to exclude testimony of SEC's proposed expert wit-

4. Defendants have intimated that the merits of a grant of summary judgment to certain individual defendants may rest in large part on Hanson's expert opinion. *See* Mot. at 5.

LEGAL AUTHORITY AA-99

United States Code Annotated
Title 15. Commerce and Trade
Chapter 1. Monopolies and Combinations in Restraint of Trade (Refs & Annos)

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Effective: June 22, 2004
Currentness

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

CREDIT(S)

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Pub.L. 93-528, § 3, Dec. 21, 1974, 88 Stat. 1708; Pub.L. 94-145, § 2, Dec. 12, 1975, 89 Stat. 801; Pub.L. 101-588, § 4(a), Nov. 16, 1990, 104 Stat. 2880; Pub.L. 108-237, Title II, § 215(a), June 22, 2004, 118 Stat. 668.)

15 U.S.C.A. § 1, 15 USCA § 1
Current through P.L. 116-158. Some statute sections may be more current, see credits for details.

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LEGAL AUTHORITY AA-100

first assure themselves that they have the authority to hear a dispute before they may decide the dispute on the merits. *See FW/PBS*, 110 S.Ct. at 607–08; *Carden*, 110 S.Ct. at 1021. Federal courts simply may not assume jurisdiction hypothetically. Some cases might cry out for decision on the merits; some might pose difficult jurisdictional problems. Our threshold duty to examine our own jurisdiction is no less obligatory in either instance.

III.

"If there were no jurisdiction, there was no power to do anything but strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be...." *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 250, 18 L.Ed. 851 (1868). In my view, this court has no jurisdiction to hear Cross–Sound's environmental claims. I would therefore strike those claims from the docket and stop before reaching the merits. Because the majority here goes further, I respectfully decline to join parts IV and V of the majority's opinion and join only parts I, II, and III.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, et al., Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent, Maxus Exploration Company, Norfolk Energy, Inc., Arco Oil and Gas Company, Exxon Corporation, Kaneb Exploration, Inc., Okmar Oil Company, Shell Western E & P, Inc., Shenandoah Oil Corporation, Texas International Petroleum Company and Phoenix Resources Company, Kaiser–Francis Oil Company and Leben Oil Corporation, Bass Enterprises Production Company, Intervenors, Northern Natural Gas Co., a division of Enron Corp.

PEOPLES NATURAL GAS COMPANY, DIVISION OF UTILICORP UNITED, INC., Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent, Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division of Santa Fe International Corporation, Santa Fe–Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Continental Energy, John H. Hendrix, Okmar Oil Company, Neleh Gas and Oil Company, Damson Oil Corporation, Montana Consumers Counsel, Public Utilities Commission of South Dakota and Montana Public Utilities Commission, Intervenors, Northern Natural Gas Co., a division of Enron Corp.

MINNESOTA PUBLIC UTILITIES COMMISSION, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent, Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division of Santa Fe International Corporation, Santa Fe–Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Continental Energy, Wayman W. Buchanan, Kaneb Exploration, Inc., Champlin

Exploration, Inc., Shell Western E & P, Inc., Exxon Corporation, Norfolk Energy, Inc., Arco Oil and Gas Company, Division of Atlantic Richfield Company, Intervenors, Northern Natural Gas Co. a division of Enron Corp.

Nos. 90–1136, 90–1215 and 90–1237.

United States Court of Appeals, District of Columbia Circuit.

Argued March 14, 1991.

Decided May 24, 1991.

Rehearing and Rehearing En Banc Denied Aug. 20, 1991.

In a rate-making proceeding, the Federal Energy Regulatory Commission (FERC) affirmed an administrative law judge's (ALJ's) ruling that a natural gas pipeline and producers intended area rate clauses in their contracts to trigger payments of Natural Gas Policy Act ceiling prices when the contracts were entered into. Petition for review was granted. The Court of Appeals, Stephen F. Williams, Circuit Judge, held that substantial evidence supported the ALJ's ruling.

Petitions denied.

Gas ⇐14.4(12)

Substantial evidence supported administrative law judge's ruling that natural gas pipeline and producers intended area rate clauses in their contracts to trigger payment of Natural Gas Policy Act (NGPA) ceiling prices when contracts were entered into; with narrow exceptions, pipeline paid NGPA ceilings for more than six years, not through oversight or inattention. Natural Gas Policy Act of 1978, § 2 et seq., 15 U.S.C.A. § 3301 et seq.

Petitions for Review of an Order of the F.E.R.C.

Daniel Guttman, with whom Frances E. Francis and Daniel I. Davidson, for South Dakota Public Utilities Com'n, John M. Cutler, Jr., for Peoples Natural Gas Co. and Jon Kingstad for Minnesota Public Utilities Com'n were on the joint brief, for petitioners in Nos. 90–1136, 90–1215 and 90–1237. Jocelyn F. Olson for Minnesota Public Utilities Com'n also entered an appearance for petitioner.

Timm L. Abendroth, Atty., F.E.R.Co., with whom William S. Scherman, Gen. Counsel, and Joseph S. Davies, Deputy Sol., F.E.R.Co., were on the brief, for respondent in all cases. Jerome M. Feit, Atty., F.E.R.Co., also entered an appearance for respondent.

Stephen L. Teichler, with whom Kent K. Carter, C. Roger Hoffman and Douglas W. Rasch for Exxon Corp. and the Estate of E.G. Rodman, Charles H. Shoneman and Randall S. Rich for Graham–Michaelis Corp., Kaiser–Francis Oil Co., Petroleum, Inc., Phoenix Resources Co., Shenandoah Oil Co., Texas Intern. Petroleum Co., Trees Oil Co., Robert F. White, Robert L. Williams, Lester Wilkonson, Philip R. Ehrenkranz and Paul F. Forshay for John H. Hendrix Corp., Neleh Gas and Oil Corp., et al. and Okmar Oil Corp., James B. Wilcox and Richard T. Saas for Kaneb Exploration, Inc., and Leben Oil Corp., Johnny J. Akins, Jon Brunenkant, Katherine B. Edwards and Mark Haskell for Kerr–McGee Corp., Jennifer A. Cates for Lear Petroleum Corp. and Tex/Con Oil and Gas Co., Robert W. Clark and Gail S. Gilman for Mapco, Inc., Mapco Oil and Gas Co. and Werner Oil, Inc., Robert C. Murray, Jon Brunenkant, Katherine B. Edwards and Mark Haskell for Marathon Oil Co., R. Brent Harshman and Nancy J. Skancke for Maxus Exploration Co., Gary M. Prescott and Nancy J. Skancke for Mesa Operating Ltd. Partnership, Marge O'Connor, Jon Brunenkant, Katherine B. Edwards and Mark Haskell for Mobil Natural Gas, Inc., Mobil Producing Texas and New Mexico, Inc., Mobil Oil Exploration and Producing Southeast, Inc., Albert S. Tabor and Catherine O'Harra for Norfolk Energy, Inc., Michael L. Pate for Oxy USA Inc., Robert Lemon for Perryton Operating Co., Nancy J. Skancke for Philcon Development, Phillips Petroleum Co., Phillips 66 Natural Gas Co. and Sidwell Oil and Gas, Inc., William H. Boyles, Robert W. Clark and Gail S. Gilman for Santa Fe–Andover Oil Co., Santa Fe Minerals, Inc., and Santa Fe Braun, Inc., Kathleen T. Puckett for Shell Western

E & P Co., Philip C. Wrangle and Nancy J. Skancke for Sonat Exploration Co., John P. Beall and Nancy J. Skancke for Texaco, Inc., and Texaco Producing, Inc., Kerry R. Brittain and Nancy J. Skancke for Union Pacific Resources Co., were on the joint brief of Producer intervenors in all cases. James L. Trump for John H. Hendrix Corp., et al. and Okmar Oil Co., Charles J. McClees, Jr. and James A. Ruoff for Shell Western E & P, Inc., James L. Trump for Neleh Gas and Oil Corp., also entered appearances for Producer intervenors.

Deborah A. Macdonald, Bill H. Kockenmeister, George J. Meiburger, Frank X. Kelly and Steve Stojic were on the brief for intervenor Northern Natural Gas Co., Div. of Enron Corp. in all cases.

John M. Cutler, Jr., entered an appearance for petitioner Peoples Natural Gas Co. in No. 90–1215.

Kevin M. Sweeney, Frank H. Markle and Charles F. Hosmer entered appearances for Arco Oil and Gas Co.

James T. McMancis, Joseph O. Fryxell and Steven K. Schroeder entered appearances for intervenor Northwest Pipeline Corp.

Robert H. Benna, David D. Withnell, Terrance J. Collins and Margaret L. Bollinger entered appearances for intervenor Tennessee Gas Pipeline Co.

Michael E. Small entered an appearance for intervenor Williams Natural Gas Co.

Nancy J. Skancke and Lisa A. Machesney entered appearances for intervenor Cabot Petroleum Corp.

Jack M. Wilhelm, Jon L. Brunenkant and Mark R. Haskell entered appearances for intervenor Amoco Production Co.

Nancy J. Skancke, Joseph E. Mixon and David G. Stevenson entered appearances for intervenor Amerada Hess Corp.

James L. Trump, Paul F. Forshay and Philip E. Ehrenkranz entered appearances for Damson Oil Corp.

William J. Grealis and Jeffrey G. DiSciullo entered appearances for intervenor Transwestern Pipeline Co.

Georgetta J. Baker entered an appearance for intervenor Natural Gas Pipeline Co. of America.

Randall S. Rich and Charles H. Shoneman entered appearances for intervenors Bass Enterprises Production Co., American Trading and Production Corp., Grace Petroleum Corp., Petroleum, Inc. and J. Burns Brown Operating Co.

Gerald P. Thurmond, Walker C. Taylor, Kim M. Brown, David J. Evans, and Patrick M. Ankuda entered appearances for intervenor Chevron, USA, Inc.

Ernest J. Altgelt, III, entered an appearance for intervenor Conoco Inc.

James U. Hamersley entered an appearance for intervenor Fina Oil and Chemical Co.

Stephen L. Teichler, Kent K. Carter and Mario M. Garza entered appearances for intervenor Anadarko Petroleum Co.

Richard T. Saas and James B. Wilcox entered appearances for intervenor Champlin Exploration, Inc.

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

In the decisions under review the Federal Energy Regulatory Commission addressed a problem arising from natural gas pipelines' and producers' adjustments of their contract relations in response to federal ceiling prices on interstate sales at the wellhead. The Federal Power Commission (FERC's predecessor) initially attempted to conform to *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), which construed the Natural Gas Act to require such ceilings, by setting "just and reasonable" rates producer by producer. The process proved "laborious", so much so as to earn it recognition as the "outstanding example in the federal government of the breakdown of the administrative process". *Permian Basin Area Rate Cases*, 390 U.S. 747, 758, 88 S.Ct. 1344, 1355, 20 L.Ed.2d 312 (1968).

The Commission then switched to setting "area" rates, governing sales by all producers in each of several regions.

The ceiling prices put interstate pipelines at a competitive disadvantage vis-a-vis intrastate pipelines, which could offer market prices. To mitigate that disadvantage, the interstates often agreed to include indefinite price escalator clauses in their long-term purchase contracts. After initial uncertainty, the Commission authorized one form of indefinite price escalator (and only one), the "area rate clause", which automatically raises the price to the area rate applicable at the time of delivery. See Order No. 329, 36 FPC 925 (1966), codified at 18 CFR § 154.93(b–1) (1990). The pipeline whose contracts are at issue here, Northern Natural Gas Company, agreed to such clauses in about 1200 contracts between the mid–1960s and 1978.

When Congress passed the Natural Gas Policy Act in 1978, it took away most of FERC's authority to set "just and reasonable" rates and instead provided statutory ceilings. See 15 U.S.C. § 3301 et seq. (1988). The question arose whether area rate clauses, which generally spoke in terms of escalation to "just and reasonable" rates set by the Federal Power Commission, authorized producers to demand the new NGPA ceilings. For gas covered by § 104 of the NGPA, for example, this would be the April 20, 1977 "just and reasonable" rate plus an adjustment for general price inflation thereafter. See 15 U.S.C. § 3314. The parties do not state what price would apply if the area rate clause did not authorize NGPA rates, but it appears likely that under most contracts the producer would be entitled to no more than the rate the gas had reached at some point before the effective date of the NGPA.

In Order No. 23, FERC Statutes & Regulations, Regulations Preambles 1977–1981 ¶ 30,040 (1979), FERC decided that area rate clauses indeed *could* be interpreted to authorize collection of NGPA rates. See *id.* at 30,315–16. If the parties to a contract agreed on that interpretation, their agreement would normally control. *Id.* at 30,316. If protesters (such as those here, a purchaser from Northern and representatives of downstream consumers) offered specific evidence that the clause in question did not supply contractual authority, the case would be set down for a hearing; if not, the protest would be dismissed. See Order No. 23–B, FERC Stats. & Regs. ¶ 30,065 at 30,455 (1979); Order on Rehearing Order No. 23–B, FERC Stats. & Regs. ¶ 30,073 at 30,475–76 (1979); see also 18 CFR § 154.94 (1990) (codifying the rules). The Fifth Circuit upheld these arrangements, with some modifications, in *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981). See also *Pennzoil Co. v. FERC*, 789 F.2d 1128 (5th Cir.1986); *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir.1988).

More than ten years ago Northern invoked the Commission's procedure, filing a list of over 1200 contracts containing area rate clauses that it and the relevant producers agreed authorized payment of NGPA rates. Various protesters challenged the submission, pointing to a statement by Peoples Natural Gas Company, then a division of Northern's parent company, made in litigation with a producer, that a specific area rate clause, worded exactly the same as some of those in the Northern contracts, did not require Peoples to pay NGPA ceiling rates. The Commission decided that "Peoples' interpretation of the contract language can be attributed to Northern because of common control," see *Northern Natural Gas Co.*, 33 FERC ¶ 61,355 at 61,706 (1985), and that this satisfied the protesters' initial burden. It sent the matter to an administrative law judge for a hearing. *Id.*

After extensive discovery, including two opportunities for the protesters to review all of Northern's relevant files, the ALJ held the required hearing. Fourteen Northern officials and 56 producer witnesses testified for Northern and were cross-examined at length, producing a transcript of about 5400 pages. See *Northern Natural Gas Co.*, 43 FERC ¶ 63,015 at 65,147–48, 65,169 (1988) ("Initial Decision"); *Northern Natural Gas Co.*, 48 FERC ¶ 61,177 at 61,649 (1989) ("Order"), *reh'g denied*, 50 FERC ¶ 61,288 (1990). Another 58 produc-

er witnesses were prepared to testify, but the ALJ decided that their testimony would be cumulative—56 was enough. The protesters offered no witnesses. See Initial Decision, 43 FERC at 65,147–48; Order, 48 FERC at 61,649.

The ALJ ruled that the evidence "overwhelmingly" showed that Northern and the producers intended the area rate clauses "to trigger payment of all generally-applicable ceiling prices established by federal authority". See Initial Decision, 43 FERC at 65,149, 65,169. The ALJ considered the contract language, the parties' testimony of mutual intent, their course of dealing, their course of performance, and trade usage. *Id.* at 65,149–69. The Commission upheld the ALJ's decision, emphasizing the evidence of the parties' course of performance. Order, 48 FERC at 61,651–52. We affirm.

* * *

The ALJ framed the issue as being whether Northern and the producers "intended [area rate clauses] to trigger payment of NGPA ceiling prices when the contracts at issue were entered into." Initial Decision, 43 FERC at 65,147 (emphasis omitted). The Commission's Order sometimes used a similar formula, see, e.g., 48 FERC at 61,648, and sometimes spoke of intent in a more generalized way, referring, for example, to evidence of " 'Northern's intent to pay the highest prices allowed by law or regulation' ", *id.* at 61,651 (evidently quoting a Northern witness). The latter formula tracks the Commission's conclusion in Order No. 23 that many gas producers and pipelines, in agreeing to area rate clauses, "intended to permit prices to escalate to the highest generally applicable ceiling rate allowed by governmental authority". FERC Stats. & Regs. at 30,314.

Neither formula seems to us to quite confront the reality of the case. It appears common ground that, at least until the latter part of the period, the parties were unlikely to have guessed that Congress would set the ceilings itself. For contracts of the earlier period, it seems something of a fiction to infer by "interpretation" that the parties "intended" escalation to statutory ceilings. Even the more general formula, which treats the parties' reference to Commission-determined rates as a shorthand for a broader intent (to escalate to the highest lawful rate), suffers the same flaw in a more subtle form: if the only issue the parties had occasion to address was fully solved by the narrower language, their intent as to the broader issue is hardly historical reality.

A number of contracts scholars frankly acknowledge the special character of such an inquiry. Farnsworth, for example, speaks of addressing issues that the contract language "omits", see E. Allan Farnsworth, Contracts §§ 7.15–.17 (1982), and Corbin distinguished between "interpretation", a term he reserved for exploring the meaning of words actually used, and "construction", which he applied to "filling gaps in the terms of an agreement, with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed", 3 Corbin on Contracts § 534 at 11 (1960). See also 6 Samuel Williston, A Treatise on the Law of Contracts § 825 (3d ed. 1962) (on "Fictitiously Imputed Intentions"). Thus a blunter way of framing the issue would be to ask whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses. The distinction is helpful, as we shall see shortly, because it puts in proper perspective a number of points raised by petitioners' counsel that assume the sole inquiry is into historical intent.

For the end of the period, while Congress was hammering out the terms of the NGPA, it can hardly be said that the parties omitted reference to statutory ceilings because they failed to foresee their arrival. For this period another reason comes into play (which indeed had been at work throughout the period, inhibiting anyone who did imagine the problem)—the Commission's explicit rule that area rate clauses were the *sole* permissible form of indefinite price escalator. See 18 CFR

§ 154.93(b–1).[1] Here the inquiry more aptly concerns what the parties would have provided had the Commission allowed them to express their intent. As the Commission was obviously aware of the problem as it formulated Order No. 23, the order reflects its judgment that its earlier restriction of parties to area rate clauses should not prevent collection of statutory ceilings where the parties would have agreed to them. See FERC Stats. & Regs. at 30,315 (despite the limitations of 18 CFR § 154.93, FERC will give effect to escalator clauses that "specifically permit escalation to Congressionally or legislatively authorized prices or which specifically reference Natural Gas Policy Act prices").

In affirming the ALJ, the Commission rested primarily on the evidence as to course of performance, which of course is probative whether one thinks of the problem in terms of historical or reconstructed intent. With narrow exceptions addressed later, Northern paid the NGPA ceilings for more than six years—and not through oversight or inattention. Before the statute went into effect on December 1, 1978, officials of its Supply Division and its Law Department began internal discussions on the issue. See Initial Decision, 43 FERC at 65,160. Three days before the President signed the Act, a company attorney circulated a memo among the gas acquisition staff asserting that the area rate clauses in Northern's contracts entitled producers to charge the NGPA prices. See Memorandum from Patrick J. McCarthy (Nov. 6, 1978), *reprinted in* Joint Appendix ("J.A.") at 1614. Its conduct clearly conformed to this view for more than six years.

Protesters regard this long pattern as completely undermined by Northern's decision, implemented on January 1, 1985, to stop paying NGPA ceiling prices under the contracts at issue for categories of gas still subject to regulation. They claim this shift reveals that the prior six years' behavior was merely a ploy "to curry favor with Producers in a time of shortage", Reply Brief for Petitioners at 13 n. 13, and assert that Northern's true construction emerged only in 1985 when it stopped paying NGPA prices because of a gas glut. As the petitioners see it, the post–1984 evidence is paramount because it shows that Northern did not intend to be obligated by the area rate clauses to pay NGPA ceiling prices *"under all market conditions"*. Brief for Petitioners at 19 (emphasis in original).

It is undisputed, however, that Northern sought price relief, in the form of contract amendments, without regard to whether the area rate clauses in its contracts were in any way applicable. See, e.g., Letter from Northern to Horizon Oil & Gas (Sept. 4, 1984) (form letter proposing contract amendments), *reprinted in* J.A. at 1970. Indeed, Northern acted the same as to contracts with clauses expressly referring to congressional price ceilings—clauses that, while inconsistent with the language of 18 CFR § 154.93(b–1), the Commission had expressly found effective in Order No. 23. See Initial Decision, 43 FERC at 65,163; see also FERC Stats. & Regs. at 30,315. Moreover, Northern's price-reduction efforts focused heavily on gas that was deregulated as of January 1, 1985, and on which area rate clauses could have no effect. Even in the case of contracts that could be affected by area rate clauses, petitioners have uncovered no effort by Northern to justify its price cutback moves by a revisionist approach to those clauses. There is ample evidence to support the Commission's conclusion that the cutbacks were implemented not in reliance on the clauses but in spite of them. See Order, 48 FERC at 61,652; Initial Decision, 43 FERC at 65,163. Finally, petitioners' argument would seem to eliminate course of performance evidence from contract disputes. Some sort of resistance to past performance, on one side or the other, would seem a prerequisite to a dispute's ever landing in court. If performance is automatically negated by later resistance, then it is hard to imagine a case it would help resolve.

1. Curiously, even the version published in 1990 contains only the reference to *area* rates, although the Commission had started setting *national* rates for certain gas in 1974. See Opinion No. 699, 51 FPC 2212 (1974).

For their claim that the pre–1985 performance was variable, petitioners point to Northern's refusal to pay the special "tight sands" ceiling prices authorized by the Commission pursuant to § 107(c)(5) of the NGPA. But from the moment the Commission established the "tight sands" rate, it reasoned that the rate could only function as an incentive for producers to increase production of such gas if it was available only where it was "a negotiated contract price"; FERC thus rejected reliance on a mere indefinite price escalator. See 18 CFR §§ 271.701–.703 (1990); see also *Pennzoil Co. v. FERC,* 671 F.2d 119 (5th Cir.1982) (upholding the requirement); *Midwest Gas Users Ass'n v. FERC,* 833 F.2d 341 (D.C.Cir.1987). In refusing to treat area rate clauses as justifying the tight sands rate, Northern merely hewed to the Commission's line.

The other alleged exception is the refusal of Northern's affiliate, Peoples Natural Gas, to pay NGPA rates (except for gas under § 104 of the NGPA)—the conduct that led to the hearings in the first place. The ALJ found, however, that Peoples, a local distribution company regulated by state authorities, not by FERC, acted as it did because of concerns peculiar to its regulatory environment. In particular, Peoples feared (and later events proved) that Kansas regulators would refuse to allow it to pass NGPA rates through to its customers. See Initial Decision, 43 FERC at 65,-166–67. The ALJ also found that the decisionmaking of the two affiliates was largely independent on the issue, a finding backed by substantial evidence. See *id.* at 65,167–68. Thus the course of performance evidence for the period prior to Northern's general effort to cut its gas costs back appears essentially unqualified.

Petitioners devote much of their brief to various witnesses' testimony that the intent of the clauses was just what they said (see, e.g., Brief for Petitioners at 54–58), that "just and reasonable" rates referred only to rates set by the Federal Power Commission (Brief for Petitioners at 51), and that the parties intended to conform to the Commission's requirements in 18 CFR § 154.93(b–1) (Brief for Petitioners at 58–60), and to documentary evidence of similar import (Brief for Petitioners at 45–49). If the issue were truly one of historical intent, these might be telling blows. But when the problem is viewed as one of how to fill a contract gap—how to address a circumstance that the contract plainly omitted—the statements look irrelevant and even tautological.

We note that even petitioners' literalism has bounds. Even though the escalation clauses conforming to the language of 18 CFR § 154.93(b–1) could refer only to *area* rates, petitioners appear not to read them as excluding coverage of the *national* rates that the Commission started to promulgate in 1974. See Opinion No. 699, 51 FPC 2212 (1974). Nor, even for clauses referring only to the Federal Power Commission, do petitioners read them as excluding coverage of rates set by FERC after its creation in 1977.[2] While this is not necessarily a case of straining at a gnat after swallowing a camel, it leaves us puzzled as to petitioners' principle of construction.

The petitioners also point to testimony suggesting rather obliquely that Northern would not have agreed to price escalator clauses that would require it to "pay even if its customers won't pay Northern for the gas", see J.A. at 983; Brief for Petitioners at 53, i.e., if the escalated price exceeded what Northern's customers were willing to pay. Indeed, as Congress obviously cannot reexamine natural gas pricing as frequently as a regulatory commission, the shift to statutory ceilings carried the risk that the ceilings would outrun the market, as in fact occurred. But that shift also contained the risk of ceilings well below market-clearing prices. As the ceilings would bind if they were below market, at the expense of producers, it is hardly surprising for the parties to have agreed that pipelines should bear the opposite risk.

2. See Department of Energy Organization Act, Pub.L. No. 95–91, 91 Stat. 565 (1977), terminating the FPC and replacing it with FERC.

Moreover, the ALJ reasoned that pipelines would be more concerned with the *average* price of gas than with the risk of some above-market purchases. See Initial Decision, 43 FERC at 65,158. The point is quite correct: interstate pipelines, operating under average-cost price regulations, do not "lose" the difference between the cost and selling price of a unit of gas (bought for more than the selling price), as would an unregulated firm; the above-average unit is "rolled" into the average, i.e., it gives the pipeline legal authority to charge a higher price. See *id.*[3] Further, the Commission's analysis of the effect of area rate clauses leaves untouched any price-reduction claims and any defenses to non-performance that a pipeline might assert under other clauses of the contracts (such as market-out clauses) or under general contract doctrines (such as impracticability). Finally, petitioners have framed the argument as a general one that appears to dispute the basic premises of Order No. 23—the sort that we have ruled out as a collateral attack on Order No. 23. *Associated Gas Distributors v. FERC*, 810 F.2d 226, 231–33 (D.C.Cir.1987).

The last of petitioners' claims that is marginally worthy of discussion is their suggestion that Northern and the producers did not meet their burden for the numerous contracts as to which no *producer* witness testified (what petitioners call the problem of "non-appearing producers" or "NAPs"). The petitioners' idea appears to be that there is a failure of evidence as to such contracts. But the testimony of the Northern witnesses encompassed all the contracts, as did the course of performance evidence. The 56 producer witnesses confirmed Northern's picture (as was to be expected in view of the producers' interest in escalated prices). In the absence of some hint that matters were different for *any* other producer, there was no reason for the ALJ to acquiesce in petitioners' effort to further bloat the proceedings. Compare *Pennzoil Co. v. FERC*, 789 F.2d at 1145 n. 44; see also Order No. 23–B, FERC Stats. & Regs. ¶ 30,065 at 30,453–55 (anticipating pipeline-by-pipeline review of protests, with initial submission of evidence only by pipelines).

Finding substantial evidence in support of the Commission's orders, we deny the petitions for review.

So ordered.

3. And, if rate regulation has held the pipeline's rates to a relatively inelastic portion of its demand curve, materially below the level that would maximize its profits in an uncontrolled market, the pipeline will be able to charge the higher lawful rate with only a limited offsetting reduction in sales. An unregulated firm, by contrast, would presumably charge profit-maximizing rates anyway, and any purchase at a price above that rate would simply cost it money.

UNITED STATES of America, Appellant,

v.

Jane DOE, Appellee.

No. 90–3027.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 7, 1990.

Decided May 24, 1991.

In five sentencing proceedings, due process challenges were raised to the Sentencing Guidelines as applied. The United States District Court for the District of Columbia, 726 F.Supp. 1359, Harold H. Greene, J., held unconstitutional Sentencing Guidelines requiring government motion prior to imposition of sentence below guidelines for defendant who offered substantial assistance to police in apprehending suspects. Appeal was taken. The Court of Appeals, Mikva, Chief Judge, held that: (1) guideline did not violate substantive due process rights of defendants; (2) guideline was not invalid for inconsistency

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lic schools"].) Thus, as the Court of Appeal here concluded, the legislative history indicates that it was only in 1999 that the Legislature intended to add charter schools to section 51747.3.

Accordingly, I would affirm the judgment of the Court of Appeal, which in turn affirmed the trial court, insofar as it concluded that section 51747.3, as originally enacted in 1999, did not apply to charter schools, and that it was only when the statute's 1999 amendment became effective on January 1, 2000, that charter schools came within the statute's reach.

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48 Cal.Rptr.3d 144

STATE of California ex rel. Kamala HARRIS, as District Attorney, etc., et al., Plaintiffs and Appellants,

v.

PRICEWATERHOUSECOOPERS, LLP, et al., Defendants and Appellants.

No. S131807.

Supreme Court of California.

Aug. 31, 2006.

Background: City filed qui tam action on behalf of state against title company and its auditor for violation of False Claims Act (FCA), alleging that title company failed to escheat dormant funds from escrows to the state under the unclaimed property law (UPL), and that auditor submitted false audit reports to Department of Insurance (DOI) that masked this liability. The Superior Court, City and County of San Francisco, No. 993507, Stuart R. Pollak, J., entered judgments against title company, but in favor of auditor. Parties appealed. The Court of Appeal affirmed judgment against title company, but reversed judgment in favor of auditor. The Supreme Court granted auditor's petition for review, superseding the opinion of the Court of Appeal.

Holding: The Supreme Court, Baxter, J., held that city, as a political subdivision, was not a "person" that could bring a qui tam FCA action on behalf of the state, another political subdivision.

Judgment of Court of Appeal reversed and cause remanded.

Opinion, 23 Cal.Rptr.3d 529, superseded.

1. States ⚿188

City, as a political subdivision, was not a "person" that could bring a qui tam action on behalf of the state, another political subdivision, under the False Claims Act (FCA), alleging that auditor submitted false audit reports to Department of Insurance (DOI) that masked title company's failure to escheat dormant funds from escrows to the state under the unclaimed property law (UPL); FCA's careful statutory distinction between public prosecutorial authorities, on the one hand, and "persons" who could bring qui tam actions on the other, suggested the Legislature did not intend to recognize public entities as qui tam relators under the FCA. West's Ann.Cal.C.C.P. § 1500 et seq.; West's Ann.Cal.Gov.Code § 12652.

See Cal. Jur. 3d, State of California, § 119; Cal. Civil Practice (Thomson/West 2006) Torts, § 31:48.

2. Statutes ⚿217.3

As an aid to statutory interpretation, the Legislative Counsel's declarations are not binding or persuasive where contravened by the statutory language, and by other indicia of a contrary legislative intent.

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Gibson, Dunn & Crutcher, Daniel M. Kolky, Joel S. Sanders, Mark A. Perry, Eth-

an D. Dettmer, Rebecca Justice Lazarus, San Francisco, and Catherine H. Ahin–Halverson for Defendant and Appellant.

Law Office of Eugene Dong and Eugene Dong, Palo Alto, as Amicus Curiae.

BAXTER, J.

The California False Claims Act (CFCA; Gov.Code, § 12650 et seq.) provides that any "person" who knowingly submits a false claim to the State of California, or to a "political subdivision," may be liable in a court action for treble damages and civil penalties. (*Id.*, §§ 12651, 12652.) The suit may be brought by the Attorney General where state funds are involved, or by the "prosecuting authority" of a political subdivision where the political subdivision's funds are involved, subject to intervention and participation by the other official where *both* state and political subdivision funds are involved. (*Id.*, § 12652, subds. (a), (b).)

The statute also includes a "qui tam" feature, under which suit may be brought in the name of a defrauded government entity, whether state or local, by a "person" with independent knowledge of the facts who files an action before anyone else eligible to sue has done so. (Gov.Code, § 12652, subds. (c)(1), (10), (d)(2), (3).) The qui tam plaintiff may conduct the action in the name of the defrauded entity or entities if the latter decline to intervene; even if such intervention occurs, the qui tam plaintiff may remain a party, eligible to receive a portion of the proceeds recovered. (*Id.*, subds. (c)(4), (7)(B), (e)(1), (f)(1), (g)(2)–(6).)

In *Wells v. One2One Learning Foundation*, (Aug. 31, 2006, S123951) 39 Cal.4th 1164, 48 Cal.Rptr.3d 108, 141 P.3d 225, 2006 WL 2506355 (*Wells*), we hold, among other things, that public school districts are not "persons," as defined in the CFCA, who *may be sued* under the terms of that statute. Here we consider whether the City and County of San Francisco (City), represented by its district attorney and city attorney, is a "person" who *may sue*, as a qui tam relator, upon a false claim involving, not its own funds, but *exclusively funds of the State of California*. We conclude that the answer is "no."

FACTS AND PROCEDURAL BACKGROUND

The history of this lawsuit is complex but, for purposes of this opinion, it can be condensed somewhat. City sued Old Republic Title Company (Old Republic) under the CFCA, the unfair competition law (UCL; Bus. & Prof.Code, § 17200 et seq.), and the false advertising law (*id.*, § 17500 et seq.). The CFCA count alleged that Old Republic had falsified "holder reports" submitted to the State Controller pursuant to the Unclaimed Property Law (UPL; Code Civ. Proc., § 1500 et seq.; see *id.*, § 1530) in order to conceal its failure to escheat dormant funds to the state as required by the UPL. The remaining causes of action, not germane to the issue here presented on review, asserted that Old Republic had used escrow accounts to generate hidden income properly payable as interest to escrow customers, and had charged customers fees for services not rendered.[1] For purposes of the CFCA count, City claimed that, although it was asserting no false claim against its own funds, it was a "person" with standing to sue on the state's behalf as a qui tam plaintiff.

When City's complaint was unsealed[2] and served on Old Republic, the company remit-

1. The wrongful financial practices alleged in the non-CFCA counts were entirely unrelated to the "escheat" claims raised by City under the CFCA. City obtained at least some of its information about Old Republic's various alleged illegal practices from Old Republic's former chief financial officer, Donald Barr. After firing Barr for embezzlement in connection with certain of these practices, Old Republic referred the matter to City's district attorney. The district attorney opened an investigation leading to criminal charges against Barr. Barr later negotiated a disposition of the charges in return for providing information against Old Republic.

2. As noted in *Wells, supra*, 39 Cal.4th 1164, 1188, 48 Cal.Rptr.3d 108, 119, 141 P.3d 225, 235 a qui tam complaint under the CFCA must be filed under seal, and may remain sealed for up to 60 days, with extensions of time available upon timely application, while the Attorney General (in cases involving state funds) or the local "prosecuting authority" (in cases involving politi-

ted to the state some $9.5 million in funds subject to escheat, plus some $7.7 million in statutory interest on those funds. (Code Civ. Proc., § 1577.) City nonetheless maintained its CFCA cause of action for treble damages recoverable under the false claims statute. (Gov.Code, § 12651, subd. (a).)

In the trial court, City's action was consolidated for all purposes with several class actions against Old Republic alleging wrongful customer practices similar to those set forth in City's complaint. Old Republic demurred to City's CFCA cause of action on grounds that City is not a "person" who may sue as a qui tam relator under that statute. The demurrer was overruled. Old Republic's motion for summary adjudication of the CFCA count, premised on similar grounds, was denied.

