

February 16, 2021

The Honorable Merrick Garland
Nominee for Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Urgent need for high-level review of “Gibson-Dunn ‘Kill-Step’ SLAPP” litigation targeting U.S. human rights defender Steven Donziger

Re. United States v. Donziger, U.S. District Court S.D.N.Y Case No. 19 Cr. 561 (LAP); 11 Civ. 691 (LAK)

Dear Mr. Garland,

The undersigned human rights and environmental justice organizations write to urge you to consider, amongst the many new priorities your office will have, a top-to-bottom review of the ongoing and extraordinarily disturbing legal attacks that Chevron Corporation and its counsel, has inflicted and orchestrated against renowned human rights lawyer Steven Donziger in the federal court system. These attacks, described briefly below and in the referenced documents, have led to a state of affairs widely viewed by the international human rights and environmental community as one of the most serious ongoing human rights abuses for which the United States has yet to answer. The situation is also a matter of exceptional personal urgency concerning Mr. Donziger (who has now been on pre-trial house arrest for a wildly excessive *540 days* in relation to a *misdemeanor* contempt of court charge), his family, and the historic Ecuadorian environmental justice and corporate accountability cause to which Mr. Donziger has dedicated himself for many years. Without immediate action, oil and gas corporations like Chevron will succeed in chilling the constitutional rights of lawyers and advocates who oppose the fossil fuel industry and who work to prevent the worst impacts of catastrophic climate change.

Chevron’s abuse of the U.S. legal system in this case to usurp a valid foreign judgment, expending millions of dollars to try to turn its Ecuadorian victims of undeniable environmental harm into “fraudsters” using what company lawyers at Gibson Dunn call the “kill step,” is not only unwise but unethical. To then abuse the court process to orchestrate the criminal contempt prosecution of one of the lawyers who helped win a historic \$9.5 billion pollution judgment, clearly is intended to send a message of intimidation to future public interest lawyers who might want to hold the industry accountable for wrongdoing.

The undersigned are not alone in expressing our concern. To date, a coalition of 55 Nobel Prize Laureates have issued a series of statements demanding Mr. Donziger’s immediate release from home detention and protesting the questionable and disparate treatment of Mr. Donziger by U.S. courts. They also have called for dismissal of the criminal contempt case against Mr. Donziger.¹ Other letters of concern have been circulated and signed by literally hundreds of leading human rights organizations and advocates.² A prominent human rights subcommittee of the European Parliament invited Mr. Donziger to make an address and then requested its counterparts in the U.S. Congress launch an investigation into his mistreatment.³ An international trial monitoring committee headed by former U.S. Ambassador for War Crimes Stephen Rapp and Canadian human rights lawyer Catherine Morris are closely following and reporting on the proceedings for human rights and lawyer protection groups around the world.⁴ And of particular note, two retired U.S. federal judges took the highly unusual step of recently publishing a critique of the still-pending criminal case against Mr. Donziger, which they called “excessive” and “deeply troubl[ing].”⁵

Chevron’s targeting of Mr. Donziger in U.S. courts began in 2010, shortly before he helped secure an historic environmental judgment for the benefit of thousands of Indigenous and rural Ecuadorians. The judgment directed Chevron to pay for the clean-up of hundreds of toxic waste pits abandoned at the company’s former operations sites in Ecuador. Chevron aimed to circumvent the judgment enforcement process by “tainting” the obviously meritorious legal case in Ecuador with spurious and even false allegations of misconduct and/or fraud. Indeed, Chevron strategists in internal emails in 2009 referenced the company’s “long-term strategy” to “demonize Donziger” as a way of avoiding liability. As such, Chevron’s ‘kill-step’ legal attacks on Mr. Donziger have

¹ See, e.g., Jonathan Watts, *Nobel laureates condemn 'judicial harassment' of environmental lawyer*, The Guardian, Apr. 18, 2020, at <https://www.theguardian.com/world/2020/apr/18/nobel-laureates-condemn-judicial-harassment-of-environmental-lawyer>; James North, *A New Justice Movement Emerges to Defend Steven Donziger*, The Nation, Sept. 10, 2020, at <https://www.thenation.com/article/activism/a-new-justice-movement-emerges-to-defend-steven-donziger>.

² See, e.g., “Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger,” International Association of Democratic Lawyers, May 18, 2020, at <https://bit.ly/3nezv9t>.