Upon City's motion for summary adjudication of the CFCA claim, Old Republic conceded liability on that count. The court granted City's motion, determined that the damages for Old Republic's delayed remission of funds subject to escheat were the stipulated UPL interest of $7.568 million, trebled to $22.704 million, and offset by interest already paid, for a net recovery of $15.136 million. The court awarded City, as the qui tam relator, one-third of the trebled damages, or $7.568 million.

The consolidated action proceeded to trial, under the UCL, on the hidden-interest and unearned-fee claims raised by both City and the class plaintiffs. Finding liability on these counts, the court awarded restitution to the class totaling $11.554 million, plus stipulated prejudgment interest of $2.211 million. Additionally, on City's complaint, the court assessed UCL civil penalties totaling $2.181 million and awarded injunctive relief.

Meanwhile, City filed an amended complaint naming PricewaterhouseCoopers, LLP (PwC) as an additional defendant under the CFCA and UCL causes of action. The amended complaint alleged that PwC was Old Republic's independent public accountant during relevant periods, and was charged, among other things, with preparing Old Republic's annual audit report to the Insurance Commissioner, as required by the Insurance Code.[3] PwC was liable, the amended complaint claimed, for failing in these reports to disclose Old Republic's escheat violations.[4]

PwC demurred to both counts, and also moved for judgment on the pleadings on the CFCA count. The trial court sustained the demurrer without leave to amend on the UCL count. The court ruled that any omissions or misrepresentations by PwC in Old Republic's audit reports under the Insurance Code were immaterial, because the Department of Insurance (DOI) does not police escheat violations. Moreover, the court reasoned, the funds had now been escheated and could be claimed by their owners, so there was no additional remedy to impose.

The court denied PwC's motion for judgment on the pleadings, ruling, as before, that City was a "person" eligible to sue, on the state's behalf, as a qui tam plaintiff under the CFCA. Subsequently, however, the court granted PwC's motion for summary judgment on the CFCA count. Again, the court reasoned that any lapses by PwC in the Insurance Code audit reports were immaterial, because even if these reports had disclosed Old Republic's escheat irregularities, the DOI, in the ordinary course of business, would not have forwarded the information to the State Controller, the officer charged with enforcement of the UPL.

Multiple appeals followed. In a proceeding numbered A097793, Old Republic appealed from the judgment against it in favor of City and the class plaintiffs. In a separate proceeding numbered A095918, City appealed from the dismissal of its action against

cal subdivision funds) decides whether to intervene and assume control of the action. (Gov. Code, § 12652, subd. (c)(2), (4)-(8).) During this time, the complaint may not be served on the defendant. (*Id.*, subd. (c)(2).)

3. Insurance Code section 12389, subdivision (a)(4) requires an underwritten title company such as Old Republic annually to submit to the Insurance Commissioner an audit report certified by independent auditors. The statutory purpose is to "maintain the solvency of the companies subject to this section and to protect the public by preventing fraud and requiring fair dealing." (Ins.Code, § 12389, subd. (d).)

4. The new allegations against PwC were apparently based on testimony given by PwC managers and auditors at the trial against Old Republic.

PwC. PwC cross-appealed in No. A095918, urging, among other things, that City is not a "person" who may sue as a qui tam relator under the CFCA. The appeals were consolidated.

The Court of Appeal, in No. A097793, affirmed the judgment against Old Republic in its entirety. In No. A095918, the Court of Appeal reversed both (1) the summary judgment for PwC on City's CFCA cause of action and (2) the dismissal of City's UCL cause of action against PwC after PwC's demurrer was sustained without leave to amend. With respect to the CFCA cause of action, the Court of Appeal rejected PwC's argument that City is not a "person" eligible for qui tam status under that statute.

City and PwC both petitioned for review; Old Republic did not. City urged that in its CFCA action against Old Republic, the trial court and the Court of Appeal should not have limited damages (subject to the treble multiplier) to *interest* on the funds whose escheat to the state was delayed, and should have included the principal amount of the unescheated funds as well.[5] PwC argued that (1) City is not a "person" who can assert qui tam status under the CFCA, (2) the Court of Appeal erred in finding that any misstatements or omissions by PwC from Old Republic's Insurance Code audit reports were "material" for purposes of the CFCA and the UCL, and (3) a UCL claim against PwC could not be premised on an alleged failure to comply with professional accountancy standards.

We denied City's petition and granted PwC's. Our order limited the issue to be briefed and argued to the following: "May a political subdivision bring an action under Government Code section 12652, subdivision (c) [i.e., the CFCA], to recover funds on behalf of the state or another political subdivision?"

Subsequently, counsel for City, Old Republic, and the class plaintiffs stipulated in this court that (1) the issue on which we granted review was presented solely by No. A095918, and had no bearing on No. A097793, and (2) Old Republic had not sought review in either appeal, had paid the judgment in No. A097793, and was entitled to exoneration of its appeal bonds. These parties therefore requested we sever the two appeals and retransfer No. A097793 to the Court of Appeal with directions to issue its remittitur therein forthwith.

PwC's counsel professed PwC's neutrality on the request, and counsel for the class plaintiffs advised that issuance of the remittitur in No. A097793 would allow some $12.5 million paid by Old Republic into a court-ordered fund to be distributed to class members. Accordingly, we severed the two appeals and retransferred No. A097793 to the Court of Appeal with instructions to issue its remittitur.[6]

We turn to the issue on which we granted review. We conclude the Court of Appeal erred in holding that City is a "person" who may sue under the CFCA, on behalf of another public entity, as a qui tam plaintiff.[7]

DISCUSSION

Under the CFCA, any "person" who submits a false claims to the "state," or to a "political subdivision," may be sued for treble damages and civil penalties. (Gov.Code, § 12651, subd. (a).) For this purpose, a "political subdivision" includes "any city, city and county, county, tax or assessment district, or other legally authorized local govern-

5. In its petition, City advised that, following the Court of Appeal's judgment, City had settled with Old Republic on terms that precluded any additional recovery by City against Old Republic regardless of the outcome of future proceedings. City nonetheless claimed the issue was not moot because, if its CFCA action against PwC was reinstated, our ruling on the damage issue would be relevant to City's potential recovery against PwC.

6. As a result of this final disposition of the claims involved in No. A097793, both City and the State of California will retain all sums recovered against Old Republic under the CFCA for violation of the escheat laws. No conclusions reached in this court's opinion will have any operative effect on those recoveries.

7. An amicus curiae brief, professing to support neither party but essentially supporting PwC on the particular facts of this case, has been filed by Eugene Dong.

ment entity with jurisdictional boundaries." (*Id.,* § 12650, subd. (b)(3).)

The CFCA specifies in detail who may bring and prosecute actions under that statute, depending on whether state or political subdivision funds are involved. If *state* funds are involved, the *Attorney General* may bring the action. (Gov.Code, § 12652, subd. (a)(1).) If *political subdivision* funds are involved, the action may be brought by the political subdivision's "prosecuting authority" (*id.,* § 12652, subd. (b)(1)), i.e., "the *county counsel, city attorney,* or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, [*the*] *particular political subdivision* " (*id.,* § 12650, subd. (b)(4), italics added). Where both state and political subdivision funds are involved, each of these officials may intervene, on behalf of the public entity he or she represents, in an action initiated by the other. (*Id.,* § 12652, subds. (a), (b).)

Under this scheme, the Attorney General, acting in his official capacity, *is not authorized* to sue to recover *exclusively* political subdivision funds. The only official who may do so in such capacity is the "prosecuting authority" representing the "*particular* political subdivision" (Gov.Code, § 12650, subd. (b)(4), italics added) whose funds are involved (*id.,* § 12652, subd. (b)(1)). Conversely, the "prosecuting authority" of a political subdivision, acting in that capacity, *is not authorized* to sue to recover *exclusively* state funds—the only category of funds at issue in this case. The sole official who may do so is the Attorney General. (*Id.,* § 12652, subd. (a)(1).) Nor may the prosecuting authority of one political subdivision sue as such where only the funds of *another* political subdivision are involved. The only official who may do so is the prosecuting authority of the "particular" political subdivision that was actually defrauded. (*Id.,* §§ 12650, subd. (b)(4), 12652, subd. (b)(1).)

There is, however, a third category of eligible plaintiffs under the CFCA. A "person" with independent knowledge of the facts, who gets to the courthouse first, may bring a qui tam action for and in the name of the state (if state funds are involved), or a political subdivision (where the political subdivision's funds are involved), or both. (Gov.Code, § 12652, subds.(c)(1), (10), (d)(2), (3).)

Such a suit is filed under temporary seal (Gov.Code, § 12652, subd. (c)(2)), whereupon the qui tam plaintiff must immediately notify the Attorney General and disclose all pertinent information in the plaintiff's possession (*id.,* subd. (c)(3)). If political subdivision funds are involved, the Attorney General must, in turn, provide similar notice and disclosure to the prosecuting authority of the affected political subdivision. (*Id.,* subd. (c)(7)(A), (8)(A).) After investigation, the pertinent official or officials may intervene in the qui tam suit and assume control of the action. (*Id.,* subd. (c)(4)-(8).) If intervention occurs, the qui tam plaintiff may remain a party. (*Id.,* subd. (e)(1).) If no official intervenes, the qui tam plaintiff may conduct the action. (*Id.,* subd. (c)(6)(B), (7)(D)(ii), (8)(D)(iii).)

When a false claims suit is brought, in the first instance, by the Attorney General, or by the prosecuting authority of a political subdivision, the defrauded entity or entities themselves receive 67 percent of the proceeds. The remaining 33 percent goes to the officials who litigated the case, for use in investigating and prosecuting other false claims against the entities they represent. (Gov. Code, § 12652, subd. (g)(1)(A)-(C).)

When a prosecuting official or officials intervene in an action initiated by a qui tam plaintiff, the plaintiff remains entitled to receive between 15 and 33 percent of the proceeds in addition to the 33 percent official share, leaving as little as 34 percent for the defrauded entity or entities. (Gov.Code, § 12652, subd. (g)(2).) If no prosecuting official intervenes in the action, the qui tam plaintiff may receive up to 50 percent of the proceeds, with the remainder going directly to the defrauded entity or entities. (*Id.,* subd. (g)(3).)

City's district attorney and city attorney, who represent City in this action, closely fit the description of officials who, as prosecuting authorities, may sue upon false claims involving *City's* funds, but have no official prosecutorial jurisdiction over false claims

that involve only *state* funds. Indeed, City concedes that neither it nor its legal representatives were authorized to sue as prosecuting authorities in this case, because only state funds, and no funds of City itself, are at issue. Nonetheless, City urges, it may proceed through these same officers on the state's behalf simply as a "person" eligible to sue under the statute's "qui tam" provision. We disagree.

The CFCA contains a single definition of "person" as including "any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust." (Gov.Code, § 12650, subd. (b)(5).) Absent contrary indications, we assume the Legislature intended the same meaning of "person" to delineate both who *may be sued* under the statute, and who *may sue under its qui tam provision.* (But see text discussion, *post.*)

In *Wells, supra,* 39 Cal.4th 1164, 48 Cal.Rptr.3d 108, 141 P.3d 225, we consider whether public school districts are "persons" who *may be sued* under the CFCA. Answering that question "no," we conclude, among other things, that the language of this particular statute weighs heavily against a determination that public or governmental entities are covered "persons."

[1] As we explain in *Wells,* the CFCA's enumeration of included "persons" "contains no words or phrases most commonly used to signify . . . public entities or governmental agencies." (*Wells, supra,* 39 Cal.4th 1164, 1189–1190, 48 Cal.Rptr.3d 108, 120–121, 141 P.3d 225, 236–237.) Yet, in other contexts the CFCA "makes very specific reference to governmental entities," including both the state and "political subdivisions," which are defined to include every kind and form of local government with jurisdictional boundaries, including cities, counties, and cities and counties. (*Id.* at p. 1190, 48 Cal.Rptr.3d at p. 121, 141 P.3d at pp. 236–237; see Gov.Code, § 12650, subd. (b)(3).) Moreover, *Wells* notes, in other statutes, "the Legislature has demonstrated that . . . definitions of 'persons' [similar to that set forth in the CFCA] do not include public entities, and that legislators know how to include such entities directly when they intend to do so." (*Wells, supra,* at p. 1190, 48 Cal.Rptr.3d at p. 121, 141 P.3d at pp. 236–237; see also *id.* at pp. 1190–1191, & fn. 12, 48 Cal.Rptr.3d at pp. 121–122, & fn. 12, 141 P.3d at pp. 236–237, & fn. 12, and examples therein described.)

These points are particularly telling in the determination whether public entities, such as City, are "persons" who may *sue,* as qui tam relators, under the CFCA. As noted above, the statute has carefully separated the officials who may bring false claims actions, *on behalf of the public entities they represent,* when *those particular entities'* funds are involved in the alleged false claims, from the "persons" who, partly in hopes of self-enrichment, may bring such actions *regardless* of the particular public entity whose funds are involved.

The obvious purpose of these provisions is to delineate the boundaries of official jurisdiction, to make each public entity's prosecuting officer or officers responsible only for funds falsely claimed from that entity, and to preclude one government agency's false claims jurisdiction from intruding on another's. In logical fashion, each designated prosecuting officer is made responsible for "diligently" investigating and pursuing false claims on behalf of his or her own entity (Gov.Code, § 12652, subds.(a)(1), (b)(1)), but not on behalf of others. Nothing in the CFCA implies that such cross-agency investigation and intrusion may nonetheless occur through the indirect device of qui tam actions by one public entity on behalf of another.

Indeed, the language of the CFCA contains one explicit indication that governmental entities, state or local, are not among the intended class of "persons" who may sue as qui tam relators. In providing that a qui tam complaint shall be filed under seal (a requirement not applicable to actions initiated by the Attorney General for the state, or by prosecuting authorities for their own political subdivisions), the statute describes such a complaint as one "filed by a *private* person." (Gov.Code, § 12652, subd. (c)(2), italics added.)

In *Wells,* we also note that the limited evidence available from the CFCA's legislative history suggests public entities were not intended as "persons" covered by the statute. "As originally introduced on March 4, 1987, Assembly Bill No. 1441 (1987–1988 Reg. Sess.) . . ., which in final form became the CFCA, explicitly included, as covered 'persons,' 'any person, firm, association, organization, partnership, business trust, corporation, company, *district, county, city and county, city, the state, and any of the agencies and subdivisions of these entities.*' [Citation.] A substantial subsequent amendment to the bill *excised the references to government entities,* and the definition of 'person' was changed to the form finally adopted. [Citation.]" (*Wells, supra,* 39 Cal.4th 1164, 1191, 48 Cal. Rptr.3d 108, 122–123, 141 P.3d 225, 237–238.)

With respect to the specific issue before us in this case—whether the CFCA contemplates public entities as qui tam *plaintiffs*—the history of Assembly Bill No. 1441 (1987–1988 Reg. Sess.) (Assembly Bill No. 1441) provides additional insights. On May 6, 1987, after the bill was amended in the Assembly on April 29, 1987, to delete the specific references to public entities as "persons," the Assembly Judiciary Committee heard testimony from David Huebner, representing the Center for Law in the Public Interest, which participated in drafting both the current federal and California false claims statutes. Huebner described the proposed California law as "deputizing *citizens* to join the fight to protect the public treasury." (Assem. Com. on Judiciary, Hearing on Assem. Bill No. 1441 (CFCA) (1987–1988 Reg. Sess.) (May 6, 1987), testimony of David Huebner, p. 3, italics added.)

Huebner explained that "the Justice Department and local prosecuting authorities do not have unlimited resources and should be able to benefit from additional *non-governmental* resources brought to bear on their behalf. The driving force behind the false claims concept is the providing of incentives for *individual citizens* to come forward with information uniquely in their possession and to thus aid the Government in [ferreting] out fraud. This false claims legislation provides a mechanism for harnessing such *non-governmental* resources, *at no additional cost to the government.*" (Huebner Testimony, *supra,* p. 3, italics added.) Huebner noted, as one of the bill's principal benefits, that "taxpayers see their elected representatives acting decisively and calling upon the source of the funds, *the taxpayers themselves,* for assistance." (*Id.,* at p. 4, italics added.)

Moreover, Huebner testified, "the False Claims bill before you encourages cooperation between state and local authorities by setting out a framework for deciding whether the state or local authorities have jurisdiction over particular cases involving mixed funds. Providing such a framework is essential to effective, efficient investigation and enforcement." (Huebner Testimony, *supra,* pp. 3–4.)

The Legislature could reasonably conclude that these purposes are undermined by allowing a local government entity to step outside the specified jurisdictional boundaries, and to bring qui tam actions *exclusively* on behalf of *other* units of government. Such a system raises concerns that scarce government resources might be wasted on duplicative, overlapping, and competitive investigations of possible false claims. Though a qui tam action brought by one government entity exclusively on behalf of another might succeed, thus enriching the coffers of both, it might also fail, resulting in the irretrievable loss of taxpayer dollars and public resources expended by the "qui tam" agency in its effort to recover funds owed exclusively to a *different* agency.

The CFCA certainly seeks to induce private "whistleblowers," uniquely armed with information about false claims, to risk the failure of their qui tam suits in hopes of sharing in a handsome recovery if they succeed. Indeed, this prospect of reward may be the only means of inducing such private parties to come forward with their information. The statute further sweetens the deal by sanctioning qui tam actions that "jump the gun" on the defrauded public agencies. Thus, a qui tam suit is barred if the defrauded entity gets to the courthouse first (Gov. Code, § 12652, subd. (d)(2)), but if the qui tam plaintiff wins that race, he or she may

file suit, and thus secure the right to share in any recovery, *before* he or she shares with the defrauded entity any information bearing on the claim (see *id.,* subd. (c)(3)).

This carefully balanced scheme enlists "nongovernmental" resources—informants acting partly in their own self-interest—in the battle to ferret out and prosecute public fraud. On the other hand, it costs the government nothing in time, resources, or money beyond what a defrauded entity might spend to investigate and prosecute on its own behalf.

Allowing public agencies to act as qui tam plaintiffs, however, may encourage some agencies, seeking risky paydays, to employ taxpayer funds, and to divert time and resources from their usual public duties, in order to speculate in qui tam litigation on the sole behalf of other agencies. It may also encourage some public entities, acting for their own enrichment, to *compete* with each other in races to the courthouse, or to withhold relevant information from their defrauded colleagues, so they can file "surprise" qui tam suits and share in the defrauded entities' recoveries. These significant policy concerns counsel against a conclusion, absent a clearer expression of purpose, that the Legislature meant to authorize qui tam suits by public entities. The issue is best left to the Legislature's specific attention, at its discretion.[8]

Nonetheless, City asserts multiple grounds for concluding that it is a "person" who can sue under the CFCA, as a qui tam plaintiff, on behalf of the state. None of these arguments is persuasive.

First, City argues that the plain language of the CFCA supports its interpretation. City urges that the statutory definition of "person" is expansive and inclusive, and particularly enumerates "corporations," which encompass municipal corporations. (See *City of Pasadena v. Stimson* (1891) 91 Cal. 238, 248, 252, 27 P. 604 [persons natural or artificial, and thus corporations public or private, and thus municipal corporations, are "persons" for purposes of statute allowing any "person" to acquire property by condemnation for sewerage purposes]; *Blum v. City and County of San Francisco* (1962) 200 Cal.App.2d 639, 644, 19 Cal.Rptr. 574 [City and County of San Francisco is a municipal corporation].) City also asserts that it is an "organization," and the CFCA does not expressly limit its coverage to "private" organizations.

[2] However, as we explain in *Wells,* and discuss further above, there are numerous indications in the language, structure, and history of the CFCA that the Legislature did not intend *this particular* statute to include public entities as "persons." Moreover, though City insists otherwise, the specific statutory reference to qui tam suits by "private person[s]" (Gov.Code, § 12652, subd. (c)(2)) provides additional support for the view that public entities are not "persons" who may bring actions of that kind.[9]

8. Our discussion of these issues in the abstract is not meant to impugn City's motives or actions in this lawsuit.

9. City points out that the Legislative Counsel's Digest for the original version of Assembly Bill No. 1441 declared the bill (which, as introduced, covered only false claims against the State of California) would authorize "the Attorney General and any *other* person" to sue on the state's behalf. (Legis. Counsel's Dig., Assem. Bill No. 1441 (1987–1988 Reg. Sess.) as introduced Mar. 4, 1987, italics added.) But that version of the bill specifically *included* all state and local entities as "person[s]." (See discussion, *ante.*) As City observes, when the bill was amended to include false claims against political subdivisions also, to designate local officials who could sue on behalf of such political subdivisions, and to delete the references to public entities as "persons," the Legislative Counsel's Digest continued to indicate that suits could be maintained by "the Attorney General, the prosecuting authority of a political subdivision and *any other person.*" (Leg. Counsel's Dig., Assem. Bill No. 1441 (1987–1988 Reg. Sess.) 4 Stats.1987, Summary Dig., p. 523, italics added.) On this basis, City urges the Legislature must have intended such officials to be "persons" with the authority to bring qui tam suits. We are not persuaded. Retention by the Legislative Counsel of the word "other" for subsequent versions of the bill may well have been an oversight, failing to take account of the fact that public entities had been removed from the definition of "person." In any event, the Legislative Counsel's declarations are not binding or persuasive where contravened by the statutory language, and by other indicia of a contrary legislative intent. (E.g., *People v. Cruz* (1996) 13 Cal.4th 764, 780, 55 Cal.Rptr.2d 117, 919 P.2d 731.)

Moreover, we have determined in this opinion that, by carefully delineating the jurisdictional responsibilities of designated public officials who may sue on behalf of particular entities, state or local, the CFCA implicitly excludes such officials as "persons" who may sue on behalf of *other* public entities. (See discussion, *ante.*) City points out, however, that "persons" suing as qui tam relators are not the exact equivalents of the statutorily designated officials suing on behalf of their own agencies. As indicated above, when a qui tam suit is filed, the relevant state or local officials must be notified, and they have the right to intervene and assume control of the action. (Gov.Code, § 12652, subds.(c)(3)-(8), (e)(1).) "Persons" otherwise eligible to bring qui tam actions have no similar right to notice and intervention in actions initiated by prosecuting officials on behalf of their own agencies, and the filing of such a suit cuts off the right to bring a qui tam action based on the same "allegations or transactions." (*Id.,* subd. (d)(2).)

Thus, City argues, recognizing a public entity's right to sue as a qui tam relator solely on behalf of other agencies—subject to their right to intervene and assume control—is not necessarily at odds with the jurisdictional limits on public *prosecutorial* authority set forth in the statute. However, we adhere to our view that the careful statutory distinction between public prosecutorial authorities, on the one hand, and "persons" who may bring qui tam actions on the other, suggests the Legislature did not intend to recognize public entities as qui tam relators.

City urges that "persons" who may bring qui tam actions under the *federal* false claims statute (FFCA; 31 U.S.C. § 3729 et seq.) include the several states. For a number of reasons, City's analysis of federal law does not convince us that the CFCA permits qui tam suits by public entities.

In the first place, as we explain in *Wells,* though the CFCA was patterned after the FFCA as then recently amended, there are significant differences between the two statutes. In particular, we note at the outset, the FFCA does not define the word "person," while its California counterpart supplies a definition that appears to exclude public entities as "persons" for any purpose under its provisions. (See *Wells, supra,* 39 Cal.4th 1164, 1197, 48 Cal.Rptr.3d 108, 126–127, 141 P.3d 225, 241; see also discussion, *ante.*)

City cites federal case law for the proposition that the states are proper qui tam relators under the FFCA. However, no decision has directly so held. In *United States ex rel. State of Wis. v. Dean* (7th Cir.1984) 729 F.2d 1100 (*Dean*), Wisconsin was the qui tam plaintiff, but no party questioned the state's standing, as such, to bring such an action. The issue was simply whether provisions of the FFCA then in effect, which barred a qui tam action based on information already known to the federal government at the time the suit was filed, were applicable if the source of the government's knowledge was the qui tam relator itself. *Dean* held that the bar applied in such cases.

In *Minnesota Ass'n of Nurse Anesthetists v. Allina* (8th Cir.2002) 276 F.3d 1032, which involved no public entity plaintiff, an issue was whether a private association could satisfy the FFCA's requirement that the qui tam relator have "direct" knowledge of the false claim, insofar as an organization must glean its information from individuals. Holding that the association could be a qui tam plaintiff using knowledge obtained from its members, the court of appeals commented, among other things, that "[t]here is no hint in the history of the 1986 [amendments to the FFCA] that Congress intended to disqualify *organizational* relators. To the contrary, any such rule would have disqualified the State of Wisconsin from proceeding as relator in *Dean* . . . ." (*Minnesota Ass'n of Nurse Anesthetists, supra,* at p. 1049, italics added.) Again, however, neither of these decisions directly presented, or decided, the issue whether *public* entities may sue as qui tam plaintiffs under the FFCA.

City points to certain legislative history of the 1986 amendments to the FFCA. These amendments, which slightly preceded enactment of the California statute, substantially revised the federal law. Among other things, the FFCA was altered, in response to *Dean,* to narrow the circumstances in which a qui tam action based on facts or evidence

already known to the federal government is barred. (See 31 U.S.C. § 3730(e)(2)(A), as added by Pub.L. No. 99–562 (Oct. 27, 1986) § 3, 100 Stat. 3154, 3157 [bar applies where suit is against member of Congress, member of the judiciary, or senior executive branch official].)

As City observes, the Senate Judiciary Committee Report for the bill incorporating the 1986 amendments (Sen. No. 1562, 99th Cong., 2d Sess.(1986)), in discussing the *Dean* issue, included the following passage: "The National Association of Attorneys General adopted a resolution in June of 1984 stating that 'to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the State and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government.' The resolution goes on to strongly urge that Congress amend the False Claims Act to rectify the unfortunate result of the *Wis. v. Dean* decision." (Sen.Rep. No. 99–345, 2d Sess.(1986), reprinted in 1986 U.S.Code Cong. & Admin. News pp. 5266, 5279.)

However, despite an apparent assumption by the quoted organization that states were proper qui tam plaintiffs under the FFCA, nothing in the 1986 amendments themselves speaks to this issue. While Congress amended the statute to ameliorate the "source of information" problem—which could arise whether the potential qui tam plaintiff is public or private—it did nothing to indicate specifically that the states, or other public entities, are "persons" with standing to bring qui tam actions.

Post–1986 federal decisions involving states as qui tam relators similarly do not directly address or determine whether their status *as public entities* affects their standing to bring qui tam actions. These cases simply note that, by virtue of the 1986 amendments, the *Dean* holding has been superseded, and states are not barred as qui tam plaintiffs *for the reason* that they provided the federal government with the pertinent false claims information before filing suit themselves. (*U.S. ex rel. Hartigan v. Palumbo Bros., Inc.* (N.D.Ill.1992) 797 F.Supp. 624, 630–631; cf. *U.S. ex rel. Findley v. FPC–Boron Employees' Club* (D.C.Cir.1997) 105 F.3d 675, 680, & fn. 1.) [10]

Insofar as it has been *assumed* that the FFCA permits qui tam actions by states, such assumptions may be based on considerations that differ significantly between the federal and California statutes. State and local public entities often have relationships with the federal government that make them privy to false claims against the national treasury; by the same token, allowing such entities to sue as qui tam relators on the federal government's behalf does not create an undue danger of interference with the single official—the Attorney General of the United States—designated to represent the government directly in such suits. On the other hand, the CFCA gives not only the California Attorney General, but numerous local officials, direct statutory authority to prosecute false claims action on behalf of the entities they represent. Additionally to rec-

10. As noted in *Wells,* the FFCA was originally adopted in 1863 to combat massive contractor fraud during the Civil War. (*Wells, supra,* 39 Cal.4th 1164, 1197, 48 Cal.Rptr.3d 108, 126–127, 141 P.3d 225, 241.) City cites a passage from the Senate floor debate on the 1863 bill in which the bill's sponsor, Senator Howard, indicated in passing his view that qui tam relators would not be limited to "the informer[s] who come[ ] into court to betray [their] coconspirator[s]," and that "[e]ven the district attorney, who is required to be vigilant in the prosecution of such cases, may also be the informer, and entitle himself to one half the forfeiture ... and ... damages...." (Remarks of Sen. Howard, Cong. Globe, 37th Cong., 3d Sess. (1863) pp. 955–956.) But the opinion of a single legislator about who might be "persons" entitled to bring qui tam suits under the 1863 federal statute is of little relevance to what the California Legislature intended when, in 1987, it adopted California's law containing a definition of "person[s]," not shared by the federal version, that appears to exclude public entities. The quotation of Senator Howard's remarks in federal case law which does not directly address the standing of public entities as qui tam relators is also of little help. (See *U.S. ex rel. Marcus v. Hess* (1943) 317 U.S. 537, 546, 63 S.Ct. 379, 87 L.Ed. 443 [private qui tam plaintiff; decision holds, under then extant version of FFCA, that qui tam relator need not have independent knowledge of the facts, and might obtain his information from reading criminal indictment].)

ognize *the same* state or local entities as "persons" who may bring qui tam suits, under the CFCA, on behalf of *other* state and local entities risks widespread overlap and competition among such California officials acting in dual capacities.

City notes the United States Supreme Court's recent holding that certain local government agencies, including counties and cities, are "persons" who *may be sued* under the FFCA. (*Cook County v. United States ex rel. Chandler* (2003) 538 U.S. 119, 123 S.Ct. 1239, 155 L.Ed.2d 247; but see *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 [states are *not* persons subject to suit under FFCA].) However, as we have explained both in *Wells, supra,* 39 Cal.4th 1164, 1197–1198, 48 Cal. Rptr.3d 108, 126–128, 141 P.3d 225, 241–242, and in this opinion, the federal and California statutes differ significantly with respect to their treatment of "persons." Since 1863 the FFCA has left that term entirely for interpretation under federal common law (see *Chandler, supra,* at p. 125, 123 S.Ct. 1239), while the CFCA's more specific definition of the word, viewed in context of the California statute's structure and history, suggests an intent to exclude public entities.

City argues that, under California principles, statutes applying to "persons" are deemed to include public entities unless such inclusion would infringe the entities' sovereign powers. (E.g., *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 276–277, 123 Cal.Rptr. 1, 537 P.2d 1250; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 933, 101 Cal.Rptr. 568, 496 P.2d 480; see *Wells, supra,* 39 Cal.4th 1164, 1192, 48 Cal.Rptr.3d 108, 122–123, 141 P.3d 225, 237–138.) City suggests that even if inclusion of public entities as "persons" who *may be sued* under the CFCA would infringe such powers, allowing public entities *to sue* as qui tam *plaintiffs* under the CFCA would not have that effect. Thus, City urges, we may hold it is a "person" for purposes of bringing qui tam actions, even if we conclude (as we do in *Wells*) that public entities are not "persons" who can be *defendants* under the CFCA.

For example, City observes, we held in *People v. Centr–O–Mart* (1950) 34 Cal.2d 702, 214 P.2d 378 (*Centr–O–Mart*), that the State of California was a "person" who could sue to enforce the Unfair Practices Act (UPA; Bus. & Prof.Code, § 17000 et seq.), even though the state was not expressly included in the statute's definition of "person" as "includ[ing] any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation" (*id.,* § 17021). In *Centr–O–Mart,* we applied the principle that laws in derogation of sovereignty must be strictly construed in favor of the state, and that statutes will not be interpreted to impair or limit the state's sovereign power to act in its governmental capacity. (*Centr–O–Mart, supra,* at pp. 703–704, 214 P.2d 378.) Noting that the express purpose of the UPA was to " 'safeguard the public,' " we held that, though not specifically mentioned in the statute, the state, through its law enforcement officers, was a proper party to bring suit for that purpose. (*Centr–O–Mart, supra,* at p. 704, 214 P.2d 378.)

On the other hand, City points out, *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 56 Cal. Rptr.2d 732, later held that a county is not a "person" who may be sued under the UPA. Distinguishing *Centr–O–Mart,* the *Community Memorial Hospital* court reasoned that in the earlier case, exclusion of the state as a "person" who could sue under the UPA would have undermined the state's sovereign power to act in its governmental capacity, while a determination that a county can be sued under the statute would also have that effect. Hence, the Court of Appeal concluded, "[t]he same rule that compelled the court in *Centr–O–Mart* to conclude the state was a person for the purpose of bringing an action compels us to conclude the County is not liable under the [UPA]." (*Community Memorial Hospital, supra,* at p. 211, 56 Cal. Rptr.2d 732.)

In *Wells,* we conclude, among other things, that recognizing CFCA suits against public entities would undermine their sovereign powers by impeding their fiscal ability to

carry out their core missions. (*Wells, supra,* 39 Cal.4th 1164, 1193–1196, 48 Cal.Rptr.3d 108, 123–125, 141 P.3d 225, 238–240.) However, as already indicated, we have independently determined for other reasons that the Legislature did not intend the CFCA to apply to public entities, *either* as defendants or as plaintiffs. Indeed, we have discerned particular indicia that public agencies were not intended as qui tam relators under the statute. Accordingly, the mere fact that allowing public entities to bring qui tam actions might not undermine their sovereign powers—an issue we do not address—does not dissuade us from our view that they are not proper qui tam plaintiffs under the CFCA.

Citing the CFCA's proviso that the statute must be liberally construed to promote the public interest (Gov.Code, § 12655, subd. (c)), City contends at length that recognizing public entities as qui tam relators furthers the purposes of the false claims law. Such a construction, City urges, broadens the range of actors available to ferret out and redress fraud against the government. Indeed, City argues, political subdivisions like City are *more* attractive qui tam plaintiffs than private persons and entities, because public entities' decisionmakers "are constrained by political accountability to utilize the [CFCA] judiciously and wisely, avoiding reckless suits." This accountability, City argues, belies PwC's contention that allowing qui tam actions by public entities would encourage them to divert their prosecuting officials from their usual law enforcement duties within their own jurisdictions.

Moreover, City insists, the CFCA contains safeguards against "opportunistic" suits, and unfair windfall recoveries, by "public" qui tam plaintiffs that sue on behalf of other public entities. In particular, City points to those statutory provisions that allow the defrauded entity itself to intervene, assume control, and even settle the action despite the qui tam plaintiff's objections.

The fact remains that the construction urged by City provides an *opportunity* for public entities, acting in their financial self-interest, to *withhold* pertinent information that fellow agencies of government have been defrauded, then race their colleagues to the courthouse in hopes of obtaining a "cut" of the proceeds that would otherwise accrue to the defrauded entities and their prosecuting authorities. For the reasons we have explained in detail, the Legislature reasonably could decide to avoid such a scheme, and we see no evidence that it intended to create one.

We therefore conclude that public entities, such as City, are not "persons" who may bring qui tam actions on behalf of other agencies of government under the CFCA. Insofar as the judgment of the Court of Appeal is premised on a contrary conclusion, it must therefore be reversed.

CONCLUSION

The Court of Appeal's judgment is reversed insofar as it concludes City may proceed with its false claims action, on behalf of the State of California, against defendant PricewaterhouseCoopers, LLP. The cause is remanded to the Court of Appeal for further proceedings consistent with the views expressed in this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, CHIN, MORENO, CORRIGAN, JJ. and IRION, J.*

39 Cal.4th 1240

48 Cal.Rptr.3d 158

The PEOPLE, Plaintiff and Respondent,

v.

Charles G. POKOVICH, Defendant and Appellant.

No. S127176.

Supreme Court of California.

Aug. 31, 2006.

Background: Defendant was convicted in the Superior Court, Shasta County, No.

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

LEGAL AUTHORITY AA-102

UNITED STATES of America, Appellee,

v.

The BENSINGER COMPANY, Appellant.

UNITED STATES of America, Appellee,

v.

The HOBART MANUFACTURING COMPANY, Appellant.

Nos. 19771, 19777.

United States Court of Appeals, Eighth Circuit.

June 30, 1970.

Rehearing Denied Aug. 18, 1970.

Dishwasher manufacturer and one of its dealers were convicted in the United States District Court for the Eastern District of Missouri, James H. Meredith, J., of violating Sherman Act by conspiring to fix price of a dishwasher, and they appealed. The Court of Appeals, Gibson, Circuit Judge, held that where there was no proof of dishwasher manufacturer's dealer representative's authority to tell a certain company that he was cutting off company's discount on parts because company had underbid one of manufacturer's dealers on a job, representative's alleged statement was not admissible against manufacturer to prove the extent of the manufacturer's representative's authority to act for the company and conduct its affairs by engaging in a price-fixing conspiracy, agreement or practice.

Reversed and remanded for new trial.

1. Monopolies ⇐12(1.8)

Where activities are of an intrastate character, in order for there to be Sherman Act violation, it must be shown that the restraint of trade directly and substantially affects interstate commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Monopolies ⇐28(7.1)

Where activities are interstate in nature and there is a per se violation of the Sherman Act, the effect upon interstate commerce follows as a matter of law and is conclusively presumed. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies ⇐28(7.1)

In order to meet jurisdictional requirement of the Sherman Act that the acts constituting the violation be in restraint of trade or commerce among the several states, there need be no showing of amount of commerce involved and it is no defense that the amount was small. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies ⇐28(8)

Where restraint is not a per se violation of the Sherman Act, but depends upon reasonableness of the activity involved, the effect upon interstate commerce may be a question of law, a question of fact, or a mixed question of law and fact. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies ⇐28(7.4)

Mere fact that a party engages in interstate commerce will not support a finding that a restraint of trade occurred in interstate commerce; the interstate commerce itself of that party must be involved. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies ⇐12(1.1)

Although dishwasher manufacturer's dealer representative was located in St. Louis, franchised dealers were located in St. Louis, buyer was in St. Louis, the agreement that first dealer would not submit a bid lower than that of second dealer was entered into in St. Louis, and dishwasher was to be installed in St. Louis, conspiracy to fix price of dishwasher was interstate in character for purposes of Sherman Act, where machine which was subject of agreement was manufactured in Ohio and it had to be delivered from there to St. Louis, order from St. Louis had to be placed and accepted in manufacturer's main office in Ohio, and one of threats which led to

agreement was that if first distributor got contract manufacturer would not deliver the machine. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies ⇐17(1.7)

Price-fixing agreements are per se violations of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies ⇐17(1.8)

Agreement that first distributor would not submit a bid lower than that of second distributor was a price-fixing agreement of simplest kind, and, for purposes of Sherman Act, it was immaterial that amount of interstate commerce involved was small. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies ⇐17(1.8)

Sherman Act condemns all price-fixing conspiracies, large or small. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Monopolies ⇐12(1.1)

For purposes of a per se violation of the Sherman Act, the conspiracy need only occur in interstate commerce, for the conspiracy itself constitutes the restraint on trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. Monopolies ⇐17(1.8)

Fact that conspiracy to fix price of a dishwasher was a failure and did not bear fruit did not preclude jurisdiction to punish the conspiracy. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Monopolies ⇐28(8)

Instruction accurately described the law relating to violations of the Sherman Act which occur in course of interstate commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

13. Criminal Law ⇐1153(4)
Witnesses ⇐240(2), 267

Extent of cross-examination and restriction of use of leading questions rest in sound discretion of the trial court, and the exercise of the trial court's discretion will not be reversed unless there is a clear abuse of discretion and prejudice to the defendant.

14. Witnesses ⇐282

In prosecution against dishwasher manufacturer and one of its dealers for conspiring to fix price of a dishwasher, ruling that manufacturer's dealer representative, who was called to testify as a government witness, was not hostile to manufacturer and manufacturer could not lead him on cross-examination did not constitute abuse of discretion, or deny manufacturer right to confront a witness, where representative freely testified as to matters he was questioned about, and there was no apparent prejudice to manufacturer in his testimony. U.S.C.A.Const. Amend. 6.

15. Criminal Law ⇐372(1)

Evidence of other criminal acts of a defendant may not be introduced to prove his general propensity to commit crimes of the nature charged.

16. Criminal Law ⇐372(1)

Government's evidence that company which had underbid one of dishwasher manufacturer's dealers on a job had been cut off by manufacturer's dealer representative from a discount on manufacturer's parts that the company had previously enjoyed would not be admissible to prove manufacturer's general propensity to suppress competition among its dealers, in prosecution against manufacturer and one of its dealers for conspiring to fix price of a dishwasher. Sherman Anti-Trust Act, § 1, 15 U.S.C. A. § 1.

17. Criminal Law ⇐369(2)

Evidence of other criminal activity of a defendant may be introduced if it is relevant to a specific factual issue in the case, and if it is so closely connected with that issue that its relevance outweighs its prejudicial effect.

18. Criminal Law ⇐419(1)

For hearsay testimony to be competent to prove facts of a transaction, an adequate foundation for its introduction must be laid.

19. Principal and Agent ⇐22(1)

Fact of agency may not be proved by alleged agent's extrajudicial statements.

20. Corporations ⇐432(8)

Where dishwasher manufacturer's dealer representative denied that he had any authority with respect to sale of parts, denied that he had ever had anything to do with the sale of parts, and denied ever having had any dealings with government witness' company, and government did not introduce any evidence showing that representative had ever conducted any business of manufacturer's connected with sale of parts, there was no sufficient basis for admission of witness' hearsay testimony that representative had told him over telephone that representative was cutting off witness' company's discount on parts because company had underbid one of manufacturer's dealers on a job, as proof of representative's agency in the matter. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

21. Corporations ⇐432(8)

Where there was no proof of dishwasher manufacturer's dealer representative's authority to tell a certain company that he was cutting off company's discount on parts because company had underbid one of manufacturer's dealers on a job, representative's alleged statement was not admissible against manufacturer to prove the extent of the manufacturer's representative's authority to act for the company and conduct its affairs by engaging in a price-fixing conspiracy, agreement or practice. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

22. Criminal Law ⇐410

Statements by an agent are admissible against the principal to prove truth of facts asserted therein, only if he was authorized to make those statements.

23. Witnesses ⇐397

If witness' hearsay testimony that dishwasher manufacturer's dealer representative told him over telephone that representative was cutting off witness' company's discount on parts because company had underbid one of manufacturer's dealers on a job were admitted as impeachment, it would only go to prove that representative made the statement attributed to him and thus to impeach his credibility; it would not prove that the facts of the incident actually occurred or that representative had authority to do what he was alleged to have done. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Lon Hocker, of Hocker, Goodwin & MacGreevy, St. Louis, Mo., and John F. McClatchey, of Thompson, Hine & Flory, Cleveland, Ohio, for appellant, The Hobart Manufacturing Co.; George F. Karch, Jr., of Thompson, Hine & Flory, Cleveland, Ohio, on the brief.

Harold D. Carey, St. Louis, Mo., for appellant, The Bensinger Co.

James M. Gordon, Asst. U. S. Atty., St. Louis, Mo., for appellee; Daniel Bartlett, Jr., U. S. Atty., St. Louis, Mo., on the brief.

Before VAN OOSTERHOUT, Chief Judge, and MATTHES, and GIBSON, Circuit Judges.

GIBSON, Circuit Judge.

The Hobart Manufacturing Company and one of its St. Louis dealers, The Bensinger Company, were convicted of violating § 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to fix the price of a dishwasher. A timely appeal was filed by both defendants. The facts constituting the alleged conspiracy are as follows.

Trader Vic's restaurant, located in the Bel Air East Motel in St. Louis, Missouri, decided to remodel its dishwashing facilities. Specifications for the remodeling called for the installation of a Hobart dishwasher, plus other equipment, and were prepared by The Bensinger Company. Upon receipt of the specifications, Trader Vic's sent out bid forms to The Bensinger Company, Almar Interior Design and Equipment

Company, and Southern Equipment Company. All of these companies were Hobart dealers located in St. Louis. According to these original bid forms, the companies were to submit bids only for the cost and delivery of the equipment. The restaurant contemplated that its own personnel would handle the installation. Bids were received only from Bensinger and Almar; Bensinger was the low bidder.

Prior to receiving the above bids, the restaurant decided that the equipment supplier should also handle the installation. The first bids were rejected and new bid forms were sent out to the same three companies. The new bid forms required the companies to submit bids specifying the contract price of the equipment as well as costs of installation. Bids were received from Bensinger and Southern. Although Southern's bid on the cost of the dishwasher was the higher of the two, it was ultimately awarded the contract because its total bid was lower.

The alleged conspiracy for which defendants were convicted was a price-fixing agreement on the sale of the dishwasher in the first round of bidding. The testimony was conflicting at the trial, but according to the government's evidence, defendant Hobart's St. Louis dealer representative, Richard Grayless, who was named as a co-conspirator, contacted Almar's officers and told them Hobart would not allow Almar to underbid Bensinger for the job, the job belonged to Bensinger, if Almar bid it would be in danger of losing its Hobart franchise, and if it got the job Hobart would not deliver the machine. When Almar said it was going to submit a bid anyway, Grayless allegedly instructed it to contact Bensinger and find out its bid and then submit a noncompetitive bid. Grayless denied these threats and instructions, but admitted discussing the job with Almar and also admitted knowledge that Almar was going to send its bid to Bensinger to be forwarded to Trader Vic's. Conversations between Almar and Bensinger followed these discussions with Grayless, the contents of which are disputed, but it is uncontroverted that Almar did forward its bid to Bensinger, which saw it and sent it on to Trader Vic's. According to Bensinger, Almar was simply submitting a courtesy bid to Trader Vic's in order to preserve good relations.

Almar later lost its Hobart franchise and subsequently complained to the United States Attorney. This prosecution followed. Almar was named a co-conspirator, but was not named a defendant.

Appellants raise three issues on appeal. First, they contend that the jurisdictional requirement of interstate commerce was not met in this case and that the judge's instructions on the issue were in error. Second, they contend that the trial court's refusal to permit leading questions in cross-examination of one witness denied them their Sixth Amendment right of confrontation. Third, they object to the admission of certain evidence. We consider these contentions in order.

INTERSTATE COMMERCE

It is a jurisdictional requirement of the Sherman Act that the acts constituting the violation be "in restraint of trade or commerce among the several States." (15 U.S.C. § 1) In legal parlance, it is said that the restraint must be upon interstate commerce. Appellants contend that the conspiracy fixing the price of one dishwasher is so insignificant that it does not meet the jurisdictional test of interstate commerce. In considering this contention, we must summarize the law applicable to violations of § 1 of the Sherman Act.[1]

1. It may be well to emphasize here that the discussion on interstate commerce relates only to § 1 of the Sherman Act. Interstate commerce aspects of other sections of the Act, such as § 2 relating to monopolies, as well as provisions of the Clayton Act, involve other considerations.

[1] For purposes of § 1 of the Sherman Act, conspiracies which are in restraint of trade may be divided into two categories: (1) those in which the activities complained of are wholly intrastate in character; and (2) those in which the activities occur in the course of interstate commerce. Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954), cert. denied, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645 (1954); United States v. Pennsylvania Refuse Removal Ass'n, D. C., 242 F.Supp. 794 (1965), aff'd 357 F. 2d 806 (3d Cir. 1966), cert. denied, 384 U.S. 961, 86 S.Ct. 1588, 16 L.Ed.2d 674 (1966). Where the activities are of an intrastate character, in order for there to be a Sherman Act violation, it must be shown that the restraint directly and substantially affects interstate commerce. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959), cert. denied 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959); Spears Free Clinic v. Cleere, 197 F.2d 125 (10th Cir. 1952); Prospect Dairy, Inc. v. Dellwood Dairy Co., 237 F.Supp. 176 (N.D.N.Y.1964).

[2–4] Where the activities are interstate in nature, the interstate commerce issue depends upon whether the restraint is a *per se* violation of the Act, such as price fixing (United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)) or division of markets (Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899)), or whether the restraint must meet the test of "unreasonableness" (Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911)). Where there is a *per se* violation, the effect upon interstate commerce follows as a matter of law and is conclusively presumed. Las Vegas Merchant Plumbers Ass'n v. United States, *supra*. There need be no showing of the amount of commerce involved and it is no defense that the amount was small. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1955); Las Vegas Merchant Plumbers Ass'n v. United States, *supra;* United States v. Pennsylvania Refuse Removal Ass'n, *supra*. Where the restraint is not a *per se* violation of the Act, but depends upon the reasonableness of the activity involved, the effect upon interstate commerce may be a question of law, a question of fact, or a mixed question of law and fact. Las Vegas Merchant Plumbers Ass'n v. United States, *supra*; compare Perryton Wholesale, Inc. v. Pioneer Distributing Company, 353 F.2d 618 (10th Cir. 1965), cert. denied, 383 U.S. 945, 86 S.Ct. 1202, 16 L. Ed.2d 208 (1965), with Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., Ltd., 195 F.2d 86 (7th Cir. 1952), cert. denied, 344 U.S. 816, 73 S. Ct. 10, 97 L.Ed. 635 (1952).

[5, 6] Therefore, the first question to be decided in this case is whether the conspiracy in question to fix prices was intrastate or interstate in character. Appellants contend that since the Hobart dealer representative was located in St. Louis, the franchised dealers were located in St. Louis, the buyer was in St. Louis, the agreement was entered into in St. Louis, and the dishwasher was to be installed in St. Louis, the conspiracy must be viewed as one wholly intrastate in character. We think this analysis of the transaction overlooks several significant aspects. It is true that the mere fact that a party engages in interstate commerce will not support a finding that a restraint of trade occurred in interstate commerce; the interstate commerce itself of that party must be involved. Lieberthal v. North Country Lanes, Inc., *supra*. But in this case, the interstate business of Hobart was directly involved in several ways. The machine which was the subject of the agreement was manufactured in Troy, Ohio, and it had to be delivered from there to St. Louis. The order from St. Louis had to be placed and accepted in Hobart's main office in Troy. Most significantly, one of the threats which led to the agreement was that if Almar got the

contract Hobart would not deliver the machine. Thus, the conspirator Hobart was engaged in interstate commerce, its product which was the subject of the conspiracy moved in interstate commerce, and that movement in interstate commerce was directly threatened by the conspiracy. This is sufficient to establish that the conspiracy occurred in the course of interstate commerce. Since the conspiracy was not intrastate in character, the requirement of that theory that the effect on interstate commerce be direct and substantial is not applicable here.[2]

[7, 8] With an "in commerce" transaction, it must be determined whether the conspiracy was a *per se* violation of the act, which requires no further showing of an effect upon interstate commerce, or whether it was a restraint which must meet the test of unreasonableness. The agreement in question was that Almar would not submit a bid lower than that of Bensinger. The only subject of the first round of bids was the price of the dishwasher and its delivery. This is a price-fixing agreement of the simplest kind, and price-fixing agreements are *per se* violations of the Sherman Act. Therefore, it is immaterial that the amount of interstate commerce involved is small.[3] United States v. McKesson & Robbins, *supra*; United States v. Socony-Vacuum Oil Co., *supra*.

[9] It may well be that this case represents the *reductio ad absurdum* of the proposition that price-fixing agreements are to be condemned as *per se* violations. The subject of the conspiracy was only one dishwashing machine, and the price at which this $10,000 machine was fixed was only $107 above the dealers' cost. Nevertheless, this court is not willing to say that large price-fixing conspiracies in interstate commerce are violations of the Act, while little ones are not; the law condemns them all. If the defendants chose to enter into the conspiracy, they cannot complain because the Government chose to prosecute.

Appellants' contention that because there was no sale resulting from the first round of bids, there was no effect upon interstate commerce so as to establish jurisdiction under the Sherman Act, merits only brief consideration.

[10, 11] For purposes of a *per se* violation of the Act, the conspiracy need only occur in interstate commerce, for the conspiracy itself constitutes the restraint on trade. The fact that the conspiracy was a failure and did not bear fruit does not preclude jurisdiction to punish the conspiracy. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n. 59, 252, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); Plymouth Dealer's Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960); United States v. Central States Theatre Corp., 187 F.Supp. 114 (Neb. 1960).

We turn now to the question of whether the trial court's instructions upon the issue of interstate commerce were adequate in view of the principles of law we have just discussed. In order to determine whether these instructions were proper, it will be necessary to review the presentation of the case at trial and specify the questions which are properly to be determined by the trier of fact.

2. If the conspiracy were one involving only Bensinger and Almar, we would have a different case, for then there would be a more difficult question as to whether the conspiracy occurred in the course of interstate commerce; we might then be faced with the question of whether this was an intrastate conspiracy which substantially affected interstate commerce. However, the involvement of Hobart directly as a conspirator changes the whole complexion of the conspiracy.

3. In the interests of clarity, it may be repeated that this conclusion follows only because we have found that the conspiracy occurred in interstate commerce. Were the price-fixing agreement to have occurred in intrastate commerce, it would be necessary to show a substantial impact upon interstate commerce. It is not necessary here to consider what that test might be.

It is not clear from the transcript exactly what theory the Government proceeded on at the trial. On appeal the Government contends that it has proved its case upon either theory: (1) that it was an intrastate conspiracy which substantially affected interstate commerce; or (2) that it was a conspiracy in the course of interstate commerce. Under the view we have taken of the case, the Government established its case only on the latter theory. Under the former theory, the question of whether there was a substantial effect upon interstate commerce is a question of fact for the jury, and as will appear from the discussion below, there was no adequate instruction on this theory given to the jury. However, if the instructions were adequate on the latter theory the Government is entitled to its judgment.

On this point, the case of Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954), is directly in point:

> "There remains the question as to whether the appellants suffered any prejudice through the failure to instruct on the 'affect commerce' theory, relied on by the Government. * * *
>
> "This is a case where the Government proceeded on two alternate theories relating to (1) matters complained of in the flow of commerce, and (2) matters complained of in intrastate commerce substantially affecting interstate commerce after the flow in commerce had ceased. Either theory properly presented to the jury would support a conviction on the facts of this case." (*Id.* at p. 748)

[12] The Court's charge to the jury in the present case on the interstate commerce element was as follows:

> "An essential element of the offenses prohibited by the Sherman Act is that the defendants' alleged unreasonable restraint must involve interstate commerce. The term 'interstate commerce' includes transactions of commodities moving across state lines, or in the flow of interstate commerce after their journey has commenced and until it is terminated, as well as entirely intrastate transactions which substantially affect interstate commerce.
>
> "It is a question of fact for the jury to determine whether defendants' conduct involved such interstate commerce in the light of business practices. In cases involving products moving across state lines, or in the flow of commerce it is not material how much commerce is involved. The Sherman Act brands as unlawful any contract or combination or conspiracy which would operate to restrain unreasonably any interstate trade and commerce, regardless of how small in amount or value.
>
> "Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes submitting collusive bids and price quotations by agreement."

This charge accurately described the law relating to violations of the Sherman Act which occur in the course of interstate commerce. It is of course a question of fact for the jury to determine whether the conspiracy occurred in the course of interstate commerce. The instructions specifically recognized that the jury must make the determination of whether the conspiracy "involved" interstate commerce, and defined that term as including "transactions of commodities moving across state lines, or in the flow of interstate commerce * * *." That instruction was accurate and encompassed the commodity involved here, the dishwasher. As discussed above, where the conspiracy occurs in interstate commerce, if there is a *per se* violation of the Act, the effect upon interstate commerce follows as a matter of

law, and the instructions adequately stated this principle.

Appellants maintain that the court should have instructed the jury that it must find as a fact that the actions affected interstate commerce, and the *per se* violation itself must have affected that commerce. The *Las Vegas Merchant Plumbers* case is again directly in point on this contention:

> "Appellants argue that the effect on interstate commerce of the acts complained of, must be substantial. They contend also the question of substantiality should have been submitted to the jury. The question should have been submitted on the 'affect commerce' theory. But we are now concerned with only the 'in commerce' theory remaining in the case.
>
> "The test of the impact on commerce is qualitative not quantitative * * * '§ 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected.' United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225, ft. note 59, 60 S.Ct. 811, 84 L.Ed. 1129 * * *.
>
> "* * * The jury found by its verdict that the defendants * * * had engaged in * * * violations per se 'flowing' in the stream of interstate commerce. The proscribed and substantial effect of these illegal acts followed as a matter of law." (Citations omitted.) Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d at 748.

We find no error in the instructions given in this case.

CROSS-EXAMINATION OF WITNESS

Barry Burlis, employed by Hobart as a dealer representative, was called to testify as a government witness. In the course of his testimony, the trial court ruled that he was a hostile witness to the Government and permitted government counsel to ask him leading questions. On cross-examination, Hobart's attorney sought to lead Burlis, and upon the Government's objection, the trial court ruled that he was not hostile to Hobart because he was a Hobart employee and Hobart could not lead him. Hobart views this ruling as a denial of its Sixth Amendment right to confront a witness. As authority for this contention, Hobart cites Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

The *Douglas* case established that "a primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of cross-examination." (p. 418, 85 S.Ct. p. 1074). Therefore, we must decide whether the trial judge's ruling in the instant case denied the defendant an effective opportunity for cross-examination.

[13, 14] The extent of cross-examination and the restriction of the use of leading questions rest in the sound discretion of the trial court. Glasser v. United States, 315 U.S. 60, 83, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Durham, 319 F.2d 590 (4th Cir. 1963); Mitchell v. United States, 213 F.2d 951, 956 (9th Cir. 1954), cert. denied, 348 U.S. 912, 75 S.Ct. 290, 99 L. Ed. 715 (1955); Stahl v. United States, 144 F.2d 909 (8th Cir. 1944). The exercise of the trial court's discretion will not be reversed unless there is a clear abuse of discretion and prejudice to the defendant. In the instant case, we find neither an abuse of discretion nor prejudice to the defendant, much less the denial of a constitutional right.

The testimony in question related to Burlis's function in quoting prices of Hobart products to dealers. On direct examination, Burlis, in response to a leading question posed by the Government, testified that he made quotations guaranteeing prices for a certain period of time. On cross-examination, the Hobart attorney explored this matter further and it was on this subject that the controverted ruling was made. Nevertheless, Hobart was able to ask the witness several questions about his function in quoting prices which the witness answered, and it does not appear that

his testimony was in any way incomplete on the subject. Hobart did not make an offer of proof at the trial and does not indicate on appeal why the denial of the right to ask leading questions prevented it from eliciting any necessary or relevant information. Furthermore, it does not appear that Burlis's testimony on direct or cross-examination was in any way prejudicial to Hobart.

Thus the facts in the instant case are materially different from those in *Douglas, supra*, relied on by Hobart. In that case, the Government called as a witness one Loyd who had previously been convicted of the same crime with which Douglas was charged. Loyd refused to testify on any matter whatsoever connected with the case, relying on the Fifth Amendment privilege against self-incrimination. In its examination the Government read to the witness an alleged confession made by him which contained a great deal of material prejudicial to the defendant. The *Douglas* case held that the introduction of the confession in this form violated the defendant's right to confront the witness because Loyd's refusal to testify prevented any cross-examination of the witness whatsoever. Here the witness freely testified as to the matters he was questioned about, and there was no apparent prejudice to the defendant in his testimony. Thus *Douglas* is inapplicable. We conclude that there was no error in the trial court's ruling.

THE PEERLESS INCIDENT

The Government was permitted at trial to introduce evidence of a circumstantial nature that the Peerless Supply Company had been cut off by a Hobart dealer representative from a discount on Hobart parts that it had previously enjoyed. Barry Burlis, employed by Hobart as a dealer representative, was called as a government witness and testified as to the duties of his position. He testified that his duties were primarily of two sorts. First, he promoted the sales of Hobart equipment by calling on architects and potential customers and encouraging them to utilize Hobart equipment. However, he was not allowed to sell Hobart equipment directly to these customers, and any sales engendered by his promotional activity were channeled through authorized dealers. Secondly, he assisted Hobart dealers by quoting them current prices on Hobart equipment and in certain cases expediting orders. He testified he was not authorized to raise or lower prices that were set by the main office in Troy, Ohio, he had nothing to do with the sales of parts, he had not met Lewis Leabman of Peerless Supply prior to the trial, and he had never had a conversation with him on any subject.

The president of Peerless Supply Co., Leabman, was called by the Government and testified that in January 1968, some five months after the conspiracy in question, Peerless was denied a previously enjoyed 15 per cent discount on the list price in the purchase of Hobart parts. He was permitted to testify over defendants' objection that Burlis told him over the telephone that he, Burlis, was cutting off Peerless' discount on parts because Peerless underbid Hobart dealers on a job at the Pattonville High School. Peerless is not, and had never tried to become, a Hobart dealer. This testimony was corroborated in part by a Peerless saleswoman who testified over defendants' objection that she had seen a sign in the parts section of Hobart's building saying "Don't sell to Peerless."

This testimony was, of course, hearsay as to Hobart and Bensinger, as well as to Burlis, and there is no question it was highly prejudicial to defendant Hobart and also to defendant Bensinger, who was not involved in the incident at all. The issue then is whether there was a proper basis for its admission and whether its relevance to the factual issues in the case outweighs its prejudicial effect.

[15, 16] It is a well-established principle of criminal law that evidence of other criminal acts of a defendant may not be introduced to prove his general

propensity to commit crimes of the nature charged. The reasons for this rule are extensively discussed in Kempe v. United States, 151 F.2d 680, at pp. 687–689 (8th Cir. 1945), and need not be detailed here, but the facts of that case well illustrate the application of the rule. In that case, defendant was charged with selling gasoline during W. W. II at prices above the maximum established under the Emergency Price Control Act. As part of its case, the Government introduced evidence of sales by the defendant above the controlled price for which he had not been charged. This evidence was held to have been improperly admitted. The rule has been applied in a civil action for antitrust violations under the Clayton Act which under certain limited circumstances permits use of prior judgments obtained by the government in criminal convictions. International Shoe Machinery Corp. v. United Shoe Machinery Corp., 315 F.2d 449, 459–460 (1st Cir. 1963), cert. denied, 375 U.S. 820, 84 S.Ct. 56, 11 L.Ed. 2d 54 (1963). It is evident from this position that the government's evidence on the Peerless incident would not be admissible to prove Hobart's general propensity to suppress competition among its dealers. Hobart was not charged with a general conspiracy to suppress such competition nor was the Peerless incident charged as a criminal offense in this case.

[17, 18] Of course, evidence of other criminal activity of a defendant may be introduced if it is relevant to a specific factual issue in the case, and if it is so closely connected with that issue that its relevance outweighs its prejudicial effect. In this case, the Government contends on appeal that the evidence of the Peerless incident was admissible on the grounds that it shows the authority of Grayless to enter into the conspiracy charged and to bind the corporation by his actions. The Government in its brief argues:

> "The only proof available was what a dealer representative like Grayless had, *in fact* done in situations similar to the offense charged in the indictment. * * * The Peerless matter itself was offered to show the existence and *actual use* of that delegated authority which would make Hobart liable for those acts by Grayless which were alleged in the indictment." (emphasis added.)

In considering the competence of this evidence, it must be kept in mind that the only proof offered of the Peerless incident was hearsay testimony, and for such hearsay to be competent to prove the facts of the transaction, an adequate foundation for its introduction must be laid.

The hearsay was introduced to prove Burlis's authority as a Hobart dealer representative and by extension to prove Grayless' similar authority at an earlier time. Three questions are raised by this proof. First, was the incident in question one in which Burlis was acting as an agent of the Hobart Company? Two, if so, can the scope of an agent's (Burlis's) authority be proved by his own hearsay admission? Three, was the statement admissible to prove that Burlis had in fact cut off Peerless with Hobart's authorization?

[19, 20] It is a universally accepted rule of evidence that the fact of agency may not be proved by the alleged agent's extra-judicial statements. Walmsley v. Quigley, 129 F. 583 (8th Cir. 1904); 4 Wigmore on Evidence, § 1078 (3d ed. 1940); A.L.I. Res. on Agency 2d, § 285 (1958). In applying this principle to the instant case, it may be noted that the employment of Burlis by Hobart is undenied. Burlis denied however that he had any authority with respect to the sale of parts, denied that he had ever had anything to do with the sale of parts, and denied ever having any dealings with Peerless. The Government did not introduce any evidence showing that Burlis had ever conducted any business of Hobart's connected with the sale of parts. The testimony by Leabman did not reveal any dealings between Leabman and Burlis, prior to the contro-

versial phone call, which would establish any reliance on Leabman's part that Burlis was an authorized Hobart agent in respect to this transaction. No reason was given by Leabman as to why he called Burlis with respect to the denial of the discount. Furthermore, the hearsay statement recounted by Leabman in no way indicated that Burlis was acting on behalf of Hobart rather than himself. In the light of this evidence, there was no sufficient basis for the admission of the hearsay phone call as proof of Burlis's agency in this matter.

[21] Even if, however, we were to overlook the inadequacy of the Government's proof on the fact of agency, and to admit for purposes of argument that Burlis did make the statement attributed to him, the question remains whether the statement was admissible against Hobart as proof of the extent of the agent's authority. We conclude that it was not.

The governing principle of law is set forth in § 285 of the Second A.L.I. Restatement on Agency:

> "Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by *other evidence* that the making of such statement was within the authority of the agent, or as to persons dealing with the agent, within the apparent authority or other power of the agent." (emphasis added.)

This statement is in accord with our own decision in Walmsley v. Quigley, *supra*, and decisions in other circuits. Flintkote Co. v. Lysfyord, 246 F.2d 368 (9th Cir. 1957), cert. denied 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957); Franhan Distributors, Inc. v. New York World's Fair, 124 F.2d 82 (2d Cir. 1941), cert. denied 316 U.S. 687, 62 S.Ct. 1277, 86 L.Ed. 1759 (1942); Durant Motor Co. v. Georgia-Florida Motor Co., 18 F. 2d 95 (5th Cir. 1927). It may be noted that the *Walmsley* case, as well as the other cases, seem to suggest that the hearsay statement itself would not be admissible to prove the scope of Burlis's authority even if other evidence were introduced. *See* Annotation, "Competence, as against Principal, of Statements by Agent to Prove Scope, as Distinguished from Fact, of Agency," 3 A.L.R.2d 598 (1949). In any event, as detailed above, there was no such "other evidence" offered by the Government in this case. Therefore, there was no proper foundation for the introduction of this statement as proof of the extent of Burlis's authority.

[22] Statements by an agent are admissible against the principal to prove the truth of the facts asserted therein, only if he was authorized to make those statements. A.L.I. Res. of Agency 2d, § 286 (1958). This of course was one of the primary issues in this case—whether Grayless had the authority to make the statements he allegedly did. It is clear from the above discussion that there was no proof of Burlis's authority, and therefore the statement was not admissible against Hobart to prove that Burlis actually cut off Peerless.

By only one hearsay statement, which was denied in court, the Government seeks to establish the fact of Burlis's agency in the alleged Peerless transaction, the extent of his authority in that transaction, and its actual use so as to bind Hobart on Grayless' acts committed some five months prior to the Peerless incident. The proffered testimony is incompetent for any of these purposes. It goes without saying that the testimony was incompetent to prove Grayless' authority, and since it was indisputably prejudicial to the defendants, its admission requires reversal.

[23] Although the Government does not now contend that the testimony is admissible as impeachment of Burlis, it was admitted on that theory at the trial [4]

4. The trial court also held the evidence admissible on a later objection, on the basis that it showed intent. Intent was not an issue in the case. The act of

and it may be well to dispose of this possibility briefly. If the hearsay were admitted as impeachment, it would only go to prove that Burlis made the statement attributed to him and thus to impeach his credibility; it would not prove that the facts of the incident actually occurred or that Burlis had the authority to do what he is alleged to have done. Hence the testimony could not by extension go to prove the authority of Grayless. Since its use in this form would be highly remote from any issue in the case (Burlis is not in any manner connected with the charged conspiracy), its prejudicial effect should preclude its admission. Furthermore, since the hearsay in this form is on a collateral issue, its denial by Burlis in direct testimony would be conclusive. 98 C.J.S. Witnesses § 611.

Reversed and remanded for a new trial.

Earnest PICKINGS et al., Appellants,

v.

Imon E. BRUCE et al., Appellees.

No. 19381.

United States Court of Appeals, Eighth Circuit.

Aug. 6, 1970.

Action for declaratory judgment and injunctive relief from sanctions imposed by college administrators against student organization, its officers and faculty advisors. The United States District Court for the Western District of Arkansas, Oren Harris, Chief Judge, dismissed complaint without prejudice, and plaintiffs appealed. The Court of Appeals, Heaney, Circuit Judge, held that imposition of sanctions for plaintiffs' parts in extending speaking invitation to couple, who had militant views, and who were seeking substantial change in race relations, violated rights of free expression and association where appearance by such couple would not reasonably be expected to do more than exacerbate tensions between college and community and provoke discussions between students and encourage them to action.

Reversed and remanded.

1. Constitutional Law ⇐90, 91

Imposition by college administrators of sanctions against student organization, its officers and faculty advisors for their part in writing letter to off-campus church which set forth organization's understanding of incident, in which black female students were asked to leave such church, which advised that action of church was un-Christian and which requested an explanation violated rights of free expression and association. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐90, 91

Students and teachers retain their rights to freedom of speech, expression and association while attending or teaching at college or university.

3. Colleges and Universities ⇐8, 9

Teachers and students have right to express their views individually or collectively with respect to matters of concern to college or to larger community and they are neither required to limit their expression or views to campus nor to confine their opinions to matters that affect academic community only.

4. Constitutional Law ⇐90, 91

Imposition by college administrators of sanctions against student organization, its officers and faculty advisors for their parts in extending speaking invitation to couple, who had militant views,

price rigging in interstate commerce was a *per se* violation of the Act and intent would be immaterial. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310, 76 S.Ct. 937, 100 L.Ed. 1209.

LEGAL AUTHORITY AA-103

Susan herself made statements suggesting White acted out of love rather than pecuniary gain. As the PCR court found, "Susan made statements to police asserting that White did not expect to receive a portion of [David's] insurance proceeds and killed [David] because [David] had abused Susan." Although she gave contradictory testimony at her own trial suggesting White was interested in the money, this could have been discredited as a self-serving story concocted after the fact to shift blame onto White.

The strongest evidence of White acting out of a pecuniary motive was his statement to Fisher indicating he expected Susan to give him $100,000, presumably from the insurance proceeds. While this statement supported the pecuniary gain finding, it was not unambiguous. Clearly, White expected that Susan was going to share the insurance proceeds with him. But a neutral factfinder could have reasonable doubts as to whether the insurance funds were a causal factor in White's agreeing to commit the murder or whether he simply succumbed to Susan's pressure because he loved her. *See Madsen*, 609 P.2d at 1053 ("[T]he receipt of the [insurance] money must be a cause of the murder, not a result of the murder."). A finding that White acted solely out of love because Susan manipulated him would have been considerably more likely if the sentencer had learned of White's troubled background, mental health issues, and low intelligence. Consequently, there is a reasonable likelihood White would have received a different sentence if McVay had investigated and presented mitigating evidence.

V. Conclusion

[28] The Sixth Amendment guarantees that criminal defendants receive reasonably effective assistance of counsel at sentencing. *See Strickland*, 466 U.S. at 686–88, 104 S.Ct. 2052. The PCR court's determination that White received what the Constitution requires was both contrary to and an unreasonable application of *Strickland*. White is therefore entitled to habeas relief. Accordingly, we reverse the district court's judgment and remand with instructions to grant a conditional writ with respect to White's sentence unless the State, within a reasonable period, either holds a new sentencing hearing or vacates White's sentence and imposes a lesser sentence in accordance with state and federal law.

REVERSED and REMANDED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas JOYCE, Defendant-Appellant.

No. 17-10269

United States Court of Appeals, Ninth Circuit.

Submitted June 13, 2018 *—San Francisco, California

Filed July 11, 2018

Background: Defendant was charged by indictment with conspiring to suppress and restrain competition involving foreclosed real property by rigging bids in violation of the Sherman Act. Following denial of

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

defendant's pretrial motion, arguing the matter should be adjudicated under a rule of reason analysis rather than the per se analysis advocated by the government, defendant was convicted in the United States District Court for the Northern District of California, Phyllis J. Hamilton, Chief District Judge, No. 4:14-cr-00607-PJH-4, 2016 WL 4269961, of violation of the Sherman Act. Defendant appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, sitting by designation, held that:

(1) as a matter of first impression, bid rigging, as a form of horizontal price fixing, is a per se violation of the Sherman Act, and

(2) under per se rule, defendant was not entitled to introduce evidence to jury of alleged ameliorative effects of bid rigging conduct on market for foreclosed properties.

Affirmed.

1. Antitrust and Trade Regulation ⚿534, 975

Under the per se rule in Sherman Act cases, arguments and evidence relating to, inter alia, the procompetitive nature of the conduct at issue are excludable. Sherman Act § 1, 15 U.S.C.A. § 1.

2. Antitrust and Trade Regulation ⚿535

In Sherman Act cases, the rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects. Sherman Act § 1, 15 U.S.C.A. § 1.

3. Antitrust and Trade Regulation ⚿534, 535

The rule of reason inquiry in Sherman Act cases is inapplicable if the restraint falls into a category of agreements which have been determined to be per se illegal. Sherman Act § 1, 15 U.S.C.A. § 1.

4. Antitrust and Trade Regulation ⚿534

The per se rule is applied in Sherman Act cases when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Sherman Act § 1, 15 U.S.C.A. § 1.

5. Antitrust and Trade Regulation ⚿534, 976

Agreements or practices that always or almost always tend to restrict competition and decrease output are conclusively presumed to be unreasonable in violation of the Sherman Act because of their pernicious effect on competition and lack of any redeeming virtue. Sherman Act § 1, 15 U.S.C.A. § 1.

6. Antitrust and Trade Regulation ⚿975, 976

If a business arrangement is a type conclusively presumed to be unreasonable, the government is relieved of any obligation to prove the unreasonableness of the specific scheme at issue and any business justification for the defendant's conduct is neither relevant nor admissible in a Sherman Act case. Sherman Act § 1, 15 U.S.C.A. § 1.

7. Antitrust and Trade Regulation ⚿822

Bid rigging, as a form of horizontal price fixing, is a per se violation of the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

8. Antitrust and Trade Regulation ⚿534

When a defendant's conduct falls squarely into a category of economic restraint necessarily prohibited by the Sherman Act the per se rule applies and the need to study the reasonableness of an

individual restraint on trade is eliminated. Sherman Act § 1, 15 U.S.C.A. § 1.

9. Antitrust and Trade Regulation ⚷534

The purpose of the per se rule in Sherman Act cases is to avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable. Sherman Act § 1, 15 U.S.C.A. § 1.

10. Antitrust and Trade Regulation ⚷534

Under per se rule applicable to price-fixing agreements which violate the Sherman Act, rather than rule of reason analysis, defendant was not entitled to introduce evidence to jury of alleged ameliorative effects of bid rigging conduct on market for foreclosed properties in non-judicial public foreclosure auctions, regardless of procompetitive justifications, or whether bid rigging activities took place in any particular industry or during a downturn in broader economy. Sherman Act § 1, 15 U.S.C.A. § 1.

11. Antitrust and Trade Regulation ⚷534, 976

The government is not required to prove specific intent to produce anticompetitive effects where a per se violation is alleged in a Sherman Act case. Sherman Act § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Northern District of California, Phyllis J. Hamilton, Chief District Judge, Presiding, D.C. No. 4:14-cr-00607-PJH-4.

Robert Waggener, San Francisco, California, for Defendant-Appellant.

Mary Helen Wimberly and James J. Fredricks, Attorneys; Marvin N. Price Jr., Acting Deputy Assistant Attorney General; Andrew C. Finch, Principal Deputy Assistant Attorney General; Makan Delrahim, Assistant Attorney General; Kelsey C. Linnett and Alexis J. Loeb, Antitrust Division; United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

Before: Michael R. Murphy,** Richard A. Paez, and Sandra S. Ikuta, Circuit Judges.

OPINION

MURPHY, Circuit Judge:

I. INTRODUCTION

Appellant Thomas Joyce was charged by indictment with conspiring to suppress and restrain competition by rigging bids, in violation of the Sherman Act, 15 U.S.C. § 1. Joyce brought a pretrial motion, arguing the matter should be adjudicated under a rule of reason analysis rather than the per se analysis advocated by the government. The district court ruled against Joyce, concluding the bid-rigging scheme alleged in the indictment was illegal per se under Section 1 of the Sherman Act. Joyce proceeded to trial and was convicted. He challenges his conviction, arguing the district court erred by refusing to apply the rule of reason analysis to the bid-rigging charge.

In this appeal, we are presented with the question of whether bid rigging is a per se violation of Section 1 of the Sherman Act. We conclude it is. Accordingly,

** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court affirms.

II. BACKGROUND

The indictment in this matter alleged that Joyce participated in a bid-rigging scheme involving foreclosed real property in Contra Costa County, California. Specifically, the indictment charged that Joyce and his coconspirators agreed to suppress competition by refraining from bidding against each other at public auctions. The means and methods alleged included: agreeing not to compete to purchase selected properties at public auctions; designating which conspirators would win selected properties at public auctions; refraining from bidding for selected properties at public auctions; purchasing selected properties at public auctions at artificially suppressed prices; negotiating, making, and receiving payoffs for agreeing not to compete with coconspirators; and holding second, private auctions, to determine the payoff amounts and choose the conspirator who would be awarded the selected property.

[1] Prior to trial, Joyce filed a "Motion to Adjudicate Government's Sherman Act Allegations Pursuant to the Rule of Reason." In the motion, Joyce asked the district court to determine that the per se rule is inapplicable to the bid-rigging charges. Under the per se rule, arguments and evidence relating to, *inter alia*, the procompetitive nature of the conduct at issue are excludable. *See Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 345, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). The district court denied the motion, concluding bid rigging "falls squarely within the per se category." Joyce was convicted at trial and sentenced to imprisonment for twelve months and one day. In this appeal, he asserts the district court erred by denying his motion and refusing to admit evidence that allegedly shows the procompetitive benefits of his conduct.

III. ANALYSIS

[2] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Despite the broad language used in the statute, the Supreme Court has held that Section 1 prohibits only agreements that *unreasonably* restrain trade. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58–60, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Typically, the determination of whether a particular agreement in restraint of trade is unreasonable involves a factual inquiry commonly known as the "rule of reason." *Metro Indus., Inc., v. Sammi Corp.*, 82 F.3d 839, 843 (9th Cir. 1996). "The rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003).

[3–6] The rule of reason inquiry, however, is inapplicable if "the restraint falls into a category of agreements which have been determined to be per se illegal." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991). The "per se rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (internal quotation marks omitted). Such agreements or practices are "conclusively presumed to be unreasonable" because of their "pernicious effect on competition and lack of any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). If a business

arrangement is a type conclusively presumed to be unreasonable, the government is relieved of any obligation to prove the unreasonableness of the specific scheme at issue and any business justification for the defendant's conduct is neither relevant nor admissible. *See United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1213 (9th Cir. 1992) ("In a criminal antitrust prosecution, the government need not prove specific intent to produce anticompetitive effects where a per se violation is alleged.").

[7] The Supreme Court has held that horizontal price fixing is a per se violation of the Sherman Act. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309, 76 S.Ct. 937, 100 L.Ed. 1209 (1956) ("It has been held too often to require elaboration ... that price fixing is contrary to the policy of competition underlying the Sherman Act ...."); *see also Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996) (listing "horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations" as restraints of trade the Supreme Court has "held to be within the per se category"); *United States v. MMR Corp.*, 907 F.2d 489, 497 (5th Cir. 1990) ("[T]he defendants point to various cases which state the unassailable proposition that an agreement among competitors to fix prices is a per se violation of section 1 of the Sherman Act."). Although this court has never expressly held that bid rigging is a per se violation of Section 1 of the Sherman Act, bid rigging is a form of horizontal price fixing. *See United States v. Fenzl*, 670 F.3d 778, 780 (7th Cir. 2012) (describing bid rigging as "a form of price fixing in which bidders agree to eliminate competition among them, as by taking turns being the low bidder"); *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970) (holding bid rigging is "a price-fixing agreement of the simplest kind, and price-fixing agreements are per se violations of the Sherman Act"), *superseded on other grounds as stated in DCS Sanitation Mgmt., Inc. v. Occupational Safety & Health Review Comm'n*, 82 F.3d 812 (8th Cir. 1996). Bid rigging is, therefore, a per se violation of the Sherman Act.

[8–10] Joyce does not contest that the conduct described in the indictment was classic bid rigging or that the evidence presented at trial was insufficient to establish he engaged in bid rigging. *See* Appellant Br. at 11 (referring to his own conduct as a "bid rigging agreement"). Instead, he argues the per se rule should not apply to the scheme in which he participated because that scheme, which he says involved "a few participants in a narrow set of public foreclosure auctions," did not have any "demonstrable effect on the pricing or quantity of the real estate sold." *Id.* When a defendant's conduct falls squarely into a category of economic restraint necessarily prohibited by Section 1 of the Sherman Act, however, the per se rule applies and "the need to study the reasonableness of an individual restraint" on trade is eliminated. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *Brown*, 936 F.2d at 1045 (holding the "case-by-case analysis is unnecessary when the restraint [on trade] falls into a category of agreements which have been determined to be per se illegal"). Accordingly, Joyce's assertion that the district court erred by not allowing him to present evidence to the jury regarding the actual effect his conduct had on the market for foreclosed properties is misplaced. The per se rule eliminates the need to inquire into the specific effects of certain restraints of trade. *N. Pac. Ry. Co.*, 356 U.S. at 5, 78 S.Ct. 514. The very purpose of the per se rule is to "avoid[ ] the necessity for an

incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Id.*

Joyce's related argument that the courts are not sufficiently familiar with non-judicial public foreclosure auctions was rejected by the Supreme Court decades ago. In 1982, the Court held that the per se rule is applicable to price-fixing agreements (of which bid rigging is a form) regardless of the industry in which the conduct occurred. *Maricopa Cty. Med. Soc'y*, 457 U.S. at 349–51, 102 S.Ct. 2466 (applying the per se rule to a price-fixing agreement among health care providers). Rejecting two arguments identical to the ones Joyce makes here, the Court stated:

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." [310 U.S. 150, 222, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)]. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements, *id.* at 220 [60 S.Ct. 811], yet the [Ninth Circuit] Court of Appeals refused to apply the *per se* rule in this case in part because the health care industry was so far removed from the competitive model. Consistent with our prediction in *Socony-Vacuum*, 310 U.S. at 221 [60 S.Ct. 811], the result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices, an inquiry we have so often condemned. Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." [*N. Pac. Ry. Co.*, 356 U.S. at 5, 78 S.Ct. 514].
>
> The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.

Id. (footnotes omitted). The Court's holding in *Maricopa County* makes it clear that for purposes of the per se rule, it is irrelevant that Joyce's bid rigging activities took place in any particular industry or during a downturn in the broader economy.

[11] Because Joyce's appellate arguments fail as a matter of law, his attempt to persuade this court that his conduct was procompetitive is unavailing. The government is not required to "prove specific intent to produce anticompetitive effects where a per se violation is alleged." *A. Lanoy Alston*, 974 F.2d at 1213; *see also*

N. Pac. Ry. Co., 356 U.S. at 5, 78 S.Ct. 514.

IV. CONCLUSION

Because bid rigging is per se illegal under Section 1 of the Sherman Act, the district court did not err by refusing to permit Joyce to introduce evidence of the alleged ameliorative effects of his conduct. Accordingly, the judgment of the district court is **AFFIRMED**.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael Joseph PEPE, Defendant-Appellant.

No. 14-50095

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 8, 2017—Pasadena, California

Filed July 11, 2018

Background: Defendant was convicted in the United States District Court for the Central District of California, Dale S. Fischer, J., of engaging in illicit sexual conduct in foreign places. Defendant appealed.

Holding: The Court of Appeals, Nguyen, Circuit Judge, held that prior version of statute that prohibited illicit sexual conduct in foreign places required government to prove that defendant was still traveling when he committed illicit sexual conduct.

Vacated and remanded.

Thomas, Chief Judge, filed dissenting opinion.

1. Criminal Law ⚿1139

Whether the statute prohibiting illicit sexual conduct in foreign places applies to U.S. citizens who reside in, as opposed to just travel to, a foreign country is a question of law that is reviewed de novo. 18 U.S.C.A. § 2423(c).

2. Courts ⚿90(2)

Where the reasoning or theory of prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

3. Courts ⚿90(2)

The "intervening higher authority" that provides a basis for a subsequent Court of Appeals panel from not following prior Court of Appeals precedent is generally the federal or state court of last resort or an en banc panel of the Court of Appeals; however, Congressional amendments to a statute can constitute "intervening" authority for the purposes of the rule.

4. Courts ⚿90(2)

The rule that "intervening higher authority" provides a basis for a subsequent Court of Appeals panel from not following prior Court of Appeals precedent is applicable in cases involving statutory interpretation where Congress has retroactively clarified the meaning of the statute at issue.

5. Courts ⚿90(2)

If case law interpreting a statute is clearly irreconcilable with the text and his-

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center of their lack of candor. Second, the record shows that Sobel brought Kay's production to ALJ Frysiak's attention. He requested the Bureau to admit receiving the document (ALJ Frysiak denied the request as irrelevant) and he requested the ALJ to take official notice of Kay's production.

As to the rest of the evidence bearing on lack of candor, the record as a whole demonstrates ample support for the Commission's conclusions. The affidavit and the pleading were false and misleading. Kay, in the pleading, and Sobel, in his affidavit, denied that Kay had any "interest" in Sobel's licenses and stations. As the evidence relating to transfer of control shows, Kay had a very substantial interest in Sobel's stations. Kay and Sobel testified that when they used the word "interest" they meant an ownership interest and that their statements were therefore accurate because Sobel retained ownership of his licenses. But what of the stations? According to their testimony, they meant to refer only to ownership of Sobel's radio station licenses, not the stations themselves. Excerpts from July 29, 1997 Hearing Transcripts in WT Docket No. 97–56, *reprinted in* JA 532 (testimony of Marc Sobel); Excerpts from Jan. 19, 1999 Trial Transcript in WT Docket No. 94–147, *reprinted in* JA 1043 (testimony of James Kay). The Commission was entitled to reject that testimony. At the least, the Commission could find that the statements they filed were misleading and intentionally so. The sheer implausibility of their explanations; their motive to divert the Bureau's investigation, which threatened to uncover the unauthorized transfer of control; the fact that they discussed the meaning of the word "interest" before they filed the pleading and affidavit; the fact that Kay told Sobel the word meant "a direct financial stake," which describes Kay's relationship to Sobel's stations—all this, and more, convince us that substantial evidence supported the Commission's findings of lack of candor. In other respects the Commission found the statements filed in January 1995 misleading, but it is unnecessary to discuss why we find substantial evidence to support those findings. It is enough to point out that "the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *RKO Gen., Inc. v. FCC,* 670 F.2d 215, 232 (D.C.Cir.1981). The Commission reasonably concluded that Kay and Sobel intentionally failed to perform their affirmative duty in their attempt to remove Sobel's licenses and stations from the original hearing on Kay's fitness to be a licensee.

Affirmed.

UNITED STATES of America, Appellee

v.

PHILIP MORRIS USA INC., et al., f/k/a Philip Morris Incorporated, Appellants

No. 04–5252.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 17, 2004.

Decided Feb. 4, 2005.

Background: United States brought action against cigarette manufacturers and related entities under Racketeer Influenced and Corrupt Organizations Act

(RICO) to recover health care expenditures federal government had paid or would pay to treat tobacco-related illnesses. The United States District Court for the District of Columbia, 321 F.Supp.2d 72, denied manufacturers motion for summary judgment as to the government's claim for disgorgement, and manufacturers appealed.

Holding: The Court of Appeals, Sentelle, Circuit Judge, held that disgorgement was not an available remedy under civil provision of RICO providing district courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act.

Reversed.

Williams, Senior Circuit Judge, filed concurring opinion.

Tatel, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⚿768.1

On appeal from denial of summary judgment, it is the order that is appealable, and not the controlling question identified by the district court; furthermore, there is no general policy that would bar court from considering questions logically antecedent and essential to the order under review. 28 U.S.C.A. § 1292(b).

2. Racketeer Influenced and Corrupt Organizations ⚿83

Disgorgement was not an available remedy under civil provision of Racketeer Influenced and Corrupt Organizations Act (RICO) providing district courts with jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act; permitting disgorgement, a remedy aimed at past violations, would thwart Congress' intent in creating RICO's elaborate remedial scheme. 18 U.S.C.A. § 1964(a).

3. Federal Courts ⚿7

Court of Appeals will not expand upon its equitable jurisdiction if it is restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

4. Statutes ⚿243

Court will expand on the remedies explicitly included in a statute only with remedies similar in nature to those enumerated.

Appeal from the United States District Court for the District of Columbia (No. 99cv02496).

Michael A. Carvin argued the cause for appellants. With him on the briefs were Robert F. McDermott, Jr., Peter J. Biersteker, Jonathan M. Redgrave, Allyson N. Ho, Edward W. Warren, John C. O'Quinn, Timothy M. Broas, Dan K. Webb, Kenneth N. Bass, Edward C. Schmidt, Matthew D. Schwartz, Gene E. Voigts, Richard L. Gray, Bruce G. Sheffler, James A. Goold, Theodore V. Wells, Jr., Murray Garnick, David Eggert, David M. Bernick, J. William Newbold, Michael B. Minton, Richard P. Cassetta, Steven Klugman, and Leonard A. Feiwus.

Robin S. Conrad, Jan S. Amundson, Quentin Riegel, and Beth S. Brinkmann were on the brief for amici curiae Chamber of Commerce of the United States of America, et al. in support of appellant.

Michael R. Dreeben, Attorney, U.S. Department of Justice, argued the cause for appellee. On the brief were Peter D. Keisler, Assistant Attorney General, Mark B. Stern and Alisa B. Klein, Attorneys, Sharon Y. Eubanks, Director, Stephen D. Brody, Deputy Director, and Frank J. Marine, Senior Litigation Counsel.

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Senior Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

A group of cigarette manufacturers and related entities ("Appellants") appeal from a decision of the District Court denying summary judgment as to the Government's claim for disgorgement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18 U.S.C. §§ 1961–68. The relevant section of RICO, 18 U.S.C. § 1964(a), provides the District Courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act. Because disgorgement, a remedy aimed at past violations, does not so prevent or restrain, we reverse the decision below and grant partial summary judgment for the Appellants.

I. Background

In 1999 the United States brought this claim against appellant cigarette manufacturers and research organizations, claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors. The Government sought damages under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651–53, and the Medicare Secondary Payer ("MSP") provisions of the Social Security Act, 42 U.S.C. § 1395y to recover health-care related costs Appellants allegedly caused. The United States also claimed that Appellants engaged in a criminal enterprise to effect this cover-up, and sought equitable relief under RICO, including injunctive relief and disgorgement of proceeds from Appellants' allegedly unlawful activities. The Government sought this relief under 18 U.S.C. § 1964(a), which gives the District Court jurisdiction

> to prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise . . . .

18 U.S.C. § 1964(a).

Appellants moved to dismiss the complaint in 2000. The District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand. *United States v. Philip Morris, Inc.*, 116 F.Supp.2d 131, 134 (D.D.C.2000).

Section 1964(a) conferred jurisdiction on the District Court only to enter orders "to prevent and restrain violations of the statute." In considering whether disgorgement came within this jurisdictional grant, the court relied on a decision of the Second Circuit, the only circuit then to have considered "whether ... disgorgements ... are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir.1995) (emphasis in original). After noting that "RICO has a broad purpose [and] the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary,' " *id.* at 1181, the *Carson* court went on to observe that it did not see how it could "serve[ ] any civil RICO purpose to order disgorgement of gains ill-gotten long ago . . . ." *Id.* at 1882. The portion of *Carson* relied upon by the District Court in the present controversy suggested that disgorgement *might* "serve the goal of 'pre-

venting and restraining' future violations," but flatly held that the remedy would not do so "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." [1] *Id.* at 1182. The Second Circuit went on to caution that disgorgement would be better justified under this analysis where the "gains [were] ill-gotten relatively recently." *Id.* The District Court accepted the Second Circuit's suggested holding that the appropriateness of disgorgement depends on whether the proceeds are available for the continuing of the criminal enterprise, but ruled that the question was premature, and denied the motion for dismissal on the RICO-disgorgement claim. *Philip Morris,* 116 F.Supp.2d at 151–52. Neither party sought leave to file an interlocutory appeal of that ruling.

The case proceeded, and the Government sought disgorgement of $280 billion that it traced to proceeds from Appellants' cigarette sales to the "youth addicted population" between 1971 and 2001. This population includes all smokers who became addicted before the age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age.

After discovery, Appellants moved for summary judgment on the disgorgement claim arguing that (1) disgorgement is not an available remedy under § 1964(a), (2) even if disgorgement were available, the Government's model fails the *Carson* test for permissible disgorgement that will "prevent and restrain" future violations, and (3) even if disgorgement were available, the Government's proposed model is impermissible because it includes both legally and illegally obtained profits in violation of *SEC v. First City Financial Corp.,* 890 F.2d 1215 (D.C.Cir.1989). The District Court denied this motion in a memorandum order designated "# 550." *United States v. Philip Morris USA, Inc.,* 321 F.Supp.2d 72 (D.D.C.2004). On motion of the defendants, the District Court certified Order # 550 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That section provides for interlocutory appeal where a district judge has certified that "an order not otherwise appealable ... involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation ...." Under § 1292(b), the Court of Appeals may then decide whether to permit the appeal to be taken from such order. In the present case, we allowed the appeal.

II. Analysis

A. Scope of Review

At the outset, the Government urges that our review should be limited to the narrow question of whether the disgorgement it seeks is consistent with the standards of *Carson*, not whether disgorgement *vel non* is an available remedy under civil RICO. The Government bases this argument on the theo-

1. While the *Carson* language may appear to be dicta, the Second Circuit remanded for determination of which disgorgement amounts were sufficiently directed to prevention and restraint to qualify under § 1964(a), thus treating the language on availability of disgorgement as essential to the outcome of the case, and therefore a holding. Some other courts have followed *Carson. See, e.g., Richard v. Hoechst Celanese Chem. Group, Inc.,* 355 F.3d 345, 354 (5th Cir.2003) (observing that "the Second Circuit noted that disgorgement is generally available under § 1964"); *United States v. Private Sanitation Indus. Ass'n,* 914 F.Supp. 895, 901 (E.D.N.Y. 1996) ("[T]he disgorgement in this case is clearly directed towards the prevention of future illegal conduct, and is therefore a permissible remedy for civil RICO violations under the limitations imposed by Carson.").

ry that the order on appeal-that is the memorandum order denying "defendants' motion for partial summary judgment dismissing the Government's disgorgement claim"-was reiterating a prior order on the general question of availability of disgorgement Further, the Government argues, the order spoke anew only to the measure of disgorgement, assuming such disgorgement to be otherwise available. In support of its proposed limitation of our review, the Government relies upon *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996). In *Yamaha,* the Supreme Court dealt with the breadth of review properly conducted by a court of appeals under 28 U.S.C. § 1292(b). *Id.* at 204, 116 S.Ct. 619. The Government selectively quotes from *Yamaha* the sentence that, "The court of appeals may not reach beyond the certified order to address others made in the case." *Id.* at 205, 116 S.Ct. 619. Based on this sentence, the Government then argues that because the first order denying a motion to dismiss had dealt with the question of the availability of disgorgement, this certified interlocutory review of the subsequent summary judgment order is restricted to the new theory considered by the court on that occasion-that the disgorgement the Government pursued exceeded the standard available for such disgorgement as set by the Second Circuit in *Carson.*

Unfortunately for the Government's position, the *Yamaha* opinion did not end with the sentence upon which the Government relies. The Supreme Court went on to say in the same paragraph: "But the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.' " *Id.* (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.25[1] at 300 (2d ed.1995) and citing 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESHMAN, FEDERAL PRACTICE & PROCEDURE § 3929 at 144–45 (1977)). Appellants' motion below was for "Summary Judgment Dismissing the Government's Disgorgement Claim," and granting this motion would have resulted in *complete dismissal* of the Government's claim for disgorgement with prejudice. *See* Appellee's App. at 19, 79. Thus the District Court's denial was on the question of whether disgorgement would be allowed *at all,* and we may review it as such regardless of the grounds the District Court gave for its decision. In the memorandum accompanying its denial of this motion, evidencing an accurate understanding of the summary judgment standard provided by Rule 56 of the Federal Rules of Civil Procedure, the District Court noted that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Philip Morris,* 321 F.Supp.2d at 74 (citing FED. R. CIV. P. 56(c)). Significantly, the court further noted that "Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by *both the text of Section 1964(a) itself and the holding in* United States v. Carson . . . interpreting that section." *Philip Morris,* 321 F.Supp.2d at 74 (emphasis added). Thus the court clearly implied the possibility that none might be ordered, and that statutory issues outside *Carson* were before the court.

[1] Our dissenting colleague argues that the availability of the disgorgement claim *vel non* is not before us because

Appellants did not fully restate their earlier arguments in their motion, but only expressed their reservation in a footnote referencing the District Court's prior rejection of their position. While it is true, as our colleague reminds us, that we have held that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion,' with only 'bare-bones arguments,' " *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 869 (D.C.Cir.2001) (per curiam), our prior holdings on that subject have been in very different contexts. In *Cement Kiln,* for example, and in *Wash. Legal Clinic for the Homeless v. Barry,* 107 F.3d 32, 39 (D.C.Cir.1997), relied upon by the dissent, we were determining whether an issue was properly before us that had been raised in no other fashion. In the present case, we are reviewing a summary judgment decision, presumably according to the standards set forth by the Supreme Court in such decisions as *Yamaha,* and the issue in question was clearly decided by the District Court in the first rejection of the motion to dismiss. The issue was called to the attention of the court as a necessary antecedent in the second summary judgment order, now under direct review, and expressly pointed out in the footnote which our colleague disdains. Furthermore, the motion leading to the order presently before us sought summary judgment of dismissal of the disgorgement claim, not simply a limitation to such disgorgement as might have been supported by the *Carson* test or other factors. Given the Supreme Court's plain teaching in *Yamaha,* particularly its adoption from a learned treatise of the language "it is the order that is appealable, and not the controlling question identified by the district court," *Yamaha,* 516 U.S. at 205, 116 S.Ct. 619 (*see* other authorities, *supra*), *Cement Kiln* and *Barry* have no applicability. *Yamaha* controls. We therefore proceed to review the denial of summary judgment, under the usually applicable standards, not simply the sole question to which the Appellees and the dissent would restrict us.

Our dissenting colleague suggests that we are limited by "our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal." Dissent at 1211. We know of no such "general policy" that the particular issue addressed has to have been raised in the particular motion. Rather, we understand our general policy to be following the instructions of the Supreme Court that we are to "address any issue fairly included within the certified order." *Yamaha,* 516 U.S. at 205, 116 S.Ct. 619. Insofar as our colleague's differing understanding rests on *United States v. British Am. Tobacco (Invs.) Ltd.,* 387 F.3d 884, 892 (D.C.Cir.2004) (citing *United States v. Hylton,* 294 F.3d 130, 135–36 (D.C.Cir.2002)), cited by Dissent at 1213, we do not read that case as supporting a general policy that limits consideration to those arguments raised in the particular motion leading to the certified order, as opposed to being "fairly included" within that order, or even to address the point. The court in *British American Tobacco* held only that an intervenor that had raised a privilege issue with respect to an entire collection of documents at one stage of the litigation, but that failed to participate at all in later proceedings focused on one of the documents, despite having notice, had not adequately preserved its objection as to that single document. 387 F.3d at 887–88. It had nothing to do with the scope of review on an interlocutory appeal under § 1292(b). Neither it nor *Hylton* dealt in any fashion with the breadth of interlocutory review, nor was establishing any standard for the papers in which an argument must have been raised. Each rejected an attempt by

an appellant to raise a new ground for the first time on appeal. Appellants before us raised and preserved their argument as set forth in the text above. We read nothing in *British American Tobacco* or *Hylton* to suggest a general policy barring our review under the *Yamaha* standard.

We find no history of such a general policy that would bar us from considering questions logically antecedent and essential to the order under review. Especially is this so given the Supreme Court's instructions in *Yamaha* that we are to "address any issue fairly included within the certified order." That must include at least issues that are logically interwoven with the explicitly identified issue and which were properly presented by the appellant. Even ignoring the apparent allusion to the broader issue of summary judgment preserved in the caption of the motion, the relief sought, and the footnote provided above, it is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order. Our colleague's interpretation of general policy would seem to compel us to return for trial a case before us for review of a denial of summary judgment, no matter how plain the absence of substantial question of material fact, on the grounds that the denial of summary judgment had been based on rejection of some other reasoning in a previous motion, even though the trial court had earlier erred in denying the first motion to dismiss-even when the appellant had called that denial to the court's attention in the caption of its motion, and a proposed order accompanying the second motion.

Our dissenting colleague finds in *Yamaha* support for the proposition that "the only issues 'fairly included' within a certified order are those decided in the district court's accompanying memorandum . . . ." Dissent at 1213. We understand the law to be, as suggested in *Yamaha*, that issues are not decided in memoranda at all, but rather in orders. Therefore, consistent with *Yamaha*, we review orders, not memoranda. Our colleague asserts that in *Yamaha* the Court "found 'fairly included' an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law." Dissent at 1213. While this may well be the case, the Supreme Court not only did not stress that circumstance, it did not even mention it. Indeed, we note that our colleague had to repair to the unpublished opinion of the District Court to discover the truth of his proposition. We seriously doubt that the Supreme Court intended to establish a precedent that difficult to discover, let alone apply.

Nothing in *United States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987), is to the contrary. The passage relied upon by our dissenting colleague to the effect that courts considering interlocutory appeals under § 1292(b) should "not consider matters that were ruled upon in other orders," *id.* at 677, 107 S.Ct. 3054, did not address a situation like the one before us. Here the order appealed from reiterated, and totally depended upon, an issue fairly encompassed within the motion before that court and the order now before us. In *Stanley,* the court of appeals undertook interlocutory review of an order dealing with one claim of a multi-claim complaint. In that order, the district court had refused to dismiss a claim asserted under the authority of *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). On appeal, the court of appeals not only affirmed the district court's conclusion as to the *Bivens* claim, but reached back in the record to order the district court to

reinstate another claim for relief asserted under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* In the present case, the disputed "prior order" had denied judgment of dismissal on the disgorgement claim. The order concededly before us denied judgment of dismissal on the same disgorgement claim. We see nothing in *Stanley* inconsistent with the later instruction in *Yamaha* recognizing our jurisdiction to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S.Ct. 619. We therefore proceed, obedient to our understanding of *Yamaha*, to review the order before us denying summary judgment.

We review an order denying summary judgment *de novo*. *Cicippio–Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1031 (D.C.Cir.2004). Obedient to *Yamaha*, we will review Order # 550 denying summary judgment applying anew the standards of Rule 56, and will not simply review that part of the District Court's thinking directed to the applicability of the *Carson* standard or the consistency of the Government's proffers with that standard. Therefore, we must address the issue, logically prior to the *Carson* question, of whether disgorgement is available at all. We hold that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case.

B. The Availability of Disgorgement

[2] The Government argues that § 1964 contains a grant of equitable jurisdiction that must be read broadly to permit disgorgement in light of *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), and its progeny. The *Porter* Court considered reimbursement awards under the Emergency Price Control Act of 1942 ("EPCA") and concluded that where a statute grants general equitable jurisdiction to a court, "all the inherent equitable powers ... are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398, 66 S.Ct. 1086. This grant is only to be limited when "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction." *Id.* In this case the text and structure of the statute provide just such a restriction.

[3] As the Supreme Court has repeatedly observed: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (citations omitted). Reading *Porter* in light of this limited jurisdiction we must not take it as a license to arrogate to ourselves unlimited equitable power. We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

As our dissenting colleague correctly notes, the Court in *Porter* was considering whether a district court acting under the authority granted in the EPCA had the authority to order restitution for overcharges. The implication of broad equitable authority in *Porter* came from a statute which empowered the district court to grant "a permanent or temporary injunction, restraining order, or other order." EPCA § 205(a), 56 Stat. 23, 33 (1942). The action before the Court in *Porter* was brought under a section providing that "the Administrator" could bring action against persons engaged in overcharges for "an order enjoining such acts or practices, or for an order enforcing compliance

with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Id.*

The Supreme Court did not have to make much of a stretch to determine that the phrase "enforcing compliance with such provision," and expressly referring to "a permanent or temporary injunction, restraining order, or other order," would include restitution for amounts collected exceeding the ceilings determined under the statute. The Government in the present case asks us to work a far greater expansion of the statutory grant enabling the District Court in a civil RICO action brought by the Government under § 1964(a). We further note that the Court in *Porter* was ordering restitution, under a statute designed to combat inflation. Restitution of overcharge works a direct remedy of past inflation, directly effecting the goal of the statute. The Court in *Porter* set forth two theories under which "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' " under the applicable statute. 328 U.S. at 399, 66 S.Ct. 1086. First, the recovery of the illegal payment by the victim tenant "may be considered as an equitable adjunct to the injunction decree," as it effects "the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* (noting that "such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available."). The equitable jurisdiction of the Court having been properly invoked, the Court then had the power "to decide all relevant matters in dispute and to award complete relief ...." *Id.* Also, and more to the point, the Court was authorized "in its discretion, to decree restitution of excessive charges in order to give effect of the policy of Congress." *Id.* at 400, 66 S.Ct. 1086. The policy of Congress under the EPCA was to prevent overcharges with inflationary effect. The goal of the RICO section under which the government seeks disgorgement here is to prevent or restrain future violations. We therefore must consider the forward-looking nature of the remedy in a way not applicable to a different remedy in *Porter* for the accomplishment of a different goal under a different statute.

Section 1964(a) provides jurisdiction to issue a variety of orders "to prevent and restrain" RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations. The examples given in the text bear this out. Divestment, injunctions against persons' future involvement in the activities in which the RICO enterprise had been engaged, and dissolution of the enterprise are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future.* Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo. *See, e.g., Tull v. United States,* 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.

The Government would have us interpret § 1964(a) instead to be a plenary grant of equitable jurisdiction, effectively ignoring the words "to prevent and restrain" altogether. This not only nullifies the plain meaning of the terms and violates our canon of statutory construction that we should strive to give meaning to every word, *see, e.g., Murphy Explor. &*

Production Co. v. United States Dept. of the Interior, 252 F.3d 473, 481 (D.C.Cir. 2001), but also neglects Supreme Court precedent. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), the Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions "to restrain" persons who were improperly disposing of hazardous waste. If "restrain" is only aimed at future actions, "prevent" is even more so.

Mitchell v. DeMario Jewelry, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), relied on by the Government, is not to the contrary. The *Mitchell* case was brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 215, 52 Stat. 1060 (1938) ("FLSA"). In that action, the Government was invoking the court's jurisdiction to restrain violations of a section making it unlawful for a covered employer to discharge or discriminate against employees who had filed complaints or instituted actions under the FLSA. The Court reviewed the whole breadth of that broad Act to conclude that the available remedies included not only injunction against further discrimination and mandatory injunctions of reinstatement, but also a "make whole" reimbursement for lost wages because of the discriminatory discharge. As in *Porter*, the Court reiterated that in equitable jurisdiction "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Mitchell*, 361 U.S. at 291, 80 S.Ct. 332 (quoting *Porter*, 328 U.S. at 398, 66 S.Ct. 1086). In the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA or the EPCA. The statute under which the Government sued Appellants, 18 U.S.C. § 1964(a), granted only the jurisdiction which we set forth above. The District Court, so far as is relevant to actions under that section, has jurisdiction only

> *to prevent and restrain* violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise . . . .

18 U.S.C. § 1964(a) (emphasis added). The order of disgorgement is not within the terms of that statutory grant, nor any necessary implication of the language of the statute.

In considering the broad language from *Porter* upon which our dissenting colleague relies for the proposition that we should find disgorgement available because Congress has not taken it away, we note that the Supreme Court considered a similar argument in *Meghrig*. The High Court nonetheless limited the available remedies under CERCLA to those provided in the statute, declaring that

> where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . ."

516 U.S. at 487–88, 116 S.Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)).

In RICO, as in RCRA and in CERCLA, Congress has laid out elaborate enforcement proceedings. One of those proceedings is a government action brought under § 1964(a). That one does not provide for disgorgement. That one provides only for orders which "prevent or restrain" future violations. Disgorgement does not do that.

It is true, as the Government points out, that disgorgement may act to "prevent and restrain" future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain." *Carson*, 52 F.3d at 1182.

[4] The remedies available under § 1964(a) are also limited by those explicitly included in the statute. The words "including, but not limited to" introduce a non-exhaustive list that sets out specific examples of a general principle. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C.Cir.1997). Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). The remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations. Disgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from § 1964(a).

The structure of RICO similarly limits courts' ability to fashion equitable remedies. Where a statute has a "comprehensive and reticulated" remedial scheme, we are reluctant to authorize additional remedies; Congress' care in formulating such a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great–West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 251, 254, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)) (internal quotations omitted) (emphasis in original). RICO already provides for a comprehensive set of remedies. When Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much. In a criminal RICO action the defendant must forfeit his interest in the RICO enterprise and unlawfully acquired proceeds, and may be punished with fines, imprisonment for up to twenty years, or both. 18 U.S.C. § 1963(a). In a civil case the Government may request limited equitable relief under § 1964(a). Individual plaintiffs are made whole and defendants punished through treble damages under 18 U.S.C. § 1964(c). This "comprehensive and reticulated" scheme, along with the plain meaning of the words themselves, serves to raise a "necessary and inescapable inference," sufficient under *Porter*, 328 U.S. at 398, 66 S.Ct. 1086, that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement.

Congress' intent when it drafted RICO's remedies would be circumvented by the Government's broad reading of its § 1964(a) remedies. The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the addi-

tional procedural safeguards that attend criminal charges, including a five-year statute of limitations, 18 U.S.C. § 3282, notice requirements, 18 U.S.C. § 1963(*l*), and general criminal procedural protections including proof beyond a reasonable doubt. Further, on the Government's view it can collect sums paralleling-perhaps exactly-the damages available to individual victims under § 1964(c). Not only would the resulting overlap allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies, *see Agency Holding Corp. v. Malley–Duff & Assoc., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), but it raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 269, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), constituted a basis for refusing to infer a cause of action not specified by the statute. Permitting disgorgement under § 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme.

A note appended to the statute stating that RICO "shall be liberally construed to effectuate its remedial purposes" does not effect this structural inference. Organized Crime Control Act of 1970, Pub.L. No. 91–452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). This clause may warn us against taking an overly narrow view of the statute, but "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young,* 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). The text and structure of RICO indicate that those remedial purposes do not extend to disgorgement in civil cases.

The Second Circuit in *Carson* has interpreted "prevent and restrain" not to eliminate the possibility of disgorgement altogether, but to limit it to cases where there is a finding "that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson,* 52 F.3d at 1182. The Fifth Circuit adopted this interpretation in a case holding that disgorgement after the defendant had ceased production of an allegedly defective product would be inappropriately punitive rather than directed toward future violations. *See Richard v. Hoechst Celanese Chemical Group,* 355 F.3d 345, 355 (5th Cir.2003). While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as required by § 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.

Our colleague reminds us that the Supreme Court has instructed "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Dissent at 1220 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). This would be most devastating to one side of the case or the other if we were in fact attempting to overrule a Supreme Court precedent. That is, if there were a Supreme Court case that had direct application to the facts before us, we would be required to follow it, and that would be the end of the matter. We would not need to consider any other line of cases. However, the *Rodriguez de Quijas* language is not particularly helpful

when no precedent of the Supreme Court "has direct application," as in the present case. There is not a Supreme Court case dealing with the jurisdiction of a district court to order disgorgement under RICO § 1964(a). There is not a Supreme Court case discussing that question. There is, in short, no Supreme Court case having direct application. With no Supreme Court case having direct application, it is our duty to construe the statute. That is what we have done.

III. Conclusion

Because we hold that the District Court erred when it found that disgorgement was an available remedy under 18 U.S.C. § 1964(a), we reverse the District Court and grant summary judgment in favor of Appellants as to the Government's disgorgement claim.

WILLIAMS, Senior Circuit Judge, concurring.

I join the opinion for the court. I write separately to emphasize problems with the government's fallback interpretation of 18 U.S.C. § 1964(a), under which the government could obtain disgorgement for purposes of reducing the defendant's *ability* to commit future RICO violations, with the amount accordingly limited to assets "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose." *United States v. Carson,* 52 F.3d 1173, 1182 (2d Cir.1995). This superficially appealing interpretation in fact creates a kind of pushmi-pullyu, a beast that Congress is most unlikely to have ordained.

I.

The statute gives district courts "jurisdiction to prevent and restrain [RICO] violations." 18 U.S.C. § 1964(a). Reasoning that pure deterrence was an impermissible objective of orders under § 1964(a), the Second Circuit went on to find that disgorgement could "prevent and restrain" if limited to the amount of ill-gotten gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. Because money is fungible, as indeed are virtually all resources when viewed as enablers of future criminal conduct, the government here refines its *Carson*-derived fallback position, quite sensibly rejecting any limitation to "ill-gotten gains" in the form of specific money or resources so gained. Such a limit, we have said (applying a different statute), would lead to absurd results. *SEC v. Banner Fund International,* 211 F.3d 602, 617 (D.C.Cir.2000). There the defendant proposed to confine disgorgement to the "actual assets" unjustly received. We said that what mattered was not the specific assets but the *amount* by which the defendant was unjustly enriched; the alternative would allow a defendant to escape liability by spending ill-gotten gains while husbanding other assets. *Id.* at 617. Thus the government's proposal is that the amount of the ill-gotten gains should set a ceiling on the disgorgement recovery, subject to the further limit mentioned above—essentially purporting to limit the disgorgement to crime-enabling resources, broadly construed.

In *Carson* itself the court ruled that this prevented the government from forcing disgorgement of funds, ill-gotten in the distant past, from a RICO defendant by then retired from the RICO enterprise itself (a union). In the context of corporate defendants such as those before us, a possible limit would be the entire net worth of the companies (a good deal less than the $280 billion that the government claims to have been ill-gotten gains). But perhaps not. Even that limit is arbitrary,

as resources can be used for criminal purposes even if offset by company debt. Subject to the bankruptcy laws, nothing in the logic of the crime-enablement theory clearly calls for stopping at confiscation of the shareholders' interests; why not the bondholders' as well?

On the other side, it might be plausible under the *Carson* theory to exempt firm resources now devoted to non-tobacco enterprises. It is probably about as difficult for these defendants to re-allocate resources from the businesses of cheese and crackers, for example, to criminality in the sale of cigarettes, as for the union in *Carson* to lure Carson and his funds back from retirement to union criminality.

In short, *Carson* and the government's fallback position send the court off on a virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime.

II.

It is hardly surprising that there are only gossamer lines between drastic disgorgement (destruction of bondholder as well as shareholder wealth) and relatively mild disgorgement (cordoning off resources in non-tobacco subsidiaries). The plain fact is that wealth deprivation is an extremely crude device for "prevent[ing]" criminal behavior. Granted, a criminal miscreant with a billion dollars is potentially more dangerous than an impoverished criminal miscreant. But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught).

Confusion arises from an ambiguity in our understanding that, in the civil context, such remedies as damage awards and restitution "deter," and thus in a sense "prevent" commission of torts, breaches of contract, and other civil wrongs. It is quite true that a rule or practice of awarding such remedies deters, and thus prevents, such wrongs. Indeed, under one viewpoint that is the primary or even sole purpose of awarding such remedies. See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987). But it is the *rule* or *practice* that creates the incentive. To make the rule credible, of course, the awards must be made; but no individual *award* has a material deterrent effect.

To evaluate that last statement consider a society that empowered some deus ex machina to randomly excuse one damage judgment in a million. Such an exception to the rules would have no detectable effect on the commission of torts or breaching of contracts. Even the lucky defendant who enjoyed the benefit of the pardon wouldn't—unless a complete fool—materially alter his future conduct because of that manna from heaven.

The equity court, empowered under § 1964(a) to "prevent and restrain" future violations, has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior. It can, for example, establish schedules of draconian contempt penalties for future violations, and impose transparency requirements so that future violations will be quickly and easily identified.

In assessing the likelihood that Congress intended an additional disgorgement remedy, it makes sense to inquire into the tendency of such an implied remedy to "prevent and restrain" future violations by the defendant. Of course the rule the government seeks here would be a rule,

not merely a random extra penalty. But the question would be its incremental effect, on top of (1) RICO's explicit provisions for criminal penalties (including disgorgement and imprisonment under § 1963(a)) and for victim recoveries (trebled) under § 1964(c), and (2) the whole available panoply of genuinely forward-looking remedies—express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations. It seems almost inconceivable that many aspiring criminals would find the incremental risk decisive. I find it hard to imagine a waffling villain—already in court for RICO violations—saying to himself: "Well, my chances of escaping § 1963(a) forfeiture and imprisonment because of the statute of limitations and the burden of proof, and of escaping treble damages under § 1964(c), and contempt penalties for violating the court's orders, still leave RICO violations attractive on a net basis; but that implied disgorgement under § 1964(a)—wow! Too much. It tilts me over the line."

The weakness of that scenario supports the inference that for the defendant who winds up before the equity court, Congress intended the words "prevent and restrain" to authorize only a tailored, forward-looking remedy. Penalties for violations of the court's decree, and transparency-enhancing measures meet that standard. A purported § 1964(a) disgorgement remedy, on top of those explicitly authorized, would provide only a trivial incremental effect (the reverse of the pardon granted once in a million), and would not qualify. Nor would disgorgement aimed at reducing the defendant's crime-enabling resources, a factor linked only crudely to his future tendency toward criminality.

Once we (1) accept the proposition that § 1964(a) limits the equity court to forward-looking remedies, as even the dissent appears to do with respect to the government's narrower argument, see Dissent at 1224–25 ("I also share the Second Circuit's apparent conclusion . . . that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations."), and (2) reject the supposition that "whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future violations," *Carson*, 52 F.3d at 1182, the court must try to draw lines between equitable remedies that merely "hurt" the defendant and ones that have a genuine tendency to "prevent and restrain" his future violations.

Because disgorgement under § 1964(a) so evidently lacks that tendency, the dissent relies on *Porter* and on the government's experts. *Porter* indeed includes the twice cited phrase suggesting that "[f]uture compliance may be more definitely assured if one is compelled to restore one's ill-gotten gains." Dissent at 1223, 1224. But the statute at issue in *Porter* gave district courts power to issue orders "enforcing compliance" and thus didn't seem to narrow the grant to forward-looking remedies. Indeed the *Porter* dissent never suggests such a limit; nor, so far as appears, did the defendant firm. For construing § 1964(a), *Porter* is of remarkably little help.

The expert testimony offered by the government for the proposition that backward-looking disgorgement will " 'prevent and restrain' defendants from committing future RICO violations," see Dissent at 1226, serves no better. Obviously such testimony cannot alone resolve the issue, turning legal analysis of the statute into a fact battle among experts. Thus the experts' testimony is valuable for its analytic quality, not its utterance by a PhD.

The dissent's genuflection before the experts leaves the reader to imagine some supporting analysis. Lest the imagination

run riot, I attach an appendix containing *all* of the expert testimony that the government saw fit to offer on the point in the summary judgment motion. The crux is Dr. Franklin Fisher's statement:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.[1]

While it is a nice rhetorical move to point out that the defendants violated RICO (as we must assume) despite existing sanctions, Fisher offers no analysis as to why the presence of a civil disgorgement remedy in favor of the government would have reduced the likelihood of violations. (Indeed, on the government's theory—that the statute actually creates such a remedy—the defendants would have taken that into account in deciding to proceed with violations.) More important, Fisher looks at the wrong setting. Before this (or any) RICO litigation against a particular defendant, that defendant would have operated without the spotlight of the lawsuit itself. (That may explain why the government let the statute of limitations run for decades, and why the victims failed to seek treble damages.) Now the spotlight is on, and the plausible explanations for nonapplication of the explicit remedies (other than § 1964(a) equitable relief) have disappeared. And the district court can amplify the spotlight with transparency-enhancing and prior-approval measures. The real question is whether the imposition of this extra remedy on the defendants before the court—backward-looking civil disgorgement in favor of the government—would materially alter their readiness to persist in violations, in the face of all RICO's explicit remedies, and a forward-looking schedule of penalties for even minute infractions, made doubly effective by compulsory disclosure and approval measures. The government's experts simply did not address that question. This court's own analysis provides a clear answer that the extra "remedy" would not do so.

The dissent's use of the government's experts is part of its effort (in its qualified endorsement of the government's fallback position) to transform an issue of statutory interpretation into one of fact. See Dissent at 1222–23, 1227–28; see also *id.* at 1223 (noting that in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), there was no affirmative evidence that the defendants were likely to commit future RCRA violations, and thus suggesting that the case was something other than pure statutory interpretation). But the "facts" hypothesized by the dissent are unrelated to the real world faced by RICO defendants—already arraigned for their past offenses and sub-

1. United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 813–14. Although Appellee's Appendix was filed under seal, the expert testimony presented to the court has also been posted by the government on its website.

ject to a battery of new disincentives on top of all RICO's conventional explicit remedies. Statutory interpretation shouldn't turn on factual hypotheticals such as, "What if pigs had wings."

III.

The above analysis seems to me to confirm what intuition suggests about the jurisdictional issue in this case. Even the most narrowly formulated question about the validity of the district court's order—the choice between the government's primary position (that § 1964(a) creates unlimited discretion to order disgorgement) and its fallback position (that it provides authority to award crime-enabling disgorgement)—requires the court to plumb the meaning of § 1964(a). The issues in this case, all turning on the interpretation of § 1964(a)'s lone sentence, are so thoroughly enmeshed that we needn't explore the court's language limiting § 1292(b) jurisdiction to issues "logically interwoven" with the explicitly identified issue. Maj. Op. at 1196. The dissent's hypotheticals as to what might be covered, see Dissent at 1212, plainly depend on an astonishingly broad notion of either logic or weaving. Having analyzed § 1964(a) and having found the order in conflict with its terms, the court must reverse.

One final note. The dissent chides the court for creating a circuit split. See Dissent at 1208. But if we confined ourselves to what the dissent acknowledges to be properly before us, and adopted the dissent's preferred position (that disgorgement is available like any other equitable remedy, regardless of its likely effects on a defendant's future behavior, simply because RICO doesn't explicitly preclude it), we would create no less of a split between this circuit and the Second.

Appendix

Excerpt from United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 812–14.

B. *Disgorgement Provides Economic Incentives That Will Prevent Further RICO Violations*

172. Despite the fact that it is not necessary for the United States to prove this, disgorgement will prevent and restrain further bad acts.

173. Drs. Fisher and Kothari have both stated in their expert reports and deposition testimony, that disgorgement of the proceeds calculated by Dr. Fisher would in fact act to prevent and restrain future RICO violations. Dr. Fisher directly addressed this point in his rebuttal report in which he states:

> Defendants' experts have suggested that disgorgement of ill-gotten gains such as the proceeds sought in this matter will not serve the goal of preventing or restraining the defendants from engaging in similar bad acts in the future. For example, Professor Carlton argues, "Having to disgorge past proceeds, by itself, would not affect a defendant's incentives to engage in misconduct in the future because it would not affect the returns (if any) from future misconduct." I address these criticisms with well-known economic principles. What Professor Carlton and the other defendants' experts who espouse this view fail to recognize is that requiring defendants to pay proceeds will affect their expectations (and those of others contemplating malfeasance) about the returns from future misconduct. As a matter of economic principle, the higher the proceeds

Appendix—Continued

amount, the lower the expected returns from future misconduct and the greater the desired effect of deterrence.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris,* (R. 1450; filed July 24, 2002) at 4–5 ¶ 12.

174. Dr. Kothari's expert report confirms Dr. Fisher's conclusion:

Requiring the defendants to pay ill-gotten proceeds is relevant. The economic incentive for illegal behavior is higher (for defendants and onlookers) if defendants are not required to pay the proceeds. While payment of proceeds has some of the features of sunk cost, it is not identical to a sunk cost because it will affect future decisions or behavior. The higher the proceeds paid the greater the economic incentive to avoid illegal behavior in the future.

Expert Report of S.P. Kothari, *United States v. Philip Morris,* (R. 1451; filed July 24, 2002) at 3–4, ¶ 8.

175. Dr. Fisher expressly states in his expert report:

[Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.

Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris,* (R. 1450; filed July 24, 2002) at 5–6, ¶ 14.

176. Dr. Fisher has repeatedly confirmed the preventative benefit of disgorgement. At his deposition he stated:

Q. . . . the idea is that disgorgement prevents and restrains future violations by altering the defendants' expectations about the returns they might receive from future misconduct. Is that right?

A. . . . I believe that to be correct.

Q. Does disgorgement prevent and restrain future RICO violations in any other way?

A. Well, it removes at least some, and possibly all, of the assets with which to engage in future illegal activities.

Deposition of Franklin Fisher, *United States v. Philip Morris,* September 12, 2002, 828:4–19 (Exhibit 77).

177. "[A]s I have repeatedly and clearly stated in my report and deposition testimony, disgorgement of Defendants' proceeds, as I have calculated them, would in fact act to prevent and restrain future RICO violations." Declaration of Franklin Fisher, *United States v. Philip Morris,* at 7, ¶ 16 (Master Rule 7.1/56.1 St. Exhibit 5)

TATEL, Circuit Judge, dissenting.

Congress passed the Organized Crime Control Act of 1970, which included RICO, "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *United States v. Turkette,* 452 U.S. 576, 589, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (quoting Pub.L. No. 91–452, 84 Stat. 922, 923 (1970)). Through this lawsuit, the United States seeks to end what it perceives as

rampant racketeering violations within the tobacco industry. Specifically, the government offers voluminous evidence, which we must view in the light most favorable to it, *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that at summary judgment the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor"), that Philip Morris, Altria Group, R.J. Reynolds, Brown & Williamson, Lorillard, BATCo, and Liggett have engaged in a half century of deceptive practices to the detriment of the health—and lives—of their customers. Acting both individually and in concert through collective agreements and jointly funded organizations like the Council for Tobacco Research and the Tobacco Institute (also defendants), these companies publicly defended smoking as both harmless and nonaddictive despite knowing from internal research that it was neither. In their advertising campaigns the companies targeted young people, who "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird,* 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), despite publicly claiming otherwise.

The government alleges that during the course of this behavior, the defendants committed over ninety racketeering violations between RICO's 1970 effective date and the government's 1999 complaint. Significantly for this appeal, the government further claims that absent court intervention and despite the master settlement agreement between the tobacco companies and the states, the companies are likely to continue their deceptive practices and commit further racketeering violations in the future. The government's claim regarding likely future conduct rests not only on the companies' alleged history of deceptive activities, but also on record evidence that the companies continue making their misleading statements about both the health consequences of smoking and the addictive nature of nicotine, as well as persisting in their marketing efforts aimed at young people. The government asks the district court to enjoin the tobacco companies from future unlawful conduct and to order them to disgorge the profits they have earned due to their racketeering violations since RICO's effective date—profits the government estimates amount to $280 billion.

In now holding that district courts may never order disgorgement as a remedy for RICO violations, this court ignores controlling Supreme Court precedent, disregards Congress's plain language, and creates a circuit split—all in deciding an issue not properly before us. Because the tobacco companies ask us to address an issue not fairly included in the certified order and not presented at that time to the district court, I would dismiss this interlocutory appeal. Were it appropriate to reach the merits, I would uphold the district court's denial of summary judgment on either of two grounds. First, unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," district courts may grant any equitable relief. *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946). Because under a fair application of Supreme Court precedent, *see id.* at 398–403, 66 S.Ct. 1086, no such inference can be drawn about RICO, I would conclude that the district court has authority to order disgorgement. Alternatively, even if RICO's phrase "prevent and restrain violations," 18 U.S.C. § 1964(a), limits the district court's equitable jurisdiction, I would still uphold the denial of summary judgment because the government has presented evi-

dence that disgorgement will accomplish just that purpose in this case.

I.

Under 28 U.S.C. § 1292(b), if a district court "shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it may certify the order for interlocutory review, and the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order." Section 1292(b) establishes a "two-tiered arrangement." *Swint v. Chambers County Comm'n,* 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Congress "chose to confer on district courts first line discretion to allow interlocutory appeals," *id.,* and "even if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment," *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (internal quotation marks and citation omitted). In accepting this interlocutory appeal, this court not only (at the least) pushes the bounds of its jurisdiction, but also exercises its discretion on behalf of defendants whose litigating tactics leave much to be desired.

A.

In 2000, the tobacco companies—usually referred to in this opinion as "Philip Morris"—filed a motion to dismiss, arguing (among other things) that "disgorgement . . . is never available under a civil RICO count." *See United States v. Philip Morris Inc.,* 116 F.Supp.2d 131, 150 (D.D.C. 2000). Denying that motion, the district court held that disgorgement could be available under 18 U.S.C. § 1964(a), but did not address whether disgorgement would be available in this particular case. *See id.* at 150–52. Philip Morris never sought certification of that order, though it could have done so at any time after the order's issuance. *See* Fed. R. App. P. 5(a)(3) (providing that the time for filing an appeal runs from when the district court amends the order to include certification, not from the issuance of the actual order); 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3929 (2d. ed. 1996) ("This latitude [in Rule 5(a)] makes it possible to employ § 1292(b) with some precision, deferring the question of appeal until it is clear that prompt appeal is apt to be useful.").

In 2004, Philip Morris sought summary judgment regarding the government's request for disgorgement in this case. Contrary to the court's statement, *see* majority op. at 1193, Philip Morris neither reargued the position it took in 2000 nor asked the district court to revisit its 2000 decision. Philip Morris's only reference to its prior position came in a one-sentence footnote: "As noted previously, Defendants respectfully disagree with the Court and maintain that disgorgement in any fashion is unavailable to the Government in a civil RICO action." Defs.' Br. in Supp. Mot. Partial Summ. J. at 6 n.4. Instead, Philip Morris urged the court to grant its motion for summary judgment for two primary reasons. First, relying on *United States v. Carson,* where the Second Circuit held that district courts may order disgorgement as a RICO remedy only where the gains "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," *id.* at 20 (quoting *United States v. Carson,* 52 F.3d 1173, 1182 (2d Cir.1995)), Philip Morris claimed

that 18 U.S.C. § 1964(a) "limits disgorgement to the amount of ill-gotten gains that remain available to defendants to fund future RICO violations," *id.* Philip Morris further argued that "the Government deliberately has refused to develop the proof properly required under *Carson* " and this in turn "requires dismissal of the Government's disgorgement claim." *Id.* at 25. Second, Philip Morris asserted that the government's disgorgement model fails as a matter of law to reasonably approximate the defendants' ill-gotten gains.

The district court rejected both arguments and denied summary judgment to Philip Morris. *United States v. Philip Morris USA, Inc.*, 321 F.Supp.2d 72 (D.D.C.2004). Interpreting section 1964(a) more broadly than had the Second Circuit, the court concluded that it could order disgorgement in situations besides those identified in *Carson*. *Id.* at 77–79. Unsurprisingly, the district court did not revisit its 2000 decision, observing only (in a footnote) that this decision had held "that disgorgement is a permissible remedy under Section 1964(a)." *Id.* at 76 n. 7. The district court also rejected Philip Morris's contention regarding the government's disgorgement model. *Id.* at 81–82.

Philip Morris then asked the district court to certify its 2004 order under section 1292(b). In its certification request, Philip Morris did not reassert its legal argument from 2000. Instead, it stated that "[w]hether the *Carson* standard applies to the Government's disgorgement claim is clearly a controlling question of law.... If the Government is wrong, and *Carson* applies, nothing is left of its claim in this case." Def's Br. Supp. Mot. Certify Order # 550 for Interloc. App. at 4.

The district court agreed that a controlling question of law existed as to whether "the disgorgement allowed under 18 U.S.C. § 1964(a) is limited to those ill-gotten gains which are 'being used to fund or promote the illegal conduct or constitute capital available for that purpose.' " *United States v. Philip Morris USA, Inc.*, No. 99–2496, slip op. at 2–4, 2004 WL 1514215 (D.D.C. June 25, 2004) (quoting *Carson*, 52 F.3d at 1182). Although in its 2004 order the district court had rejected *Carson*'s interpretation of section 1964(a), it found substantial ground for difference of opinion on this issue, explaining that "it is obvious that the arguments to the contrary in *Carson* are neither insubstantial nor frivolous," and certified the 2004 order. *Id.* at 4, 7.

In its initial petition urging this court to accept the interlocutory appeal, Philip Morris never raised the broader question the district court had addressed in 2000, i.e., whether disgorgement is ever available under section 1964(a). Instead, Philip Morris focused on the narrower issue actually raised in its 2004 motion for summary judgment, arguing that the district court had erred in rejecting *Carson*'s interpretation of section 1964(a) and claiming that "[i]f this Court agrees with the Second Circuit in *Carson*, its decision on appeal would dispose of the Government's disgorgement claim." Emergency Pet. for Permission to Appeal an Order at 9. The government opposed Philip Morris's section 1292(b) petition, arguing that a host of factual issues would require resolution regardless of whether this court adopted *Carson*'s or the district court's interpretation of section 1964(a) and thus that "interlocutory appeal would not materially advance the termination of this litigation." Resp. in Opp'n to Emergency Pet. at 15.

Responding to the government's opposition, Philip Morris suddenly changed tack and brought in play the issue decided in 2000. Philip Morris wrote:

> The district court rejected [the government's] argument [that an interlocutory

> appeal would not materially advance the litigation's termination] as a reason not to permit an appeal, and this Court should as well.
>
> First, and most obviously, if this Court reverses the district court's ruling that 'disgorgement is a permissible remedy under section 1964(a),' (Summary Judgment Order at 8 n.7), then the Government's $280 billion claim is precluded as a matter of law.

Reply to Emergency Pet. for Permission to Appeal an Order at 5. This entirely disingenuous statement conveyed the impression that the district court had *ruled* on this broader issue in the certified 2004 order rather than simply mentioning its 2000 decision. Moreover, by placing this statement under the heading "The District Court Properly Determined That an Appeal From Its Order Would Materially Advance This Litigation," *id.,* Philip Morris insinuated that the district court had certified *this* issue to this court as opposed to the narrower question actually resolved in the 2004 order. The government, of course, had no opportunity to correct these misrepresentations, and a motions panel accepted Philip Morris's appeal, expressly leaving the merits panel free to reconsider and dismiss the appeal. *In re Philip Morris USA, Inc.,* No. 04–8005 (D.C.Cir. July 15, 2004).

Philip Morris's opening brief on the merits reveals the scope of its bait and switch. The brief devotes forty pages to the issue decided in the 2000 order and only seven to the issues decided in the certified 2004 order. In response, the government urges us to dismiss the appeal entirely, suggesting that we lack jurisdiction over the issue decided in the 2000 order and observing that "Defendants' tactics subvert the mechanism for appeal established by section 1292(b)." Appellee's Br. at 45–46.

B.

As the foregoing discussion indicates, Philip Morris asks us—and the court now agrees—to decide an issue (1) not briefed in the motion leading up to the certified order, (2) not decided in the district court's opinion accompanying the certified order, (3) not raised by Philip Morris in its request for certification, (4) not discussed in the order granting certification, (5) not raised by Philip Morris in its section 1292(b) petition before this court, and (6) decided in an entirely different order which Philip Morris could at any time have asked the district court to certify. This presents serious questions on two separate fronts: our jurisdiction over this appeal under section 1292(b), and our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal. Unlike the court, I cannot brush these concerns aside.

Regarding our jurisdiction under section 1292(b), the Supreme Court has made clear that an appellate court can review "any issue fairly included within the certified order" because "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (holding that where the district court decided two issues in the certified order but identified only the damages issue as the controlling question of law, the court of appeals could nonetheless address the other issue). But the "court of appeals may not reach beyond the certified order to address other orders made in the case." *Id.; see also United States v. Stanley,* 483 U.S. 669, 677, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (holding that the

court of appeals erred in addressing a claim not raised in the certified order though closely related to it). Both "[c]ommentators and courts have consistently observed that 'the scope of the issues open to the court of appeals is closely limited to the order appealed from [and][t]he court of appeals will not consider matters that were ruled upon in other orders.' " *Stanley,* 483 U.S. at 677, 107 S.Ct. 3054 (quoting 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3929 (1977)) (second and third alterations in original).

This case falls near the intersection of these commands. For all intents and purposes, Philip Morris asks us to address the 2000 order. Today's decision overturns that order. This court has jurisdiction to do this under *Yamaha* only if the issue addressed in the 2000 order is "fairly included within the certified order." Taking a broad view of "fairly included," the court concludes that because the 2004 order denies dismissal of the government's disgorgement claim, we may review (at a minimum) any basis for summary judgment that is "logically interwoven with the explicitly identified issue." *See* majority op. at 1196. This approach not only gives us jurisdiction over the issue decided by the district court in the 2000 order, but also over the district court's 2002 determination, made in denying Philip Morris's motion for a jury trial, that disgorgement is an equitable remedy rather than a legal one, *United States v. Philip Morris, Inc.,* 273 F.Supp.2d 3, 8–11 (D.D.C.2002). Indeed, although the concurrence apparently does not share this approach, *see* sep. op. at 1206 (Williams, J., concurring), the majority opinion suggests that any issue which would result in "*complete dismissal* of the Government's claim for disgorgement with prejudice" lies within our jurisdiction "regardless of the grounds the District Court gave for its decision," *see* majority op. at 1194. By this logic, we may also have interlocutory jurisdiction to review the district court's denial of the tobacco companies' 2000 motion to dismiss, where they claimed that the government has not "adequately alleged that Defendants' racketeering activity will continue into the future," 116 F.Supp.2d at 147–50, and even the district court's denial of Liggett's 2000 motion to dismiss, where the company argued that (as to it) the government could not show two elements required for a RICO claim, *id.* at 152–53. Because victory for the tobacco companies on the first issue (and, for Liggett, victory on the second) could also trigger dismissal of the government's disgorgement claims, under the court's theory our interlocutory jurisdiction may extend to these issues as well.

The court's approach is problematic in several respects. Most significantly, it curtails the district court's section 1292(b) certification role. In this case, the district court had neither an opportunity to exercise "first line discretion to allow interlocutory appeal[ ]," *Swint,* 514 U.S. at 47, 115 S.Ct. 1203, on the broader issue resolved in its 2000 order nor notice that Philip Morris would raise this issue with us. In future cases, district courts will lose their flexibility to certify discrete issues for review, since the certification of one order may give this court jurisdiction over all sorts of prior orders. Today's situation illustrates this: under the court's theory, we have jurisdiction in this interlocutory appeal to review at a minimum two prior orders, neither of which Philip Morris sought to certify. Moreover, by reducing the opportunity for tailored review, the court's jurisdictional theory threatens this circuit with interlocutory overload. Parties who persuade us to accept an interlocutory appeal may feel encouraged to raise any or even all issues decided in prior

orders that fall within our newfound jurisdiction especially since, according to the court, issues raised in prior orders are "preserved" for section 1292(b) purposes, *see* majority op. at 1196, and not simply for the purpose of appeal after final judgment.

By contrast, no harm of consequence would result from holding, as I would, that the only issues "fairly included" within a certified order are those decided in the district court's accompanying memorandum—exactly the situation with the issue reached by the Supreme Court in *Yamaha*, 516 U.S. at 203–05, 116 S.Ct. 619. There, the Court found "fairly included" an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law, *see Calhoun v. Yamaha Motor Corp., USA*, No. 90–4295, 1993 WL 216238 (E.D.Pa. June 22, 1993). While the Court did not explicitly rely on this point, it is relevant to determining whether *Yamaha*'s "fairly included" language stands for the proposition that appellate courts have interlocutory jurisdiction over all possible bases for reversing a summary judgment denial (as my colleagues read it) or only over bases which the district court considered and resolved in this denial (as I read it).

My approach, moreover, respects the Court's instruction in *Stanley* that we should "not consider matters that were ruled upon in other orders." 483 U.S. at 677, 107 S.Ct. 3054 (citation omitted); *cf. Briggs v. Goodwin*, 569 F.2d 10, 25 (D.C.Cir.1977) (noting that any possible justification for addressing "all other issues relevant to the result reached by [a certified] order" would "be substantially diminished ... where the order certified for appeal is a separate order from the one [containing the other issues]"); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 840 (2d. Cir.1998) (finding that the certified order referred to rather than incorporated a prior order and concluding that no interlocutory jurisdiction existed over the issue decided in the prior order). It is thus hardly surprising that the court today points to no case in which an appellate court has exercised interlocutory jurisdiction over an issue decided in a different order from the one under certification. True, under my approach a party seeking an interlocutory appeal on a matter split across two orders would need to seek certification of both orders to bring the matter fully to this court. But that seems a small burden. If the party fails to make this effort (as in this case) and we conclude that it would be inappropriate to address only the issues raised in the certified order (as I would here), then we have discretion under section 1292(b) to refuse to permit the interlocutory appeal altogether—a point this court overlooks.

In addition to resting on a dubious interpretation of section 1292(b), the court's decision to review the broader issue runs counter to this circuit's general rules regarding waiver. Parties may raise here only those arguments they presented to the district court in their papers seeking (and opposing) the order under review, since only in exceptional circumstances will we consider an argument not made to the district court. *See United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 887–88 (D.C.Cir.2004) (finding waiver based on a party's failure to appear and defend a privilege claim in the proceedings resulting in the interlocutory appeal, even though the party had asserted the privilege in a related proceeding in the same case); *see also id.* at 892 (refusing to consider argument not raised below) (citing *United States v. Hylton*, 294 F.3d 130, 135–36 (D.C.Cir.2002)). Here, as discussed earlier, Philip Morris never argued the broader issue in the relevant plead-

ings; a sentence-long footnote stating "respectful disagreement" is not an argument, particularly when offered in such a cursory fashion. *Cf., e.g., Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 869 (D.C.Cir.2001) (per curiam) (observing that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion' with only 'bare-bones arguments' "); *Wash. Legal Clinic for the Homeless v. Barry,* 107 F.3d 32, 39 (D.C.Cir.1997) (declining to address argument made in a footnote). Although it is true, as the court points out, that in the two just-cited cases the issues were apparently never raised at an earlier stage, here we are reviewing not the entire case but only the certified 2004 order, which sets the bounds of both our jurisdiction and waiver doctrine. Moreover, while we sometimes make exceptions to our waiver rules, I would not do so here given Philip Morris's questionable tactics. Even under my colleagues' jurisdictional theory, only by exercising our discretion to accept an argument not raised in the district court—and further exercising our discretion to accept the interlocutory appeal—does the broader issue stand before us.

In sum, whether viewed in terms of jurisdiction or waiver, only Philip Morris's narrower challenge is properly before us. True, this means we should dismiss the appeal altogether, as it makes little sense to decide the narrower question at this time when the broader question might be appealed later. But Philip Morris itself created this problem. It had several ways it could properly have brought the broader issue to our attention. In its 2004 motion for summary judgment, it could have reargued the broader question and asked the district court to reconsider its decision; the district court's denial of reconsideration would have brought the issue fairly into the challenged order. Even more appropriately, Philip Morris could have asked the district court to certify both the 2000 and 2004 orders and candidly explained that it wished this court to review the earlier order as well. Either way, the district court, having fair notice that Philip Morris wanted to raise both issues with us, could have performed its section 1292(b) gatekeeping function. Taking neither approach, Philip Morris instead not only jumped the fence at the district court level, but also circumvented our own screening process by waiting until after the government's opposition to raise the broader issue with the motions panel. This court should not be rewarding such tactics by exercising its discretion to hear this appeal.

I would therefore dismiss the interlocutory appeal. I reach this conclusion reluctantly because I certainly understand how hearing this interlocutory appeal could be helpful to Judge Kessler, who is presiding over a long and difficult trial. In my view, however, preserving section 1292(b)'s integrity and discouraging the kind of litigating tactics reflected in this record far outweigh the efficiency that hearing this interlocutory appeal might produce in this concededly complex case.

But the court disagrees with my position. The appeal stands before us, so in the following sections I exercise a dissenter's prerogative to address the merits. *See, e.g., Gratz v. Bollinger,* 539 U.S. 244, 291, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (Souter, J., dissenting); *Arizona v. Evans,* 514 U.S. 1, 18, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (Stevens, J., dissenting); *Larson v. Valente,* 456 U.S. 228, 258, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (White, J., dissenting).

II.

Like my colleagues, I begin with the structure and language of RICO's remedial provisions. RICO authorizes criminal

penalties and civil remedies against those engaging in patterns of racketeering behavior. 18 U.S.C. § 1963 sets out the criminal penalties: guilty persons shall "be fined under this title or imprisoned . . . or both, and shall forfeit to the United States" any illegally acquired interest. Section 1964 provides for the civil remedies. At issue in this case is subsection (a), which states:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Another subsection, § 1964(c), authorizes injured persons to sue RICO violators for treble damages and to recover attorneys' fees. Finally, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," Pub.L. No. 91–452, § 904(a), 84 Stat. 922, 947 (1970) (codified in a note following 18 U.S.C. § 1961)—a provision that, if it "is to be applied anywhere, [should be applied] in § 1964, where RICO's remedial purposes are most evident," *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 491 n. 10, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

The government argues that district courts have authority to order any remedy, including disgorgement, within their inherent equitable powers. More narrowly, the government argues that assuming the district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, disgorgement—by reducing the incentives for the tobacco companies to violate RICO in the future—will accomplish that purpose in this case. These two distinct arguments present very different consequences for district courts: under the first theory, courts may order disgorgement any time they find the remedy necessary to ensure complete relief, while under the second theory courts may order disgorgement only to prevent ongoing or future violations. In this case, the district court accepted only the second argument. *See* 321 F.Supp.2d at 74–80. The court today rejects both.

A.

In dismissing the argument that district courts may impose any equitable remedy for RICO violations, the court distinguishes—unconvincingly, in my view—the two Supreme Court cases relied on by the government, *Porter v. Warner Holding Co.,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960). I believe these two cases control this case and compel the conclusion that district courts may impose any equitable remedy for RICO violations.

In *Porter,* the Supreme Court considered whether a district court had authority to order restitution in a suit brought by the Price Control Administrator against a landlord who had violated the Emergency Price Control Act (EPCA) by charging too much rent. The act contained no specific provision for restitution or disgorgement, but—like RICO—authorized a broad array of other remedies, both criminal and civil. On the criminal side, offenders could be fined and imprisoned. EPCA, § 205(b)-(c), 56 Stat. 23, 33 (1942). On the civil

side, injured individuals could sue for treble damages plus attorneys' fees, and if they were not entitled to sue or the statutory period for their suit had passed, the Administrator could sue for the same remedy on behalf of the United States. *Id.* § 205(e), 56 Stat. at 34, *as amended by* Stabilization Extension Act of 1944, § 108(b), 58 Stat. 632, 640–41. The Administrator could also sue to suspend a violator's license. *Id.* § 205(f)(2), 56 Stat. at 35.

In the section most at issue in *Porter,* the act further provided that

> [w]henever in the judgment of the Administrator any person has engaged or is about to engage in [violations of the act], he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Id. § 205(a), 56 Stat. at 33. Although this section clearly authorized injunctions aimed at future behavior, it made no express provision for restitution and did not, contrary to my colleagues' suggestion, explicitly "grant[ ] general equitable jurisdiction" to the district courts, *see* majority op. at 1197. Indeed, in *Porter,* the Eighth Circuit had held that district courts were without authority to order restitution as a remedy for violations of the EPCA. *Bowles v. Warner Holding Co.,* 151 F.2d 529, 532 (8th Cir.1945) (concluding that the district court had no authority to order restitution because "[i]t is well settled 'That where a statute creates a right and provides a special remedy, that remedy is exclusive' ") (citations omitted).

The Supreme Court reversed. Discussing "the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act," 328 U.S. at 397–98, 66 S.Ct. 1086, the Court concluded—and I quote at length since the language is so critical to the disposition of this case—that

> [s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.... [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398, 66 S.Ct. 1086 (citations omitted). The Court concluded that because the EPCA, despite the very detailed and specific nature of the authorized remedies, did not rule out restitution by a "necessary and inescapable inference," the district court could order restitution even if not expressly authorized by the statute. *See id.* at 398–400, 66 S.Ct. 1086; *see also Mitchell,* 361 U.S. at 291, 80 S.Ct. 332 (discussing *Porter*).

Indeed, the Court further suggested that restitution could be considered an "other order" to enjoin or enforce compliance within section 205(a) in either of two ways. First, it could be "considered as an equitable adjunct to an injunction decree" since "where, as here, the equitable jurisdiction of the district court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." 328 U.S. at 399, 66 S.Ct. 1086. Second, restitution could "be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400, 66 S.Ct. 1086. The Court then remanded for the district court to "exercise the discretion that belongs to it" and decide whether to order restitution. *Id.* at 403, 66 S.Ct. 1086.

Porter was not unanimous. "It is not excessive to say that perhaps no other legislation in our history has equaled the Price Control Acts in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions," *id.* at 404, 66 S.Ct. 1086, wrote Justice Rutledge in dissent. "The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared." *Id.* "Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer." *Id.* at 405, 66 S.Ct. 1086. "[E]ven courts of equity may not grant relief in disregard of the remedies specifically defined by Congress." *Id.* at 408, 66 S.Ct. 1086.

The court's opinion today sounds a lot like the *Porter* dissent. The court observes that the language of section 1964(a)—a court has "jurisdiction to prevent and restrain violations"—does not explicitly open the door to all of equity, but neither did EPCA section 205(a) (a court may issue orders "enjoining" violations or "enforcing compliance"). The court asserts that reading full equitable jurisdiction into RICO will render section 1964(a)'s language largely meaningless, but *Porter* rejected just this concern with regard to EPCA section 205(a). The court emphasizes that RICO "already provides for a comprehensive set of remedies," majority op. at 1200, but the EPCA had at least as comprehensive a remedial structure. The court further points out that should restitution be available, the government could obtain duplicative recovery (given RICO's criminal forfeiture provisions) and also escape the applicable statutes of limitations, but the *Porter* majority dismissed similar concerns, 328 U.S. at 401–02, 66 S.Ct. 1086; *see also id.* at 406–08, 66 S.Ct. 1086 (Rutledge, J., dissenting). Finally, the court attempts to distinguish *Porter* on the grounds that the EPCA had a different policy goal than RICO (preventing inflation rather than seeking to eradicate organized crime), but this has no effect on *Porter*'s essential holding that "the court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances," *see id.* at 398, 66 S.Ct. 1086. In sum, the court offers no basis for concluding that RICO's structure and language get the statute past *Porter*'s high bar for finding by a "necessary and inescapable inference" that Congress intended to empower district courts to order only limited equitable relief.

Nor does Philip Morris point to anything in RICO's legislative history that creates such a "necessary and inescapable inference." Only one remark even gives me pause. The Senate Committee report stated, "Subsection [1964](a) contains

broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S.Rep. No. 91–617, at 160 (1969); *accord* H. Rep. No. 91–1549, at 57 (1970). The second part of this "limit"—requiring due provision for the rights of innocent persons—poses no concern, for it describes equity rather than constricts it. *See, e.g., Holly v. Domestic & Foreign Missionary Soc'y,* 180 U.S. 284, 295, 21 S.Ct. 395, 45 L.Ed. 531 (1901) ("[A] court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."). But the first part of this "limit"—that remedies should accomplish the aim of removing the corrupting influence—does more than simply restate an equitable principle. Suggesting that the remedies must remove the corrupting influence, it allows one to infer that remedies may accomplish *only* this aim. But that inference is, to use *Porter*'s words, neither "necessary" nor "inescapable." One could also infer that remedies must accomplish this aim as a lower limit (i.e., no corrupting influence may remain), but may also accomplish other aims—just as remedies must make due provision for the rights of the innocent, but may presumably do much more. Indeed, this reading comports with how RICO's sponsor, Senator McClellan, described the bill when he introduced it: the "ability of our chancery courts to formulate a remedy to fit the wrong is one of the greatest benefits of our system of justice. This ability is not hindered by the bill." 115 Cong. Rec. 9567 (1969).

Mitchell, the second Supreme Court decision the government relies on, considered whether district courts could order restitution of wages lost from unlawful discharge in suits brought by the Secretary of Labor under section 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 217 (1960). Relying on *Porter,* the Court concluded that where the statute provided that "the district courts are given jurisdiction ... for cause shown, to restrain violations" of the act, 29 U.S.C. § 217, district courts had full equitable powers, 361 U.S. at 291–95, 80 S.Ct. 332; *see also id.* at 289, 80 S.Ct. 332. Reaffirming *Porter's* strong presumption in favor of finding equitable relief fully available, the Court stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to ... give effect to the policy of the legislature.' " *Id.* at 291–92, 80 S.Ct. 332 (quoting *Clark v. Smith,* 38 U.S. (13 Pet.) 195, 203, 10 L.Ed. 123 (1839)) (omission in original); *see also Califano v. Yamasaki,* 442 U.S. 682, 704–06, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (using the *Porter* presumption to conclude that district courts could order injunctive relief not explicitly authorized by the Social Security Act). The *Mitchell* Court thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA section 16, 29 U.S.C. § 216 (1960), duplicative recovery might occur. 361 U.S. at 292–93, 80 S.Ct. 332. *But see id.* at 303, 80 S.Ct. 332 (Whittaker, J., dissenting) (concluding that the statutory scheme "seems plainly to show that Congress intended by s 16(c) to allow recovery of unpaid minimum wages and overtime compensation at the instance of the Secretary only in an action at law, brought under that subsection, and triable by a jury").

Mitchell reinforces the proposition that district courts may order any equitable relief in civil RICO suits brought by the government. My colleagues suggest that in "the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA." Majority op. at 1199. The only jurisdictional hook in the FLSA's text, however, was its language: "the district courts are given jurisdiction ... for cause shown, to restrain violations" of the act, 29 U.S.C. § 217. If this language opens the door to all equitable relief, then RICO's language—"[t]he district courts ... shall have jurisdiction to prevent and restrain violations"—certainly does the same. And if the possibility of duplicative recovery did not circumscribe the district court's equitable authority under the FLSA, then neither should that possibility under RICO do so.

Not surprisingly, in the wake of *Mitchell* and *Porter,* circuit courts including this one have read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it. In *SEC v. First City Financial Corp.,* 890 F.2d 1215 (D.C.Cir.1989), we held that district courts may order disgorgement under the Security Exchange Act's sections 21(d) and (e), 15 U.S.C. § 78u(d)-(e) (1989), which provide that the district courts "shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding" compliance with the act and regulations made under it. *See* 890 F.2d at 1230 (relying on *Porter* and *Mitchell*). "Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e) ... vest jurisdiction in the federal courts." *Id.; see also SEC v. Tome,* 833 F.2d 1086, 1096 (2d Cir.1987); *SEC v. Wash. County Util. Dist.,* 676 F.2d 218, 227 (6th Cir.1982). Other circuits have reasoned similarly in interpreting other acts. *See, e.g., FTC v. Gem Merch. Corp.,* 87 F.3d 466, 468–70 (11th Cir.1996) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Federal Trade Commission Act); *ICC v. B & T Transp. Co.,* 613 F.2d 1182, 1183–86 (1st Cir.1980) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Motor Carrier Act, though noting that "[i]f we were writing on a blank slate, we might agree with the district court that the language of the Motor Carrier Act cannot justify" the remedy of restitution); *CFTC v. Hunt,* 591 F.2d 1211, 1221–23 (7th Cir.1979) (applying *Porter* in holding that courts may order disgorgement as a remedy for violations of the Commodity Exchange Act).

Instead of following *Porter* and *Mitchell,* the court relies on a later Supreme Court decision, *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). In *Meghrig,* the Supreme Court considered whether private citizens could seek restitution under the Resource Conservation and Recovery Act (RCRA) for the cost of having cleaned up a prior landowner's toxic waste. The statute provided that the "district court shall have jurisdiction ... to restrain any person who has contributed or who is contributing" to waste problems, "to order such person to take such other action as may be necessary, or both." *Id.* at 482 n. *, 116 S.Ct. 1251 (quoting 42 U.S.C. § 6972(a)). The Court held that it was "apparent from the two remedies described ... that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts." *Id.* at 484, 116 S.Ct. 1251. While not explicitly defining the limits of the two remedies described, the court suggested that these remedies should be equated with prohibitory and mandatory injunctions. *Id.* Moreover, relying in part on the fact that an analogous statute expressly

authorized damages, the Court concluded that "neither remedy . . . contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Id.* at 484–85, 116 S.Ct. 1251. According to the Court, it "is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 488, 116 S.Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 14–15, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)).

The *Meghrig* Court noted that in arguing that the district court had inherent authority to award equitable remedies, the plaintiffs relied on *Porter* and its progeny. *Id.* at 487, 116 S.Ct. 1251. Without expressly distinguishing those cases, the Court explained that "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions [of the analogous statute], amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* Notably for our purposes, *Meghrig* did not overrule *Porter.* Indeed, even after *Meghrig,* the Supreme Court has cited *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent . . . an 'inescapable inference' to the contrary." *Miller v. French,* 530 U.S. 327, 340, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000); *see also United States v. Oakland Cannabis Buyers' Co-op.,* 532 U.S. 483, 496, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).

At one level, reconciling *Meghrig* with *Porter* and *Mitchell* is difficult. *Meghrig* suggests that "to restrain" only authorizes prohibitory injunctions. By contrast, *Mitchell* holds that this language imposes no limit on the district court's full equitable powers. *Meghrig,* relying on a version of the canon *expressio unius est exclusio alterius,* observes that courts should be "chary" in reading remedies into a statute which expressly provides for other remedies. By contrast, *Porter* indicates that in the context of equity jurisdiction, the general *expressio unius* canon gets inverted, meaning that district courts possess all equitable powers unless the statute "inescapabl[y]" provides to the contrary. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 18–20, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974) (discussing these competing canons).

These tensions cannot be dealt with simply by dismissing *Porter* and *Mitchell. Meghrig* not only left both cases intact, but also suggested that the "limited remedies" in RCRA, together with the "stark differences" between RCRA and the analogous statute, explain the different outcomes. Given this, our responsibility is to follow the Supreme Court's oft-cited instruction that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *see also Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (reaffirming this requirement).

In my view, *Porter* and *Mitchell,* not *Meghrig,* "directly control" this case. Several reasons support this conclusion, and nothing points the other way. First, RICO's statutory scheme resembles the EPCA more than the RCRA. Both RICO and the EPCA stand alone in grappling with a broad social issue, whereas the

RCRA had a closely related statute on which the Court in *Meghrig* relied heavily. Second, as in both *Porter* and *Mitchell*, the government brought the suit rather than a private party like the *Meghrig* plaintiff, and *Porter* makes clear that district courts may have "even broader and more flexible" equitable powers where the public interest is involved, 328 U.S. at 398, 66 S.Ct. 1086. This point has particular traction if the government is the only party that may seek equitable relief under RICO. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1083–89 (9th Cir. 1986) (holding that equitable relief under RICO is available only to the government). *But see Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695–700 (7th Cir. 2001) (holding that private plaintiffs can seek equitable relief under RICO), *rev'd on other grounds*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003). Finally, *Meghrig*'s suggestion that "restrain" in the RCRA refers only to prohibitory injunctions cannot apply to section 1964(a), since that section explicitly authorizes other remedies—e.g., divestment—to "prevent and restrain" RICO violations. For these reasons, in determining whether the phrase "prevent and restrain" limits the district court's equitable powers, I think it makes more sense to look to *Porter* and *Mitchell*, not *Meghrig*.

The court "[r]ead[s] *Porter* in light of" the statement in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), that " '[f]ederal courts are courts of limited jurisdiction' " and " 'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.' " Majority op. at 1197. But " '[j]urisdiction,' it has been observed, 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citation omitted). *Kokkonen* simply makes the unremarkable point that federal courts have subject-matter jurisdiction over cases only if the Constitution or Congress so provides, 511 U.S. at 377, 114 S.Ct. 1673, and the Supreme Court has since clarified that it is "unreasonable" to apply subject-matter jurisdiction principles where a statute uses the term jurisdiction "merely [in] specifying the remedial *powers* of the court," *Steel Co.*, 523 U.S. at 90, 118 S.Ct. 1003.

Finally, while Congress modeled section 1964(a) on the antitrust laws, *see* 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan); *see also* 15 U.S.C. § 4 (the "district courts . . . are invested with jurisdiction to prevent and restrain violations"); *accord* 15 U.S.C. § 25, I disagree with Philip Morris that the Supreme Court's antitrust decisions provide useful guidance as to whether the phrase "prevent and restrain" limits the equitable remedies available to district courts. On the one hand, the Court once ignored, though did not explicitly reject, an invitation by Justice Douglas to apply *Porter* to antitrust actions. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 366–67, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947) (Douglas, J., dissenting in part); *cf. United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952) (emphasizing that in antitrust actions the purpose of injunctive relief is to "forestall future violations"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639–47, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (declining to fashion and apply a common law right of contribution in the antitrust context). On the other hand, some antitrust cases suggest that courts may impose equitable remedies beyond those intended merely to stop future violations from occurring. *E.g., United States v. Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S.Ct. 254, 89 L.Ed. 160 (1944) (although

the district court ordered a remedy said to "exceed any reasonable requirement for prevention of future violations," the "Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations.... Those who violate the Act may not reap the benefits of their violations"); *cf. United States v. U.S. Steel Corp.,* 251 U.S. 417, 452, 40 S.Ct. 293, 64 L.Ed. 343 (1920) (observing that the Sherman Act is "clear in its direction that the courts of the nation shall prevent and restrain [monopolies] (its language is 'to prevent and restrain violations of' the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"); *Schine Chain Theatres v. United States,* 334 U.S. 110, 128, 68 S.Ct. 947, 92 L.Ed. 1245 (1948) (suggesting that "[l]ike restitution," divestment "merely deprives a defendant of the gains from his wrongful conduct" and upholding it as a remedy under the Sherman Act), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752, 763 n. 8, 777, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). As these cases illustrate, antitrust precedent offers little reason to doubt the applicability of *Porter* and *Mitchell* to the case at hand.

To sum up, *Porter* and *Mitchell* rather than *Meghrig* control this case, and no "necessary and inescapable inference" limits the district court's jurisdiction in equity. If the district court concludes that the government has shown that the tobacco companies have committed RICO violations by advertising to youth despite assertions to the contrary and by falsely disputing smoking's addictive, unhealthy effects, then it may order whatever equitable relief it deems appropriate. Of course, the court must work within the bounds of equitable doctrines, recognizing defenses like laches and unclean hands, paying due regard for the rights of the innocent, and generally exercising its discretion. With these principles in mind, the district court can "do complete rather than truncated justice," *Porter,* 328 U.S. at 398, 66 S.Ct. 1086.

B.

In addition to rejecting the government's argument that district courts may impose any equitable remedy on RICO violators, the court rejects the government's alternative, narrower argument—that even if district courts may order only remedies that "prevent and restrain" RICO violations, disgorgement can appropriately accomplish that purpose. Because the court's analysis of this argument is as flawed as its analysis of the government's broader argument, I add this discussion of the issue. In my view, the court transforms what should be a question of fact—what remedies appropriately prevent and restrain future violations—into a question of statutory interpretation in a way that disregards section 1964(a)'s plain language and ignores Supreme Court precedent recognizing the equitable flexibility of district courts.

Under section 1964(a), district courts may issue "appropriate orders" to prevent and restrain" RICO violations. "Prevent" has many meanings. The first nonarchaic one listed in *Webster's Third New International Dictionary* (1961) is "to deprive of power or hope of acting, operating, or succeeding in a purpose." "Restrain" can mean "to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure)" and "to limit or restrict to or in respect to a particular action or course: keep within bounds or under control." *Webster's Third New International Dictionary* (1961).

The government offers expert testimony to the effect that a disgorgement order will deter the tobacco companies from violating RICO in the future—in the dictionary's language, it will deprive them of the hope of succeeding in benefiting from future RICO violations and hold them back from committing such violations. In essence, the government claims that the tobacco companies, having engaged in a persistent pattern of deceptive representations over decades, will be less likely to continue this illegal behavior if they must surrender their past ill-gotten profits. Treating the government's expert testimony as correct, as we must at this stage of the litigation, *see Anderson,* 477 U.S. at 255, 106 S.Ct. 2505, I think it enough to forestall summary judgment in Philip Morris's favor. Indeed, the Supreme Court has accepted just this theory of deterrence, stating in *Porter* that restitution "could be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S.Ct. 1086. If restitution helps enforce compliance, then we should have little doubt that disgorgement helps prevent and restrain violations.

This court does not conclude that disgorgement can never have a restraining effect on future conduct of the defendants—the only conclusion that could justify a holding that district courts can never order disgorgement under section 1964(a). Instead, the court offers several unpersuasive reasons for its conclusion that as a matter of statutory interpretation disgorgement is not a permissible remedy under section 1964(a).

First, the court states that disgorgement "is a quintessentially backward-looking remedy." Majority op. at 1198. Although I agree that a court sitting in equity cannot order disgorgement that exceeds a defendant's past ill-gotten profits, *see Tull v. United States,* 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (observing that "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant' ") (quoting *Porter,* 328 U.S. at 402, 66 S.Ct. 1086), this does not mean disgorgement is always backward-looking and can never have a forward-looking effect on the defendants. The Supreme Court made this clear in *Porter,* 328 U.S. at 400, 66 S.Ct. 1086, and *Meghrig* nowhere rejects *Porter*'s conclusion that a disgorgement order can impact future conduct—indeed, there was no evidence in *Meghrig* that the defendants were likely to commit future RCRA violations, and in any event, as discussed *supra* at 1220–21, *Porter* and *Mitchell* are the cases most directly on point for our purposes.

Second, the court concludes that district courts are limited not merely by the words "prevent and restrain," but also "by those [three remedies] explicitly included in the statute" by application of the canons *noscitur a sociis* and *ejusdem generis.* *See* majority op. at 1200; *cf. United States v. Thomas,* 361 F.3d 653, 659 (D.C.Cir.2004) (defining these canons). Even assuming we should apply these canons, however, they spell out nothing more than what everyone agrees on: that the only "appropriate" orders under this section are equitable ones. *See West v. Gibson,* 527 U.S. 212, 225–26, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999) (Kennedy, J., dissenting) (observing that these canons "suggest the appropriate remedies authorized by [a statute using the word 'including'] are remedies of the same nature as reinstatement, hiring, and backpay—*i.e.,* equitable remedies" and noting that "the phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity").

More important, I doubt the canons apply here at all. While the canons can prove useful where there is otherwise "no general principle in sight," *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C.Cir. 1997); *see also Wash. State Dep't of Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (applying the canons in interpreting the last listed term of "execution, levy, attachment, garnishment, or other legal process"), here the statute provides the general principle of preventing and restraining violations. Indeed, the Supreme Court declined to use these canons altogether in interpreting a statute which gave the EEOC the power of enforcement "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," 42 U.S.C. § 2000e–16(b). *See West*, 527 U.S. at 218, 119 S.Ct. 1906 (stating that the "word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow that word"); *cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) (declining to apply *ejusdem generis* canon where Congress used "expansive language"). I see no reason why we should do otherwise here, especially since section 1964(a) uses the even more expansive language: "including, but not limited to." Finally, *noscitur a sociis* and *ejusdem generis* should not be used to limit the types of equitable relief available to district courts given Congress's instruction that RICO "shall be liberally construed to effectuate its remedial purposes," *see supra* at 1215, one of which is preventing and restraining future violations—an aim that, far from being a "new purpose[ ] that Congress never intended," *see* majority op. at 1201 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)), expressly appears in the statute's text. If an equitable remedy achieves this goal, then the statute authorizes it.

Third, the court suggests that disgorgement should be unavailable because it allows the government to achieve relief "similar in effect" to criminal forfeiture, raising concerns that the government can achieve duplicative recovery and evade the procedural safeguards girding the forfeiture provision. *See* majority op. at 1200–01. To be sure, such concerns are relevant in considering whether to infer additional causes of action. As discussed earlier, *supra* at 1217, however, given the Supreme Court's explicit rejection of similar concerns in *Porter* and *Mitchell*, they cannot carry the day. Nor should such concerns stop a court from issuing equitable orders that accomplish the express statutory purpose of preventing and restraining RICO violations, whether the remedies are specifically listed in section 1964(a), e.g., divestment, or available as other "appropriate orders." Discussing RICO, the Supreme Court has observed that "Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions." *United States v. Turkette*, 452 U.S. 576, 585, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The converse should hold as well. If an equitable remedy prevents and restrains RICO violations—one of the remedial purposes which we should liberally construe the statute to effectuate—it is untenable to claim that the existence of criminal provisions renders this remedy nonetheless beyond the scope of district court authority.

Of course, that disgorgement may sometimes serve to prevent and restrain defendants from committing RICO violations does not mean that it will always accomplish that purpose. As the district court here recognized, a court must first find

that the defendants are likely to commit future RICO violations. 321 F.Supp.2d at 75–76. This is not a foregone conclusion. In *Carson,* for example, while the Second Circuit recognized that disgorgement can sometimes serve to prevent and restrain RICO violations, it was rightly skeptical that disgorgement of the "gains ill-gotten long ago by a retiree" who had long since left the union position that he had abused in accepting kickbacks would accomplish this purpose. 52 F.3d at 1182. Assuming district courts are limited to remedies that prevent and restrain, *but see supra* Part II.A, I also share the Second Circuit's apparent conclusion that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations, *see* 52 F.3d at 1182. *But see Richard v. Hoechst Celanese Chem. Group,* 355 F.3d 345, 355 (5th Cir.2003) (leaving open the possibility that disgorgement might be ordered solely to deter other possible offenders). Because any remedy imposed for a solely exemplary purpose (i.e., to dissuade others from committing RICO violations) would amount to punishment, it goes beyond what Congress intended, *see* S.Rep. No. 91–617, at 81, as well as pushes the boundaries of what equity permits, *cf. Tull,* 481 U.S. at 422, 107 S.Ct. 1831. In this case, however, the government offers evidence that the defendant companies themselves are likely to commit future RICO violations by misleading the public about the health consequences of smoking and the addictive effects of nicotine, as well as by persisting in marketing to young people.

According to Philip Morris, only injunctions are "appropriate orders" under section 1964(a) because, in its view, they will always adequately prevent past lawbreakers from committing future violations, particularly given the threat of heavy contempt penalties. Refining this point, the concurrence finds it "almost inconceivable" that disgorgement can change the incentives governing a defendant's future behavior given RICO's other provisions. *See* sep. op. at 1204 (Williams, J., concurring). The concurrence thus concludes that as a matter of law, Congress intended to exclude disgorgement from those remedies appropriate to prevent and restrain RICO violations. *See id.* at 1204–05. I think this approach is flawed in several respects.

To begin with, as noted above, *Porter* indicated that disgorgement may encourage guilty defendants to obey the law in the future. Interpreting a statute replete (like RICO) with other remedies, the Court concluded that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S.Ct. 1086. We are without license to ignore the Supreme Court's views on this point.

Moreover, Philip Morris's suggestion that only injunctions provide "appropriate" relief under section 1964(a) not only cuts against the statute's plain language—Congress would hardly have included divestment in its list of sample remedies if it thought injunctions alone would be adequate—but also ignores the equitable flexibility the statute was designed to preserve, *see, e.g.,* 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan). Indeed, nothing in the statute requires courts to prefer contempt penalties (not explicitly named in section 1964(a)) to disgorgement (also not explicitly named). Rather, no single remedy is always appropriate. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann v. Charlotte–Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (quoting *Hecht Co. v. Bowles,* 321 U.S. 321, 329–30, 64 S.Ct. 587, 88 L.Ed. 754 (1944)).

Sometimes injunctive relief alone will make the most sense; other times, different equitable remedies or combinations of equitable remedies, perhaps including disgorgement, might prove as or more effective.

To be sure, given RICO's comprehensive remedial scheme, disgorgement orders may prove appropriate in preventing and restraining future violations only in rare circumstances. But "[i]n equity, as nowhere else, courts [should] eschew rigid absolutes," *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 777 n. 39, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (internal quotation marks and citation omitted), and precisely what remedy or combination of remedies, within the bounds of the equitable doctrines discussed earlier, will serve to prevent and restrain defendants from committing RICO violations is an issue of fact, not statutory interpretation. For these determinations, we must rely in the first instance not on what we appellate judges can or cannot imagine will "prevent or restrain," but on tried and true methods of fact-finding before district courts—including cross-examination and presentation of contrary evidence. *Cf. id.* at 780, 96 S.Ct. 1251 (noting district courts' " 'keener appreciation' of peculiar facts and circumstances") (citation omitted).

Finally, and again as noted earlier, record evidence in this case suggests that disgorgement will in fact "prevent and restrain" defendants from committing future RICO violations. As one of the government's experts stated, "[R]equiring defendants to pay proceeds will affect their expectations ... about the returns from future misconduct." Appellee's App. at 813. The expert added that, even if coupled with an injunction laden with contempt penalties, disgorgement will "provide additional economic incentives to deter future misconduct" by "strengthen[ing] the credibility of existing laws" which the defendants have allegedly violated in the past. *Id.* at 814. Disagreeing, the concurrence offers its own "expert opinion" of the incentives driving the behavior of past RICO violators. *See* sep. op. at 1203–05, 1205–06. According to the concurrence, the most appropriate deterrence will stem from the "spotlight of the lawsuit," if properly "amplif[ied]" by "transparency-enhancing and prior-approval measures." *Id.* at 1205. Perhaps so, but "on summary judgment, the evidence should be viewed in favor of the nonmoving party, not," as the concurrence would have it, "the other way around." *Langon v. Dep't Health & Human Servs.,* 959 F.2d 1053, 1059 (D.C.Cir. 1992) (reversing district court grant of summary judgment where that court disregarded admissible expert testimony); *see also Sears, Roebuck & Co. v. Gen. Servs. Admin.,* 553 F.2d 1378, 1381–83 (D.C.Cir.1977) (holding that district court inappropriately granted summary judgment where experts disagreed about whether certain data constituted a "trade secret" from which an intelligent competitor could gain information). At this stage of the litigation, then, we must assume that the government expert is correct and that disgorgement will "prevent and restrain" future RICO violations. Should Philip Morris offer expert testimony along the lines suggested by the concurrence, then it will be up to the district court to evaluate the competing evidence and make appropriate findings of fact. Should either party appeal, this court, unrestrained by the inferences required at summary judgment, would then review that factual determination pursuant to Rule 52's clear error standard. *See* Fed.R.Civ.P. 52 advisory committee's note (observing that judgment under this standard "differs from a summary judg-

ment under Rule 56 in the nature of the evaluation made by the court"); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2585 (2d. ed.1994) (noting that under Rule 52 a reviewing court need not view the evidence in the light most favorable to the appellee).

C.

In sum, were this case properly before us, I would hold, in accordance with *Porter* and *Mitchell*, that district courts have authority to order any remedy, including disgorgement, necessary to ensure complete relief. As the concurrence points out, sep. op. at 1206 (Williams, J., concurring), my approach would create a circuit split, since *Carson* did not apply *Porter* and *Mitchell* to RICO (and, indeed, the parties do not appear to have brought these cases to the Second Circuit's attention). Even if, as *Carson* holds, district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, I would still affirm the denial of summary judgment, leaving it to the district court to determine, on the basis of a fully developed record, whether disgorgement will help accomplish this purpose. I disagree with my colleagues' conclusions not because they have created a circuit split of their own by rejecting *Carson*'s holding that disgorgement may prevent and restrain RICO violations, but because they have done so by accepting an interlocutory appeal that we should not hear and by disregarding both Supreme Court precedent and section 1964(a)'s plain language.

III.

This leaves one final, distinct issue. Philip Morris claims that the government's disgorgement model fails as a matter of law to measure the tobacco companies' ill-gotten profits. Because the district court decided this issue in the certified order, it is—unlike the issue the court does resolve—properly before us. *See Yamaha*, 516 U.S. at 205, 116 S.Ct. 619.

In calculating disgorgement, the government first identifies what it calls the "Youth Addicted Population" (YAP), namely, all people who were smoking an average of at least 5 cigarettes a day at the time they turned 21. The government next calculates that from RICO's effective date in 1970 to 2001, the tobacco companies earned profits of $280 billion through sales to these people. The government arrives at this calculation by (1) determining the gross revenue from these total sales minus the direct costs (excluding overhead and taxes) and (2) adjusting for the time value of money. Philip Morris asserts that the government has failed to show that these profits are attributable to the companies' alleged RICO violations, relying on admissions by government experts that it would be "highly unlikely" to say that "nobody under the age of 21 would have ever smoked regularly . . . but for the defendants' alleged RICO violations."

Philip Morris cannot prevail on this issue at summary judgment because the government need not show that nobody under 21 would have smoked but for the RICO violations. As we held in *First City Financial*, 890 F.2d at 1229, "disgorgement need only be a reasonable approximation of profits causally connected to the violation." In *First City Financial*, we found that the district court appropriately ordered disgorgement of *all* profits on a stock sale where the defendants failed to make a material disclosure, purchased stock whose value would likely have already risen had the disclosure been made, and then sold the stock for a killing after the undisclosed news broke. *See id.* at 1229–32. Although the government never

proved that all increases in the stock's value stemmed from the violation, we rejected the defendants' argument that because the increase in price may have depended on other factors, disgorgement of all profits was "simplistic, quite unrealistic, and so *de facto* punitive." *See id.* at 1231. Noting that "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task," we held that "the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied" its "burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." *Id.* at 1231–32. Although recognizing that this might result in "actual profits becoming the typical disgorgement measure," we observed that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* at 1232; *see also SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C.Cir.2000).

Disentangling the tobacco companies' legal and illegal profits might also be a "near-impossible task." The government offers evidence that the tobacco companies not only fraudulently suggested that smoking was harmless and nonaddictive, but did so through a comprehensive, decades-long pattern of deliberate behavior. The government further offers evidence that advertising is a "very substantial influence on young people starting to smoke," *see* Appellee's App. at 783, and that the tobacco companies committed RICO violations in advertising to young people while publicly denying that they were doing so. Under *First City Financial*, then, the government's calculations serve as a reasonable approximation: just as we permit actual profits in insider trading cases to serve as a proxy for ill-gotten gains, so too can actual profits from sales to the YAP meet the government's initial burden of reasonably approximating the tobacco companies' unlawful gains. The burden would thus shift to Philip Morris to "demonstrate that the disgorgement figure was not a reasonable approximation," 890 F.2d at 1232, and the district court would have to sort out who is right.

ST. ELIZABETH'S MEDICAL CENTER OF BOSTON, INC., Appellant

v.

Tommy G. THOMPSON, in his official capacity as Secretary of the U.S. Department of Health and Human Services, Appellee

No. 04–5092.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 7, 2004.

Decided Feb. 4, 2005.

Background: Hospital brought action seeking review of decision of Secretary of Health and Human Services (HHS), denying it a new provider exemption from routine cost limits on Medicare reimbursement for its newly opened skilled nursing facility (SNF). The United States District Court for the District of Columbia, Urbina, J., 307 F.Supp.2d 73, granted summary judgment in favor of the Secretary. Hospital appealed.

Holdings: The Court of Appeals, Sentelle, Circuit Judge, held that:

(1) Medicaid-certified nursing facility that sold its bed rights to hospital was not

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claim without prior evidentiary hearings. This, however, is not such a case and we decline to review this issue on direct appeal. This determination however, does not affect Grandison's right to apply for relief in a § 2255 proceeding should he elect to do so.

AFFIRMED.

UNITED STATES of America, Appellee,

v.

W.F. BRINKLEY & SON CONSTRUCTION COMPANY, INC. and William F. Brinkley, Jr., Appellants.

No. 84-5355.

United States Court of Appeals, Fourth Circuit.

Argued Aug. 2, 1985.

Decided Feb. 21, 1986.

Construction contracting company and its president were convicted in the United States District for the Eastern District of North Carolina, Terrence William Boyle, J., of conspiring to rig bids on construction project. Defendants appealed. The Court of Appeals, Sneeden, Circuit Judge, held that: (1) by agreeing to give remaining competitor amount to bid, low bidder gained knowledge that competitor would not actually be competing for contract, affording low bidder opportunity to inflate bid, and such conduct constituted "bid rigging" in violation of antitrust laws, and (2) trial court did not err in instruction defining "bid rigging" or in its instructions concerning requisite intent in cases involving per se violation of antitrust law.

Affirmed.

1. Monopolies ⇐12(2)

By agreeing to give remaining competitor amount to bid, low bidder gained knowledge that competitor would not actually be competing for contract, affording low bidder opportunity to inflate bid, while competitor preserved appearance of being legitimate competitor for contract, and such conduct constituted "bid rigging" in violation of antitrust laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2. Federal Courts ⇐638

Issue of whether trial court erred in its instruction defining "bid rigging" was not properly preserved for appeal, where objection to that portion of instructions was withdrawn.

See publication Words and Phrases for other judicial constructions and definitions.

3. Monopolies ⇐12(2)

Where two or more persons agree that one will submit bid for project higher or lower than others or that one will not submit bid at all, "bid rigging" has occurred, and there has been unreasonable restraint of trade which violates Sherman Anti-Trust Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4. Monopolies ⇐29

Holding that intent element in criminal antitrust actions must be proved and cannot be presumed does not apply in same manner in cases involving per se violation, as it does in rule of reason cases.

5. Monopolies ⇐29, 31(2.4)

In prosecution for conspiracy to rig bids on construction project, Government had to prove beyond reasonable doubt that defendants either participated in combination or in conspiracy for purpose of producing of anticompetitive effects or that defendants participated in combination or conspiracy with knowledge that would produce anticompetitive effects and that effects were produced, and element of intent would be established if defendant's act, knowingly done, resulted in agreement of type forbidden by Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

N. Carlton Tilley, Jr. (William L. Osteen, Osteen, Adams, Tilley & Walker, Greensboro, N.C., on brief), for appellants.

Robert B. Nicholson (John P. Fonte, Charles P. Rule, Acting Asst. Atty. Gen., Washington, D.C., Carl W. Mullis, III, Atlanta, Ga., Bargery G. Williams, on brief), for appellee.

Before PHILLIPS and SNEEDEN, Circuit Judges, and JONES, United States District Judge for the Western District of North Carolina, sitting by designation.

SNEEDEN, Circuit Judge:

The defendants, William F. Brinkley, Jr. and W.F. Brinkley & Son Construction Company ("Brinkley & Son"), appeal their convictions of one count of conspiring to rig bids on a construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Brinkley, president of Brinkley & Son was sentenced to 30 days incarceration and fined $25,000. The company was fined $100,000.

The appellants contend that the trial court erred by denying their motion for judgment of acquittal and by improperly instructing the jury on the definition of bid rigging and on the requisite intent to violate Section 1 of the Sherman Act. Finding no error below, we affirm their convictions.

I.

This case concerns the 1979 bidding process for a portion of the Pasquotank River Supply Project undertaken by Elizabeth City, North Carolina. For several years Elizabeth City considered the need to supplement its raw water supply, finally concluding that obtaining water from the adjacent Pasquotank River was the best alternative. The overall project was divided into several subprojects, each of which was to be awarded through a competitive bidding process. Contract 12, at issue in this case, involved constructing a pumping station at the river and laying a pipeline system to carry the water to a treatment plant.

Contract 12, along with several other subprojects, was first let for bidding in 1977. The city received bids from Brinkley & Son; Dickerson, Inc. ("Dickerson"); Crain & Denbo, Inc. ("Crain & Denbo"); and Dellinger, Inc.[1] Brinkley & Son was the low bidder with a bid of $653,000. Contract 12 was not awarded in 1977, however, because bids on other projects were significantly higher than expected and the city decided not to award any of the contracts.

In the summer of 1979, Elizabeth City again offered Contract 12 for bidding. Brinkley & Son, Dickerson, and Crain & Denbo submitted bids. Brinkley & Son was again the low bidder—this time with a significantly higher bid of $995,000—and was awarded the contract.

At trial, representatives of both Dickerson and Crain & Denbo testified as immunized witnesses for the government concerning events which preceded the 1979 bidding. Frank Carpenter, the Utility Division manager for Dickerson, testified that he spoke with William Brinkley prior to the bidding and told him that they should try to get the contract together again[2] and that Dickerson would "honor" Brinkley's low bid from 1977. Joint Appendix at 59–60 and 103. Carpenter stated that Brinkley indicated his agreement with that suggestion. Joint Appendix at 60. While Carpenter could not recall the specific wording of his conversation with Brinkley—a point on which he was vigorously cross-examined by defense counsel—he remembered that the substance of the conversation was that

1. Prior to the bidding, Brinkley & Son and Dickerson entered into an agreement whereby each company agreed to give the other a subcontract estimate for a portion of Contract 12. Brinkley, which specializes in plant work, gave Dickerson a subcontract price for the pumping station construction; and Dickerson, which specializes in pipeline work, gave Brinkley a price for the pipeline work. While both companies submitted a competitive prime contractor bid on Contract 12, each agreed that if it won the contract it would subcontract the relevant portion to the other company.

2. *See supra* note 1.

Dickerson would intentionally submit a high or "complementary" bid to ensure that Brinkley would again be the low bidder. Joint Appendix at 79. Carpenter further testified that, to the best of his recollection, the amount which Dickerson bid in 1979 for Contract 12 was given to him by Brinkley. Joint Appendix at 73.

Harold Crain, Jr., and Edward Denbo, Jr., of Crain & Denbo, the third company to submit a bid in 1979, also testified. Both Crain and Denbo stated that, on the morning of the day that bids were to be submitted, they telephoned William Brinkley and asked that he give them a "safe" number to bid on Contract 12. Joint Appendix at 165. Both further testified that Brinkley agreed to give them an amount to bid on the project. Joint Appendix at 129–130 and 165. Crain and Denbo indicated that they had originally intended to submit a competitive bid but were unable to complete the bid when a subcontractor failed to give them a price for the pipeline work. Joint Appendix at 145 and 167. Thus, their options at that point were to submit no bid, to guess on an amount, or to obtain a safe number from another contractor. Joint Appendix at 156. They testified that they rejected the alternative of failing to submit a bid because they did not want to offend the project engineer. Joint Appendix at 147. Fearing a costly mistake if they simply guessed on a bid amount, they decided to contact William Brinkley for a safe number to bid.[3] Joint Appendix at 149. Both Crain and Denbo stated during cross-examination that they decided not to submit a competitive bid prior to discussions with Brinkley. Joint Appendix at 146 and 181.

Gene Greer, an employee of Crain & Denbo, then testified that he went to Brinkley's motel shortly before noon on the day of the bidding and was given an amount to bid by Brinkley. Greer stated that he then filled out a bid, placed it in a sealed envelope, and gave it to Brinkley to turn in for him. Joint Appendix at 185–187. Greer further testified that Brinkley appeared to be working on Brinkley & Son's bid, which was due at 2:00 p.m. that afternoon. Joint Appendix at 185–186.

II.

The appellants first argue that the district court erred in denying their motion for judgment of acquittal, both at the conclusion of the government's case and at the close of all the evidence, because there was insufficient evidence of an agreement between Crain & Denbo and appellants to rig bids.[4] Pointing out that unilateral action cannot violate Section 1 of the Sherman Act, the appellants argue that there was no agreement to rig bids because Crain and Denbo[5] had decided not to compete for Contract 12 *before* contacting Brinkley.[6] Appellants maintain that Crain & Denbo's decision was thus the result of unilateral action and not the result of a conspiracy involving the appellants. Under the appellants' view, one could never be convicted of bid rigging for simply giving a competitor a safe number to bid once that competitor

3. Crain and Denbo also testified that, prior to the bidding in 1977, Brinkley contacted them for safe numbers to bid on Contracts 7 and 8 of the Pasquotank River Supply Project. They further testified that they supplied him with those numbers. Joint Appendix at 136 and 170.

4. The appellants contend that the general nature of the jury's verdict makes it impossible to tell whether the jury looked to the alleged agreement between Carpenter and Brinkley, the alleged agreement between Crain & Denbo and Brinkley, or both, to support its verdict. The possibility that the jury relied only on the agreement between Crain & Denbo and Brinkley—one which they claim did not exist—gives rise to their argument that the evidence was insufficient. Without commenting on this contention by the appellants, we address the issue of whether the evidence regarding the conduct of Crain, Denbo and Brinkley is sufficient to support appellants' convictions of bid rigging.

5. Of course, a corporation acts through its officers or agents. The use of the conjunctive "and" instead of the ampersand indicates actions by the individuals on behalf of the corporation.

6. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The necessity of concerted action is apparent on the face of the statute.

had decided for himself not to compete for a particular contract.[7]

[1] We agree with appellants' assertion that unilateral action does not violate Section 1, but that is the extent of our agreement with their position. Contrary to the appellant's argument that Crain & Denbo acted unilaterally, the facts of this case clearly demonstrate concerted action by Crain & Denbo and Brinkley on the submission of bids to Elizabeth City. While Crain and Denbo might have decided between themselves not to submit a competitive bid on Contract 12, they went beyond unilateral action when they contacted Brinkley requesting a safe number to bid and he consented to give them one. At that point, there was an agreement between two competitors pursuant to which bids would be submitted to Elizabeth City. Such an agreement is clearly bid rigging. As Judge Russell explained in *United States v. Portsmouth Paving Corp.*, "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging *per se* violative of 15 U.S.C. § 1." 694 F.2d 312, 325 (4th Cir. 1982), (citations omitted).

The appellants would have liability under the Sherman Act turn on the fact that Crain and Denbo decided not to bid competitively for Contract 12 prior to contacting Brinkley. We cannot accept such a proposition. Regardless of which competitor initiated the contact, and regardless of the reason, the agreement between these competitors clearly deprived Elizabeth City of the benefits of a competitive bidding process. By agreeing to give his remaining competitor an amount to bid, Brinkley gained the knowledge that Crain & Denbo would not actually be competing for Contract 12. That knowledge afforded him the opportunity to inflate his bid, confident that he would still be the low bidder.[8] Crain & Denbo received a number which it could submit as a "complementary" or intentionally high bid, thus preserving the appearance of being a legitimate competitor for the contract. The only entity that did not benefit from the arrangement was Elizabeth City, which thought it was awarding the contract for the lowest possible cost.

Moreover, as the government points out in its brief, accepting the appellants' position would lead to self-serving testimony in virtually every bid rigging trial. Brief for Appellee at 20. Rarely would a competitor make anything other than a unilateral decision not to submit a competitive bid.

It is clear that appellants' conduct constituted bid rigging in violation of the antitrust laws and that the evidence in this case is more than sufficient to support the jury's verdict. The district court therefore properly denied appellants' motion for judgment of acquittal.

7. To that end, the appellants requested that the trial court give the following instruction to the jury:

> Members of the jury, I instruct you that certain conduct, standing alone, is not a violation of the Sherman Anti-Trust [sic] Act. It is not, for example, a violation—nothing more appearing—for one contractor to give another contractor a price to bid above if so requested when the contractor requesting the price has already determined independently and unilaterally not to compete for the project.

Brief of Appellant at 15. For the reasons set forth below, we find that the district court properly refused to give such an instruction.

8. There is evidence in the record to suggest that Brinkley did indeed inflate his bid. In 1977, Brinkley & Son won Contract 12 with a low bid of $653,000. Two years later, Brinkley & Son won the contract with a bid of $995,000. The project design was not altered between 1977 and 1979. Joint Appendix at 47. Assuming a 23 percent rate of inflation in construction costs—to which the parties stipulated—Brinkley should have adjusted his bid to $803,000. Joint Appendix at 50.

Moreover, Dickerson, to whom Brinkley subcontracted the pipeline work for $555,000, apparently earned a substantial profit on the project. Carpenter testified that while Dickerson normally estimated a profit of 15 percent on such projects, it estimated a 25 percent profit in its 1979 subcontract price to Brinkley because "there was very little competition on the job." Joint Appendix at 79. Carpenter further testified that Dickerson's actual gross profit on the job was 49 percent. Joint Appendix at 78.

III.

[2, 3] The appellants next contend that the trial court erred in its instruction defining bid rigging. This argument need not long detain us. By withdrawing their objection to this portion of the trial court's instructions, Joint Appendix at 229–230, appellants failed to properly preserve this issue on appeal as required by Rule 30 of the Federal Rules of Criminal Procedure. Appellants now assert, as they must, that the trial court's instruction defining bid rigging constituted plain error. They suggest that the district court should have told the jury that "[b]id rigging is an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job that is to be awarded on the basis of bids."[9] Brief of Appellants at 19. However, we find the district court did not err in providing the following instruction:

> Under the law, a conspiracy to allocate projects or rig bids is automatically or per se unreasonable and illegal. Therefore, where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act.

Joint Appendix at 221. The above instruction, read in conjunction with the remainder of the court's instructions, is an accurate statement of the law and a proper definition of bid rigging.

IV.

The appellants' final argument also focuses on alleged inaccuracies in the instructions given by the district court. The appellants contend that the court committed reversible error in its instructions concerning the intent required to violate the Sherman Act. The district court instructed the jury, in relevant part, as follows:

> The crime charged in this case requires proof of intent before the defendants can be convicted. To establish the required intent, the government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case, that means that the government must prove beyond a reasonable doubt that the defendants formed, joined or participated in a combination or conspiracy to allocate the project charged in the indictment or to submit collusive and non-competitive bids on the project.
>
> Moreover, the *Government must also prove beyond a reasonable doubt that the defendants either participated in this combination or conspiracy with the purpose of producing anti-competitive effects or that the defendants participated in the combination or conspiracy with knowledge that this agreement would produce anti-competitive effects and these effects actually were produced.*
>
> The word "knowingly" as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident. The purpose of adding the word "knowingly" is to ensure that no defendant will be convicted for an act done because of inadvertent accidents or other innocent reasons. *If a defendant's act, knowingly done, resulted in an agreement of the type forbidden by the Sherman Act, such as an agreement to rig bids, the element of intent is established.* It is also unnecessary for the government to prove that the defendants knew that the agreement, combination or conspiracy to allocate the construction project or to rig bids was a violation of the law.

Joint Appendix at 219–221 (emphasis added).

The appellants object to the court's statement that the element of intent is established if the "defendant's act, knowingly

9. This suggested instruction is obviously based on appellants' argument that there was no agreement between Crain & Denbo and Brinkley to restrain trade because Crain & Denbo had unilaterally decided not to compete for Contract 12. We again reject this argument and any instruction based thereon.

done, resulted in an agreement ... to rig bids." Joint Appendix at 220. They contend that this statement essentially nullified the earlier portion of the court's instruction that the Government must prove the appellants' knowledge or purpose concerning the anti-competitive effects of the conspiracy and thereby removed from the jury the duty to find that appellants intended to produce such effects. They argue, therefore, that the district court's instructions contravene the decision of the Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), which holds that the intent element in criminal antitrust actions must be proved and cannot be presumed. We reject this argument, as we are required to do by prior decisions of this circuit.

[4] In *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir.1979), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 859, 66 L.Ed.2d 801 (1981), this court declined to apply *Gypsum* in a case in which the defendant's conduct constituted a *per se* violation of the Sherman Act. In his opinion for the court, Judge Field explained that the conduct in *Gypsum* concerned price verification, a practice not regarded as a *per se* antitrust violation. "Since in a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendant's illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' " *United States v. Society of Independent Gasoline Marketers*, 624 F.2d at 465 (citations omitted). Thus, the holding in *Gypsum* concerning proof of intent does not apply in the same manner in cases involving a *per se* violation, as it does in rule of reason cases.

In *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527 (4th Cir.), *cert. denied sub nom., Dellinger, Inc. v. United States*, — U.S. —, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985), this court recently reaffirmed its position concerning the intent that must be shown in *per se* cases. The defendants in *Smith* were charged, as were the defendants in the present case, with bid rigging in violation of Section 1 of the Sherman Act. Rejecting a challenge to an instruction similar to the instruction given in this case, we held that "this circuit recognizes *per se* antitrust violations. Therefore, the trial court correctly instructed the jury that the government must prove the defendants' intentional participation in the conspiracy to rig bids. The government did not have to prove the defendants' specific intent to unreasonably restrain trade." *Id.* at 533.[10]

V.

[5] We find that the trial court's instructions in this case constituted an accurate statement of the law concerning the requisite intent in cases involving *per se* violations of antitrust law. We therefore find no error on the part of the district court.

The convictions of the appellants are AFFIRMED.

10. Other circuits have considered the application of *Gypsum* in *per se* cases and have reached the same conclusion as this circuit. *See United States v. Koppers Co., Inc.*, 652 F.2d 290, 295–96, n. 6 (2nd Cir.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981) ("Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid."); and *United States v. Brighton Building and Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979) ("We do not read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement which is unlawful *per se*, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce.").

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Overview [1998] Lloyd's Rep Med 223, [1998] PIQR P 324, | **[1998] Lexis Citation 18**, [1998] 4 ML 4

Wisniewski v Central Manchester Health Authority [1998] Lexis Citation 18

CA, CIVIL DIVISION

QBENF 96/0572/CMS1

Roch, Aldous & Brooke LJJ

1 April 1998

01/04/1998

Wednesday 1 April 1998

LORD JUSTICE BROOKE: This is an appeal by the Defendant health authority from a judgment of Thomas J sitting at ***Manchester*** on 2nd April 1996 when he directed that judgment be entered for the Plaintiff in this medical negligence action. Damages were agreed between the parties during the course of the trial, and the judge was only concerned to decide the question of liability.

At the centre of this litigation is a boy called Philip. He is now 10 years old. He was born at St Mary's Hospital ***Manchester*** in the early hours of the morning of 15th January 1988 and he has suffered from athetoid cerebral palsy from birth. In an admirably clear judgment the judge held that he suffered irreversible damage to his brain in the 13 minutes immediately prior to his birth at 5.40 am because as he moved down the birth canal the umbilical cord was wrapped round his neck and had a knot in it. He was effectively being strangled. His mother had been admitted to hospital at 2.50 am, less than 3 hours earlier, and the judge held that if her care had not been negligently mismanaged, a doctor would have carried out an artificial rupture of the membranes (ARM) shortly after 3.40 am, and such an exercise would inevitably have disclosed the presence of a substance called meconium. This discovery would have led to the child being born by caesarean section, thus obviating the hazards of birth down the birth canal.

The Defendants' case both at trial and in this court is essentially that there was a respectable school of medical practitioners who would not have moved immediately to investigate intervention at the sign of possible trouble which revealed itself at 3.40 am and that by the time any further trouble signs appeared it would have been too late to perform a caesarean. It is therefore said that the judge did what the House of Lords in *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151 has again very recently affirmed that he must not do, which was to substitute his own assessment of what would have been an appropriate standard of care for the standard considered appropriate by a responsible body of skilled medical opinion. There are two further issues in the appeal, one connected with the judge's positive finding, in the absence of the relevant doctor from the trial, as to what he would have done if he had attended his patient at 3.40 am, and one connected with issues of causation.

Philip's mother had given birth to her first child, who is a healthy boy, in 1985. She had been admitted to the same hospital for four days towards the end of that pregnancy with high blood pressure. A trace of protein in her urine had indicated pre-eclampsia, but further testing had eliminated this possibility.

For her second pregnancy, when she was 31 years old, the expected date of delivery was 7th January 1988. Five days later high blood pressure was disclosed at a routine check-up and she was admitted to hospital overnight. This helped her blood pressure to return to normal. The following evening (14th January) she began to feel mild

contractions, and her husband took her to St Mary's Hospital in the early hours of 15th January, arriving there at about 2.50 am. St Mary's is a major teaching hospital with a specialist obstetric unit.

The relevant staff on duty that night were Sister Brockbank, the midwife sister on duty, and Dr Renninson, the resident senior house officer ("SHO") on call. No other member of the hospital's staff figures in this story until a number of people came on the scene during the events surrounding Philip's birth about three hours later. Sister Brockbank had qualified as a SRN in 1974 and as a midwife in 1978. She had served on the staff of this hospital since 1979 and was promoted to midwife sister in 1982. She had had a lot of practical experience as a midwife, since in an average week the hospital had 40-50 mothers in labour. Dr Renninson, on the other hand, had qualified as a doctor at ***Manchester*** University as recently as 1985. After obtaining experience at two other local hospitals as a house physician and house surgeon between August 1985 and July 1986, he had had six months experience as a SHO in obstetrics and gynaecology at one of those other hospitals, and had then come to St Mary's Hospital as a SHO in obstetrics and gynaecology in February 1987. At the time these events took place, therefore, he had had 17 months experience in this speciality, which included 11 months experience of managing patients on delivery suites.

The Defendants faced the difficulty that the Plaintiffs' solicitors' letter before action was not written until over three years after Philip was born (9th April 1991), the writ was not served for another 21 months (21st March 1993), and the trial of the action started more than eight years after Philip's birth. In those circumstances it is hardly surprising that Sister Brockbank told the judge that she could not recall what had happened prior to the actual delivery (although she did remember the delivery itself because it was so rapid) and Dr Renninson said in a written statement that he had no independent recollection of his involvement in the management of this case at all. By the time of the trial Dr Renninson had obtained an appointment at a cancer centre in Australia, and he did not return to England to give evidence at the trial, a matter which evoked adverse comment from the judge to which I will refer in due course. For the events prior to delivery Sister Brockbank was constrained to try and reconstruct the history of what had happened from the entries in the admission records and other records and from her usual practice.

Soon after Mrs ***Wisniewski*** was admitted Sister Brockbank carried out an abdominal examination. She recorded the foetus heart beat as 160 and regular and the position of the foetus as a cephalic presentation with the head 3-4/5ths palpable. The contractions were noted as irregular. At 3.05 am she carried out a vaginal examination. She recorded that the cervix was 1-2cm dilated, that the head was 3cm above the ischial spines, and that it bobbed out of the pelvis as she was making her vaginal examination. She said she would not have pushed the foetus: the head, which was in the pelvic rim and not completely free, would have just moved at her touch. She considered that Philip's mother was a normal patient in niggling or early labour and arranged for her to be taken to the pre-delivery room.

At 3.10 am she started electronic monitoring of the foetal heart rate using a Corometric monitor. This monitor displayed a digital readout of the foetal heart beat and recorded both the heart beat and the contractions on a cardiotachograph (CTG) trace. Between 3.10 am and 3.40 am the trace showed a foetal heart rate baseline of between 170 beats per minute (bpm) and 175 bpm, rising to 180 bpm, but not dropping below 160 bpm. The trace showed that the beat to beat variability was 5 bpm, which was considered to be at the bottom end of normal.

During this period there were two early decelerations in the foetal heart rate when the rate fell to 130 bpm (at 3.23 am) and 110 bpm (at 3.40 am) although it rapidly recovered on both occasions. The Plaintiff's case stands or falls by the contention put forward by his expert witnesses that the early deceleration identified on the CTG trace at 3.40 am called for investigative intervention at that stage and that to adopt a policy of waiting to see if there were any further indications of trouble would have been negligent.

There is a note made by Sister Brockbank in the admission record against the time of 3.40 am which stated, after noting the CTG readings:

"Dr Renninson informed. Patient to remain in (central delivery unit) - observe.

Patient may mobilise."

The judge found that Sister Brockbank went to speak to Dr Renninson at this time, and that he did not attend Mrs ***Wisniewski*** or examine her or see the CTG trace himself. Instead, he probably assented to Sister Brockbank's advice on what to do. Sister Brockbank had told the judge that she had decided to contact Dr Renninson mainly because of the quick foetal heart beat (tachycardia) - in 1988 the normal range for a foetal heart rate was considered to be between 120 bpm and 160 bpm - but also in relation to the deceleration to 110 bpm at 3.40 am. There were some inconsistencies in her evidence, and the judge eventually held that she had failed to tell Dr Renninson about the tachycardia, since this was not expressly mentioned in Dr Renninson's statement. He went on to hold that the Defendants were negligent in that Dr Renninson should have attended and examined Mrs ***Wisniewski*** at this time. He found that there was nothing else happening in the hospital that night which properly prevented the attendance of Dr Renninson or another doctor, or excused his failure to attend. These findings are not challenged by the Defendants on this appeal. They understandably take the view that whether this omission was caused by the midwife not telling the doctor the full story or by the doctor, on the assumption that he was told the full story, failing to attend, the result would have been the same and as the responsible health authority they would be vicariously liable in either event.

The judge also found that it was Sister Brockbank who took the decision to disconnect the electronic monitor and allow Mrs ***Wisniewski*** to walk about the ward. She said that she might have made this decision, which was the type of decision midwives often make, of her own motion or in answer to a request to go to the toilet. The judge also accepted the evidence of Mr and Mrs ***Wisniewski*** that between 3.40 am and 4.20 am, when the monitor was reconnected, Sister Brockbank did not at any time check the foetal heart rate with a stethoscope or a sonicaid. But although the judge held that the Defendants were negligent in failing to ensure continuous electronic monitoring during this period, nothing now turns on this finding because the judge held that the Plaintiff had not proved that there was any material difference in the foetal heart rate during this period, and there is no cross-appeal against this finding. At 4.20 am Sister Brockbank noted that there were 2 weak contractions every 10 minutes and that the foetal heart rate was 170 beats per minute and regular. She made no further notes until 5 am, and the judge accepted the evidence of Mr and Mrs ***Wisniewski*** that Sister Brockbank did not come and look at the trace again after the CTG was reconnected until Mr ***Wisniewski*** went and fetched her when the trace seemed to be going haywire at 5 am.

The judge found that the earliest time by which delivery by caesarean section might have been carried out, following investigation at 3.40 am, would have been 4.00 am, and the latest time 4.30 am, and that if Philip had been born by that method he would not have encountered the catastrophe which actually befell him. It was not till 4.50 am, 30 minutes after the trace had been recommenced, that the judge held that there was again evidence on the CTG of a deterioration sufficient to warrant intervention in the course of labour by an ARM. He found that the Plaintiff had failed to prove that it would have been possible to carry out a caesarean section safely, following a decision to rupture the membrane after the deceleration observed at 4.50 am, even if the ARM had been performed without taking a foetal blood sample. In the event Sister Brockbank performed an ARM at 5.20 am, and events then moved very swiftly towards the baby's birth only 20 minutes later.

The result of this appeal therefore turns critically on the findings that ought to follow the judge's unchallenged finding that the Defendants were negligent because Mrs ***Wisniewski*** was not examined by the SHO on duty soon after the early deceleration was noted on the CTG at 3.40 am. In one respect this court has an advantage not available to the judge, since the decision of the House of Lords in *Bolitho* was handed down in November 1997, long after the judgment at first instance. I will first describe the way the judge approached these additional findings before I go on to consider Mr Grime QC's criticisms of the approach he adopted.

The judge set out in his judgment passages from the judgment of Farquharson LJ (with whom Dillon LJ agreed) in this court in *Bolitho* [1993] PIQR P 334, at p 342 and from the judgments of Hobhouse and Roch LJJ in *Joyce v Merton, Sutton and Wandsworth HA* [1995] *27 BMLR 124*, at pp 155-6 and 145. The judge deduced from these

cases that he had an obligation to make findings as to what Dr Renninson would have done if he had attended, and what a hypothetical competent doctor would have done in his place, and also findings as to whether, if Dr Renninson had not proceeded to rupture the membrane artificially and gone on to decide upon a caesarean section, this would have been contrary to responsible medical practice. If Dr Renninson (or a competent substitute) would probably have performed an ARM soon after 3.40 am, there would be no need to undertake the second, more complex investigation, since the Plaintiff would have proved as a fact that but for the Defendant's negligence an ARM would have been performed which would have led inevitably to a decision to perform a caesarean section and would have avoided the hazard that in fact befell him.

On the question of what Dr Renninson himself would have done the judge adopted the following course. The Defendants' solicitors had disclosed on 10th August 1994 a short statement signed by Dr Renninson a week earlier from an address in Cheshire, in which he made it clear that he had no recollection of his involvement in the management of this case. Apart from the question of what happened or did not happen at about 3.40 am, there was never any suggestion that he was involved again in any way until 5.27 am (13 minutes before the baby's birth) when he was told of the presence of meconium-stained liquor associated with foetal tachycardia and he (and many others) attended the labour ward immediately. There were hints at the trial, which he was not present to refute, that he might have been asleep in the room at the hospital which is made available for this purpose for busy SHOs on call at night.

As I have said, Dr Renninson did not give evidence at the trial. A Notice under the Civil Evidence Act 1968 was served on 16th January 1996 seeking to put his written statement in evidence because he was beyond the seas: the Plaintiff's solicitors served a counter-notice on 1st February on the grounds that he was one of only two material witnesses to the events complained of, and that the Plaintiff would be severely prejudiced by being deprived of the opportunity to cross-examine him as to the contents of his statement which directly contradicted the medical notes. On 8th February 1996 the doctor wrote a letter, which the Defendants' solicitor exhibited to an affidavit, explaining that he was reaching the end of his medical training in gynaecological cancer surgery at the Women's Cancer Centre in Sydney, Australia, and that he did not intend to return to England with his wife and three children until August 1996 or, possibly, August 1997. The Plaintiff's legal advisers then made an unsuccessful application to a district judge for an order requiring Dr Renninson to return to England to give evidence at the trial. Nobody seems to have considered the possibility of arranging for Dr Renninson to give evidence by video-link, although he had said in his letter he would be happy to help in any way possible from where he was. At the close of the Defendant's case at the trial the judge reluctantly admitted his statement as hearsay evidence although he was not willing to give its contents much weight.

The reason for this was that the judge took a dim view of Dr Renninson's attitude, from which he was willing to make findings adverse to the Defendants. Two passages in his judgment touch on this point. At p 12 the judge said in relation to the question whether Dr Renninson attended at 3.40 am:

"Dr Renninson's evidence was only given by way of a statement. There was no justifiable reason which explained his non attendance at the trial to give evidence and be cross-examined on his statement, and no reason why some other arrangements could not have been made had the defendants so chosen. For this reason and because his statement was equivocal on whether he attended or not, I attach little weight to his evidence on this issue. However, his statement, the circumstances of his non-attendance and the failure to submit his evidence to cross examination give rise to further consequences to which I refer at page 21"

On p 21, following a heading “What would Dr Renninson have done?”, the judge said:

"Dr Renninson's statement does not mention that he was told of the tachycardia and I do not accept the evidence of Sister Brockbank that he was. For the reasons given, I find her an unreliable witness and her evidence as to why she contacted Dr Renninson was contradictory; she was not sufficiently concerned about Mrs ***Wisniewski***'s condition to give him a full picture.

As I have already observed, Dr Renninson's statement does not deal with what he might have done if he had had full information and examined the CTG trace and Mrs ***Wisniewski***. The statement does not seek to answer the serious criticism made as to what ought to have been done.

It was submitted by Mr Redfern that I should infer from Dr Renninson's failure to attend that he had no answer to the criticism made and that I should therefore find that he would after examination of Mrs ***Wisniewski*** and the CTG trace have concluded because of the tachycardia and decelerations that it was necessary to rupture the membrane and concluded it was safe to do so and thereafter proceeded to a caesarean section; see *Chapman v Copeland* (1966) 110 SJ 569; *British Railways Board v Herrington* [1972] AC 877 at p 930. In my judgment this is an inference that I can and should draw; there was no legitimate reason put forward by Dr Renninson for not returning to this country for the trial; furthermore there was no explanation from the defendants for not taking his evidence in Australia on commission or otherwise so he could have been cross examined and given evidence as to what he might have done. I conclude that a decision not to call him or to take his evidence in Australia was made for tactical reasons; the defendants cannot therefore complain if I draw this adverse inference against them."

If the Plaintiff is able to hold this positive finding on appeal, then there would be no need to go any further. The judge went on:

"However, it is rightly pointed out that the evidence of the actual doctor who should have attended should be treated with a degree of caution, and it is therefore right that I also find what a competent doctor would have done had he attended."

The judge then reminded himself on the way in which Mr Redfern QC had put the case for the Plaintiff. He had argued that it was clear that the foetus was distressed by 3.40 am and that the cause of this was not easy to determine. There were grave risks in allowing the delivery to continue without intervention and great benefit in rupturing the membrane and then proceeding to a caesarean section with only a small risk attached. In these circumstances he had submitted that it was negligent of a doctor to have run the grave risks inherent in non-intervention at 3.40 am and not to have ruptured the membrane and then performed a caesarean section.

The judge said he was satisfied that a competent doctor would have concluded that an ARM should be performed and that it was safe to do so and that he would have then proceeded to perform a caesarean section. He said that the only real risk that was entailed in carrying out an ARM at or shortly after 3.40 am was the possibility of a cord prolapse; there was no risk of accelerating labour at that time. Any competent assessment of that risk would have to take into account an examination to see if the cord could be felt, the position of the head (which the judge held was not free at that time), and the risk of the head moving. He said that this risk of movement could have been overcome by requiring the midwife to push the foetus down, as suggested by Mr Johnson, who was one of the Plaintiff's expert witnesses.

Against that risk (which the judge considered to be very low) there was the evidence of distress to the foetus as evidenced by the CTG trace. The cause of that distress was not possible to determine, but there was a foreseeable and likely risk that the cause might well be one that would lead to cerebral damage (or worse) from hypoxia. It was highly desirable to see if that risk was real by rupturing the membrane to ascertain whether meconium was present.

The judge said that a competent doctor would balance these risks, and he had no doubt that the only proper course in the circumstances was to carry out an ARM.

The judge then went on to consider whether a decision to delay rupturing the membrane but to continue observation would have been consistent with an approach that would have been adopted by a responsible body of medical opinion.

On this question he was confronted, as is common in contested litigation of this type, with a conflict of expert

opinion. The Plaintiff's experts were Mr Anthony Johnson and Mr G J Jarvis, the Defendants' experts Mr R R Macdonald and Professor E J Thomas. The judge was clearly impressed by the long periods of “hands on” experience in obstetrics and gynaecology professed by the first three of these witnesses. He described them all as eminent consultants and impressive witnesses (“most impressive”, so far as Mr Johnson was concerned), and he dismissed a challenge made by Mr Redfern to Mr Macdonald's integrity. In addition to calling Mr Macdonald an impressive witness, the judge described him as a honest and impartial expert.

Professor Thomas's experience had been different from the other three. He had specialised in obstetrics and gynaecology since 1984, and his “hands on” experience as a consultant was much shorter. He had first become a consultant at Newcastle General Hospital and a lecturer at Newcastle University in 1987. At the end of 1990 he had taken up a post as professor and consultant at Southampton University, and since August 1995 he had been Dean of Medicine there, so that inevitably much of his time in the eight months before the trial was taken up in administration. Apart from making an observation about the shorter length of his experience, the judge was disposed to find fault with Professor Thomas for being reluctant to criticise any conduct on the part of the Defendants even where criticism was plainly merited, and for not being prepared to give straight answers to questions. The judge described him, nevertheless, as an eminent consultant and rejected the attack Mr Redfern also made on his integrity.

In his judgment the judge set out the contrasting approaches of the two pairs of experts.

Mr Johnson and Mr Jarvis both said that if a doctor had assessed the CTG trace at 3.40 am it would have been important for him to take into account what was known about Mrs ***Wisniewski***'s condition. She was 31 years old, eight days post term, and had had high blood pressure during both this and her earlier pregnancy. Whilst none of this evidence was in itself significant, when these factors were taken together there was a need for a doctor to be more alert because they contributed to the risk. They considered Mrs ***Wisniewski*** to be part of the way up the scale of risk, or at the low end of high risk.

They both considered that since by 3.40 am the CTG was still showing a baseline tachycardia without accelerations, this considerably raised the level of risk. Baseline tachycardia which continued for more than the 15-20 minutes that were required to see if it would settle down, was an indication of foetal distress. The first deceleration at 3.23 am (which the judge held to be an early, or Type 1 deceleration, connected with a contraction) should have alerted any doctor to keep a close eye upon the patient. After the second deceleration, which was also Type 1, at 3.40 am, accompanied as it was by the observation of baseline tachycardia for 40 minutes and the evidence of the clinical condition of the mother, they both considered that any competent obstetrician would have appreciated that the situation was serious because there were clear indications of deprivation of oxygen (hypoxia) in the blood of the foetus.

Although common causes of such hypoxia were a cord accident or obstruction, they said that it was not necessary to try and determine the cause immediately. The objective was to treat the baby there and then and worry about the cause later. The next step was therefore to conduct a further vaginal examination and then to proceed to an ARM. If a vaginal examination had been carried out at 3.40 am it would have shown it was safe to carry out an ARM since this was the best way to obtain the further information that was needed.

An ARM would have revealed whether meconium was present in the amniotic fluid and, if it was, this would be a confirmatory sign of foetal distress. Meconium is the intestinal waste expelled through the bowel, which is expelled by a foetus when distressed through anoxia (or during a breech birth, not relevant in this context). An ARM would also enable a foetal scalp electrode to be fitted and this would give a better reading of the foetal heart rate.

Mr Johnson and Mr Jarvis both accepted that there are downside risks involved in carrying out an ARM, particularly the risks of cord prolapse and of accelerating the labour. They considered that there was very little risk of accelerating labour in this case, as it had not progressed far by 3.40 am, and that there was a negligible risk of cord prolapse.

This risk depends in part on the position of the head. If the head is free and high, the risk is greater. Mr Johnson and Mr Jarvis's belief that this risk was negligible was founded on the evidence that the head was engaged at 3.40 am and was not high in the pelvic area. The fact that Sister Brockbank had recorded 50 minutes earlier that the head bobbed out of the pelvis did not mean it was free, and they considered that the relative position of the head to the ischial spines meant it was not free. If the cord had come down, it would have been possible to feel it during the earlier vaginal examination. In any event, if the head was not engaged, Mr Johnson said that, since the baby's head was later found to be a small one, the ARM could have been performed without risk by the midwife pushing down on the foetus, thus preventing the head from moving and eliminating the risk of cord prolapse.

Mr Johnson and Mr Jarvis went on to express their shared opinion that if an ARM had been performed, there was a 90-95% chance that meconium would have been found to be present. They based this belief on their own experience, supported as it was by the description of the meconium found at 5.20 am and by the evidence that when Philip was born there was meconium in his trachea and he was gasping. A caesarean operation would have then followed.

Mr Macdonald and Professor Thomas, on the other hand, were both of the opinion that no action apart from continued monitoring was required at 3.40 am, although Mr Macdonald would not have criticised a doctor who took the course advocated by the Plaintiff's experts. They acknowledged that the three points mentioned about Mrs ***Wisniewski***'s clinical condition should have been borne in mind as indications for closer supervision, although they did not regard them as significant as Mr Johnson and Mr Jarvis considered to be. The fact that she was 31 years old did not concern them because this was her second labour. Since the normal span for delivery was 7 days, she was only one day late. As her blood pressure was only slightly raised it was not relevant. There was, in their view, nothing in her clinical condition that was not within the range of normality, and none of the points that had been raised would have the effect of limiting foetal reserves.

Mr Macdonald accepted that by 3.40 am the trace was “suspicious”. He would have concluded that the foetus was being stressed for some reason and that its reserves were being taken up from the outset. However, the foetal tachycardia might have been associated with maternal anxiety, and although he would have noted it, he would not have considered it a matter of serious concern. After examination he would have been concerned, but he would have continued observation and seen what further progress there was in labour. He might have tried moving the mother's position to see if that brought out an improvement to the trace. His aim would have been to try to work out the cause of the tachycardia, difficult though this might be.

Professor Thomas's evidence was along the same lines. He considered that there were signs of stress present, but he said that this was normal in labour. He did not see any signs of compromise or oxygen deprivation, with the associated risk of cerebral damage. Things, in his opinion, were normal at that stage.

Mr Macdonald would not have carried out an ARM in these circumstances. When asked whether he agreed with Mr Johnson's view about the small risk of a cord prolapse he replied:

"No, I do not. I put more emphasis on that risk, that even if you push the head into the pelvis in order to rupture the membranes the head will tend to rise again when the midwife lets go and there is a significant risk that the cord might come down. But I think my main emphasis is on the point that I would regard this trace as less serious than he did."

This opinion about the risk that the head would tend to rise again when the midwife let go was not challenged in cross-examination. He restated his opinion, even as to the later time of 4.20 am, that the trace did not demonstrate such a degree of hypoxia at that stage that more than continued observation was appropriate.

Professor Thomas's evidence was to the same effect. He was worried about the risk of a cord prolapse. He

had never come across the manoeuvre mentioned by Mr Johnson. He had never been taught to perform it, he had never performed it, and he was unaware of it from the text books he used. Although Mr Johnson's description of it seemed logical, he was worried that if the head was unmoulded at this early stage of labour, a midwife might not actually be able to push it physically into the space that was currently available for it. This concern was not explored or challenged in cross-examination. The judge ascribed his approach to “his relatively less experience”, despite the fact that he had had 11 years experience of obstetrics and gynaecology. Professor Thomas was of the opinion that on balance he would not have ruptured the membrane but continued to monitor. If there was a deterioration, then he would have carried out a rupture of the membrane.

When analysing the effect of this evidence the judge showed that he was influenced by a passage in the judgment of Sachs LJ in *Hucks v Cole* [1993] 4 Med LR 393 at p 397 when he had said that a court must be vigilant to see whether the reasons given for putting a patient at risk were valid in the light of any well-known advance in medical knowledge, or whether they stemmed from a residual adherence to out-of-date ideas.

The judge said:

"In my judgment it is clearly necessary for me to analyse whether the course of treatment put forward by Mr Macdonald and Professor Thomas put the patient unnecessarily at risk and was not one that a competent doctor acting with ordinary skill and care or a responsible body of medical opinion would have followed; see the judgment of Farquharson LJ in *Bolitho* at p 342. I reject the submission that such an analysis takes a trial judge into the medical arena; such an analysis of medical evidence given by experts to see if a view put forward is in fact one that a responsible body of medical practitioners could hold about a clinical judgment on an individual patient is no different in this respect to a similar analysis of a judgment by an accountant, lawyer, underwriter or other professional. A judge has to be conscious of his own lack of medical knowledge and of the fact that clinical decisions are often difficult to make. However where an analysis of the expert evidence on the facts relating to a particular case shows that a decision made by a doctor and supported by experts cannot be justified as one that a responsible medical practitioner would have taken, then a judge should not preclude himself from reaching that conclusion simply because clinical judgment is involved.

For reasons I have set out in the analysis that a competent doctor should have undertaken in assessing the risks involved in deciding whether to rupture the membrane and despite the eminence of Mr Macdonald and Professor Thomas, I consider on a balance of probabilities that no doctor acting with reasonable skill and care and no responsible body of medical opinion would have reached any decision other than to rupture the membrane at or shortly after 3.40 am. The risks of not acting were too great and the downside very small."

In making this finding the judge did not of course have the advantage of the guidance now provided by the House of Lords in *Bolitho*. After referring to *Hucks v Cole* and *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296, Lord Browne-Wilkinson said at p 1160A-E:

"These decisions demonstrate that in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence (I am not here considering questions of disclosure of risk). In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are question of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of

clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman [in *Maynard v West Midlands RHA* [1984] 1 WLR 634, 639] makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed."

Hucks v Cole itself was unquestionably one of the rare cases which Lord Browne-Wilkinson had in mind. A general practitioner, knowing that his patient had a streptococcal infection, kept her on a course of drugs which would not kill the organism, and when that course was over failed to put her on to penicillin. Although four expert defence witnesses defended his conduct, Sachs LJ said that their reasons on examination did not really stand up to analysis.

In my judgment the present case falls unquestionably on the other side of the line, and it is quite impossible for a court to hold that the views sincerely held by Mr Macdonald (“an eminent consultant and an impressive witness”) and Professor Thomas cannot logically be supported at all. These two consultants did not regard Mrs ***Wisniewski*** as anything other than a normal patient. They noted the tachycardia (which Mr Macdonald connected with the high maternal heart rate noted by Sister Brockbank) and the two early decelerations, and they both maintained that it would be consistent with an appropriate standard of care for a doctor to continue observation for the time being, while seeking to ascertain the cause of the suspicious signs.

It is clear from their evidence that neither of them was willing to discount entirely the risk of a cord prolapse, which Mr Johnson had described as a calamitous event if it occurred. Although the baby's head was not entirely free, it had moved when Sister Brockbank touched it, and Mr Macdonald was not convinced that Mr Johnson's preferred expedient of having the baby's head pushed down by the midwife was completely foolproof. He was not cross-examined about this. Professor Thomas (for all his practical and academic experience) had never heard of it, and put up theoretical concerns about it on which he was not challenged in cross-examination, and Mr Jarvis was not asked about it at all. In those circumstances, in my judgment, the judge was wrong to have concluded that any reasonably competent doctor would have resorted to this technique to eliminate the risk of cord prolapse, and the views expressed by Mr Macdonald and Professor Thomas were views which could be logically supported and held by responsible doctors. Needless to say, neither Mr Macdonald nor Professor Thomas would have been willing to countenance a situation in which no monitoring of any kind would have been conducted for the next 40 minutes, and the CTG trace would have then remained unwatched for a further 40, but there is no appeal against the judge's somewhat benign finding that even if such monitoring had taken place between 3.40 and 4.20 am it would not have revealed anything further which would have led a doctor to perform an ARM. After 4.20 am it was not until 4.50 am that the trace displayed evidence on which immediate action should have been taken.

I will now turn to consider the judge's finding that Dr Renninson himself would have performed an ARM if he had attended Mrs ***Wisniewski*** and conducted a vaginal examination soon after 3.40 am. Mr Grime accepted that there is a line of authority which shows that if a party does not call a witness who is not known to be unavailable and/or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness a judge is entitled to draw an inference adverse to that party and to find that matter proved. On this occasion, however, he says that Dr Renninson was known to be unavailable, and there was a good reason for his unavailability; the Plaintiff had not adduced any evidence which tended to show what Dr Renninson would have done if he had attended; and so far from drawing an adverse inference the judge was willing to draw a benign inference (in the light of the view he took of the case) that this negligent doctor would have behaved in a non-negligent way if he had in fact attended.

The need for the party relying on such an inference to establish a prima facie case on the matter in question was established in *McQueen v Great Western Railway Company* (1875) LR 10 QB 569, where it was more likely that a servant of the railway company (rather than a member of the public) would have stolen the plaintiff's goods

from a truck in a railway siding to which the public had access, but the plaintiff did not call any evidence to show that this was what had in fact happened. In those circumstances, Cockburn CJ said at p 574:

"If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not displace the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."

In *Chapman v Copeland* (1966) 110 SJ 569 a defendant driver elected to call no evidence in a case involving a fatal road traffic accident where the plaintiff widow had adduced evidence of brake and tyre marks made by his car on the road surface, and this court was willing to infer in his absence that he had been at fault. Salmon LJ said that:

".... as the law now stood there was no obligation on the defendant at the end of the widow's case to give evidence. However, if he chose not to do so, he could not complain if, on a very narrow balance of probability, the evidence justified the court in drawing the inference of negligence against him ... Where the defendant, quite legitimately, in a case in which there was nothing but accident mathematics, chose not to give evidence to the contrary, he could not complain."

In *Herrington v British Railways Board* [1972] AC 877, the other case cited by the judge, Lord Diplock applied the same principle when the plaintiffs had adduced evidence that a chainlink fence four feet high, which ran along the boundary between a railway line equipped with live electric rail and a public open space where children gathered to play, was pressed down to a height of no more than ten inches from the ground at a point where it was approached by a well-trodden path across the meadow. This state of affair was said to have existed for several weeks before a child suffered an accident on the line.

Against this background Lord Diplock said at pp 930F-931B:

"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

A court may take judicial notice that railway lines are regularly patrolled by linesmen and gangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realise the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence."

The need for the party who seeks to rely on an adverse inference to adduce proof on the matter in issue was repeated by the Supreme Court of Victoria in *O'Donnell v Reichard* [1975] VR 916 where Gillard J conducted a review of earlier English and Australian cases and said at p 920:

"Of course, patently there must be some limitation imposed upon the application of this rule. For example, any party upon whom the burden of proof on any issue is imposed must always adduce a prima facie case on such

issue to go to the jury, and the failure of the other party to the litigation to call witnesses who may be expected to elucidate the matter cannot fill in any gaps in the proof required (see per Dixon CJ in *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at p 371; and *Tyne v Rutherford* (1963) 36 ALJR 333)."

Gillard J summed up the state of the authorities in these terms at p 921:

"Looking at the authorities from *Blatch v Archer* (1774) 1 Cowp 63 right up to *Earle v Eastbourne District Community Hospital* [1974] VR 722, it may be accepted that the effect of a party failing to call a witness who would be expected to be available to such party to give evidence for such party and who in the circumstances would have a close knowledge of the facts on a particular issue, would be to increase the weight of the proofs given on such issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness."

It will be noticed that Gillard J described one effect of drawing an adverse inference as being “to increase the weight of the proofs” given on the issue in question by the party in whose favour the inference is being drawn, and that in *Chapman v Copeland* this court was willing to uphold the judge even though the plaintiff widow had been able to adduce very little evidence to support her claim that the defendant driver had been at fault. The same approach is exemplified by the unreported case of *Hughes v Liverpool City Council* (Lexis transcript, 11th March 1988, CA). A tenant had sued her landlords, the Liverpool City Council, for breach of an implied covenant in her lease because the gas boiler in her flat had exploded when she tried to light the pilot light. The only evidence she could adduce to the effect that the council knew about the defect was the fact that her flat had been inspected by one of its representatives when she had taken it over two months earlier. The defendants called no evidence, and while May LJ upheld the judge in finding that the boiler would have been inspected at that time and that the defect would have been present then, he was not willing to uphold the judge's further inference that as a result of the inspection, the defendants had been put on inquiry at that time that a repair to the boiler was needed.

He said:

"Although I have every sympathy with Mrs Hughes, I do not think that that is the correct approach in law to this matter. The learned judge had to decide this case on the evidence. He could only draw inferences from the evidence and from his findings of primary fact on that evidence. He was not, in my opinion, entitled to draw an inference or inferences from the mere failure to call a witness. The onus was on the plaintiff to make out her case. If there had been only a scintilla of evidence called on her behalf tending to support the fourth inference to which I have referred, then in the absence of any contrary evidence, because no witness was called for the defendants, the judge would have been entitled to find even that scintilla sufficient to make out the plaintiff's claim."

In *T C Coombs v IRC* [1991] 2 AC 283 Lord Lowry explained at p 300 the benefit which a court may be willing to confer on a silent defendant who gives some sort of explanation for his failure to give evidence, even if it is not a very good one. He said:

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

It is therefore necessary to examine with some care the evidence adduced by the Plaintiff on the issue as to what Dr Renninson would have done if he had attended Mrs ***Wisniewski***, and examined her, and the circumstances surrounding his failure to attend the trial to give evidence.

The Plaintiff adduced evidence to the effect that Dr Renninson was the duty doctor on call that night, and that if he had attended Mrs ***Wisniewski*** when Sister Brockbank told him about her, he would have seen the CTG trace which would have shown him that there had been flat baseline foetal tachycardia for 40 minutes and that there had been two early Type 1 decelerations and no accelerations. He would have also noted the other features of his patient's history which I have mentioned in this judgment.

Mr Johnson told the judge, when asked what the doctor should have done, that if Dr Renninson had attended, then after absorbing all this evidence he would have told Mrs ***Wisniewski*** that he wanted to examine her abdomen and that he would then have told her he wanted to do a vaginal examination and to rupture the membranes, if appropriate. This was the standard he would expect of a reasonably competent SHO. It was not very complicated obstetrics: it was simple stuff. He would know enough to know that he needed to rupture the membranes. This was standard practice, which he would have expected on the signs and appearances he had described. Indeed, Mr Johnson went so far as to describe it as mandatory. Towards the end of his evidence he said that the care he was describing was the big typed stuff in the books we read: not something in obscure journals.

Mr Jarvis, who agreed with Mr Johnson's evidence, spoke to the judge in terms of a doctor's duty to obtain more information in these circumstances.

In addition to this evidence, which spoke in terms of mandatory obligations, or duties, the judge was shown two textbooks which reflected the proper approach to the situation which would have confronted Dr Renninson if he had attended his patient at 3.40 am. The first of these text books, *A Textbook for Midwives* by Margaret F Myles, was unequivocal in its advice to midwives. After describing how foetal distress occurs when the foetus suffers oxygen deprivation and becomes hypoxic, the 1989 edition reads at p 174:

"Signs of foetal distress. Any or all of the following may be present:

foetal tachycardia which is an early sign of oxygen deprivation

foetal tachycardia or foetal heart rate decelerations related to uterine contractions

passage of meconium-stained fluid.

Management of foetal distress. When signs of foetal distress occur the midwife must call a doctor..."

The earlier, 1964, edition had said at p 421 that a foetal heart rate of over 160 should give rise to concern and that when the rate decreases by 20 beats this indicates severe oxygen lack and is a serious sign of foetal distress.

The other textbook was called *Foetal Monitoring in Practice* (Gibb and Arulkumaran 1992). The passage from that book at p 16 which the judge quoted in his judgment was not wholly apt for the circumstances of the present case, because the suggested causes of a high foetal baseline heart rate of 150-160 bpm were absent here, and it was common ground that in 1988 there was not the same degree of concern about a foetal heart rate below 160 bpm. Nevertheless the text contains the same general message as *Myles*, and the Defendants did not adduce any textbook reference which might tend to suggest that the seriousness with which Mr Johnson and Mr Jarvis were disposed to regard the situation as shown by the CTG trace at 3.40 am was misplaced.

When I turn to consider the pre-trial development of the Plaintiff's case, the Statement of Claim, served on 25th March, concentrated its fire particularly on the alleged failings at 3.40 am. In particular it was said that a vaginal examination should have been carried out at or about that time, and that if that had been done the membranes would have been ruptured and meconium would have shown demonstrating foetal distress and the need for a caesarean section, which should have been carried out. In the Defence, served on 15th July 1993, it was admitted and averred that the CTG was normal and demonstrated good baseline variability with occasional decelerations and that at about 3.40 am irregular contractions were noted, the CTG scan then demonstrating a rate of 160 to 170 bpm with satisfactory baseline variability and shallow decelerations. There was a general traverse of the allegations of negligence. In May 1994 the Plaintiff furnished further particulars of his claim, which included the allegation that there was a significant episode of deceleration on the trace at 3.40 am.

The Defendants were very slow in furnishing their witness statements, for which an “unless” order eventually had to be sought. *Bolitho* had been decided in this court by the time Dr Renninson's statement eventually appeared (see [1993] PIQR P 334) so that the Defendants' solicitors would or should have known that a likely issue in the case was what Dr Renninson would probably have done if he had attended his patient at 3.40 am, read her notes and seen the CTG trace (see Farquharson LJ, with whom Dillon LJ agreed, at p 342).

Dr Renninson's statement is completely silent on this issue. He does not say whether he was told of the long period of tachycardia in the foetal heart rate, and he could not remember if he in fact saw the patient. He says that he gave instructions that the patient should remain on the labour ward and that observation should continue but that the patient could mobilise for a while. He also comments in retrospect that he would have been satisfied, if the CTG was discontinued, if the midwife had continued monitoring with a Pinnards stethoscope. But he nowhere says what he would have done if he had attended his patient.

The experts' reports were exchanged soon after the witness statements were exchanged. The Defendants' solicitors would by now have known of the uncompromising terms in which Mr Johnson and Mr Jarvis were expressing their opinion. Mr Johnson said that failure to carry out a vaginal examination and an ARM was well below accepted standards of care. Mr Jarvis said that he believed that the latest time that ARM should have taken place was 3.40 am, and he was equally outspoken about the standards of care Mrs ***Wisniewski*** in fact received (“I cannot believe that there is any reasonable body of clinical opinion who would have ceased monitoring at this point given the information already available”). Before the action came on for trial at the end of February 1996 the decision of this court in *Joyce v Merton, Sutton and Wandsworth Health Authority* [1995] *27 BMLR 124* had also been reported. Hobhouse LJ, with whom Nourse LJ agreed, made it clear in his judgment at pp 155-6 that the plaintiff could now win a case like this if he satisfied the court that the doctor who failed to attend would probably have taken the requisite action if he had attended (although he would not have been at fault if he did not). What Dr Renninson would have done if he had attended was therefore now an even more central issue in the case.

I have recited earlier in this judgment how the Defendants' solicitors, well outside the time allowed by Order 38 Rule 21(1), served a notice under the Civil Evidence Act in relation to his statement, and what the Plaintiff's solicitors' reaction was to this belated notice. Because the trial went short, after quantum had been agreed, and

because Professor Thomas could not attend until what would normally have been the eighth day of evidence, there was in fact a six-day break in the hearing between 28th February and 6th March. Just before this break the judge made it very clear to the Defendants that he would be likely to draw an adverse inference if Dr Renninson did not give evidence.

Mr Grime has explained to us that during the course of his discussion with the judge at that time, he believed that the effect of Farquharson LJ's judgment in ***Bolitho*** was that the Plaintiff not only had to prove what Dr Renninson would have done if he had attended but also that he would have been negligent if he had not done it. The judge told him he wanted to indicate that he had never come across a case before where a person had chosen not to come to defend his clinical judgment. At that stage he had not been shown Dr Renninson's letter, but he made it very clear that unless he was shown evidence that it had been rendered impossible for Dr Renninson to attend, he would be liable to draw an adverse inference.

Although they had been given this warning, the Defendants placed no further evidence about Dr Renninson's non-appearance (other than his letter) before the judge when the trial resumed nearly a week later. So far as the judge was aware, although damages had now been agreed at £900,000, the Defendants made no effort during the break in the hearing to see if Dr Renninson could after all fly to England to give evidence or if he could give evidence by videolink from Sydney (there is a reference to the protocol which is available as a guide to the use of video-conferencing equipment in civil proceedings in the High Court in the notes to Order 38 Rule 3 in Volume 1 of the White Book).

In addition to Dr Renninson's absence, there was also a deafening silence from the other members of the relevant medical team at the hospital. Neither the registrar who had been on call that night nor the consultant with overall responsibility for the team attended to tell the judge what the practice at that hospital was for handling situations like the one that presented itself at 3.40 am. If such evidence had tended to show that the doctors at that hospital would be likely to adopt a “wait and see” approach, it would have been much more difficult for the judge to make a finding that Dr Renninson would have adopted a different course if he had in fact attended.

In all the circumstances, in my judgment the judge was entitled to adopt the course he chose to adopt. The Plaintiff had established a prima facie, if weak, case that a doctor who attended Mrs ***Wisniewski*** at 3.40 am would probably have adopted the course which the Plaintiff's expert witnesses had told him it was his duty to adopt, and the judge was entitled to treat Dr Renninson's absence, in the face of a charge that his negligence had been causative of the catastrophe that befell Philip, as strengthening the case against him on that issue. It must be remembered that the first limb of the ***Bolitho*** test, as it has now been explained by Lord Browne-Wilkinson, does not require a court to make a finding of fact as to what a doctor actually did, but as to what a doctor would have done in the hypothetical situation the court is required to envisage. In those circumstances it may be easier for the Plaintiff to set up an affirmative case on that issue which is liable to be strengthened if for no good reason the doctor is unwilling to submit him/herself to questioning before the judge as to what he/she would probably have done. And in these days of videolink technology it may no longer be sufficient for defendants to rely on a doctor's absence abroad to avoid calling him/her to give evidence.

In future it would, in my judgment, be very much better in this type of case for the Statement of Claim to include a positive averment that if the defendants had not been negligent in failing to take the action alleged, the relevant member of their staff would have acted in the manner which the plaintiff contends would have represented appropriate non-negligent practice, so that that issue is fairly and squarely on the pleadings for the defendants to answer. However, as the law was developing during the passage of this litigation, I would not discharge the judge's finding on that account, since both ***Bolitho*** (in the Court of Appeal) and ***Joyce*** had been decided before the trial took place, and it would not have been difficult to infer how the Plaintiff would be putting his case: indeed, the Defendants were given the windfall of six extra days to think about how to defend themselves successfully while the trial was going on.

Mr Grime's third challenge to the judgment related to causation. Put shortly, he argued that the harm which

befell Philip during his passage down his mother's birth canal (in effect, strangulation because the umbilical cord was looped round his neck and had a knot in it which gradually tightened) was quite different from the harm to which the health authority's breach of duty had wrongfully exposed him (the risk of damage by oxygen starvation within the womb). He cited to us a number of well-known authorities on issues of causation, culminating in a passage from the speech of Lord Hoffmann in *Banque Bruxelles SA v Eagle Star Insurance Company Ltd* [1997] AC 191 at p 213C:

"Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful."

Some of the earlier cases to which Mr Grime referred us were reviewed by Glidewell LJ in *Galoo Ltd v Bright Grahame Murray* (1994) 1 WLR 1360 at pp 1369-1374, and culminated with this passage which starts at p 1374G:

"The passages which I have cited from speeches in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B* [1949] AC 196 make it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an 'effective' or 'dominant' cause of his loss. The test in *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 that it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the question to be answered 'How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?'.

The answer in my judgment is supplied by the Australian decisions to which I have referred, which I hold to represent the law of England as well as of Australia, in relation to a breach of a duty imposed on a defendant whether by contract or in tort in a situation analogous to breach of contract. The answer in the end is 'By the application of the court's common sense'."

The Australian decisions to which Glidewell LJ referred went back to dicta by Dixon CJ, Fullagar and Kitto JJ in *Fitzgerald v Penn* (1954) 91 CLR 268 at p 277:

"It is all ultimately a matter of common sense .... In truth the conception in question is not susceptible of reduction to a satisfactory formula."

The judge dealt with this issue quite briefly at the end of his judgment:

"It is clear that the actual mechanism that led to the hypoxia - the true knot in the cord wrapped around the neck - could not have been foreseen. A true knot in a cord is a very rare happening - perhaps 1 to 2 a year in a busy teaching hospital, although the cord being looped around the neck is much more common. Thus the particular mechanism that brought about the injury could not have been foreseen.

Mr Grime accordingly argues that even if Sister Brockbank and Dr Renninson had been negligent, no foreseeable damage occurred.

I am however satisfied that there clearly was a foreseeable risk of damage by hypoxia to Philip. The damage that occurred was caused by hypoxia and of the kind that was foreseeable; as the damage was of the kind foreseeable, it makes no difference that the precise mechanism by which the hypoxia arose was not foreseeable."

I can find no fault with this approach, and it would in my judgment be regarded as an affront to common sense, and the law would look an ass, if we reached any different conclusion. As the judge concluded, the risk to which the Defendants' breach of duty exposed Philip was the risk of damage by hypoxia. For all we know, the harm which was showing up on the CTG was being caused by a cord accident or obstruction connected with the presence of a cord which was shortened by the presence of a loose knot and looped round his neck, and it was this harm which

the Defendants should have taken steps to address. As the judge said, it makes no difference in these circumstances that the precise mechanism by which the later, much more serious hypoxia arose was not foreseeable. This was not a case of novus actus interveniens and the Defendants' breach of duty was indeed properly categorised as the effective cause of the Plaintiff's damage.

For these reasons I would dismiss this appeal.

LORD JUSTICE ALDOUS: I agree.

LORD JUSTICE ROCH: I also agree.

ORDER (Not part of judgment):

Appeal dismissed; respondent to have costs of appeal; legal aid taxation of respondent's costs; money in court (£315,000) to remain in court; balance of agreed damages (ie balance of £585,000) to be paid into court together with interest on that sum from 2 April 1996; monies in court to be transferred to the higher interest account; the question of a structured settlement to be listed as soon as is convenient before Thomas J; leave to appeal refused; case to be given its full title.

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