³ *Donziger Speaks to European Parliament About Chevron Human Rights Violations In Ecuador* at <https://www.makechevroncleanup.com/press-releases/2020/6/22/donziger-speaks-to-european-parliament-about-chevron-human-rights-violations-in-ecuador>

⁴ See, e.g., Briefing Note on Allegations of judicial harassment and arbitrary detention of lawyer Steven Donziger, July 29, 2020, at <https://www.lrwc.org/usa-allegations-of-judicial-harassment-and-arbitrary-detention-of-lawyer-steven-donziger-briefing-note>; Report of Monitors, October 27, 2020, at https://www.lrwc.org/ws/wp-content/uploads/2020/10/ObserversReport.USvDonziger.Hearing.5October2020.FF_.pdf.

⁵ Hons. Nancy Gertner and Mark Bennett, *Criminal Contempt Charges in Donziger Case Are Excessive*, Law360, July 13, 2020, at <https://bit.ly/37bIAKO>.

been highlighted by a coalition of leading human rights groups as the world’s most prominent and disturbing example of a “Strategic Lawsuit Against Public Participation” or “SLAPP.”⁶

Chevron initiated the multi-layered SLAPP in 2011 with a series of hyper-aggressive civil lawsuits against Mr. Donziger and allies of the Ecuadorian environmental justice cause. Chevron kept its cases going in large part by paying roughly 60 brand-name law firms huge sums to deploy unprecedented and abusive litigation tactics—including the outright payment of millions of dollars in cash and benefits to a corrupt key “fact” witness, Alberto Guerra. Guerra later admitted that he lied under oath in the case Chevron paid him to testify in. In 2017-2018, Mr. Donziger and a number of human rights groups urged the Department of Justice to investigate this situation involving apparent illegal payment for testimony and other witness tampering and obstruction of justice by Chevron and its lawyers and private investigators.⁷ We urge you to revisit the specific issues raised in those letters as part of the top-to-bottom review requested here.

Although Chevron is estimated to have spent as much as \$2 billion to pay at least 60 law firms and 2,000 lawyers and private investigators to try to taint the Ecuador judgment, the company was unable to achieve its objective of stopping the proceedings either in Ecuador or in any of the countries where enforcement actions had been initiated. Other countries—and global civil society—quickly recognized the collateral-attack, forum-shopping, and SLAPP nature of Chevron’s retaliatory lawsuits. Ecuador’s Supreme Court and Constitutional Court dismissed all of Chevron’s arguments on appeal in 2013 and 2018, respectively. In 2015, the Canadian Supreme Court ruled unanimously that Mr. Donziger’s clients could pursue an enforcement action directly against Chevron in Canadian courts.

Chevron responded not by facing up to its Ecuadorian environmental liability but by increasing the stakes of its “demonize Donziger” strategy as a way of trying to deter other lawyers from daring to challenge the industry. Starting in March 2018, Chevron filed a series of post-judgment motions to try to hold Mr. Donziger in civil contempt on the theory that he was not allowed to raise third-party litigation financing on behalf of his Ecuadorian clients so they could enforce their judgment outside the United States—despite Judge Kaplan’s express authorization that Mr. Donziger and his colleagues be allowed to do so. Chevron’s lawyers managed to prevent the merits of the contempt motion from being appealed, while demanding

⁶ See, e.g., Protect the Protest Coalition (PTP): History of SLAPPS, at <https://www.protecttheprotest.org/history/>. The PTP Coalition includes leading organizations such as Greenpeace International, Human Rights Watch, Amnesty International, the American Civil Liberties Union (ACLU), the Center for Constitutional Rights (CCR), the Center for International Environmental Law (CIEL), the Electronic Frontier Foundation (EFF), the Natural Resources Defense Council (NRDC), EarthRights International (ERI), STAND.earth, the Rainforest Action Network (RAN), among others.

⁷ See Letter to Robert Zink *et al.* from Amnesty International, Greenpeace USA, Rainforest Action Network, and others, dated June 24, 2019, at <https://chevroninecuador.org/assets/docs/2019-06-24-doj-letter.pdf>; Letter to Robert Zink *et al.* from Global Witness, dated Apr. 3, 2019, at <https://chevroninecuador.org/assets/docs/2019-04-02-motion-for-additional-time-with-simon-taylor-letter.pdf>; Letter to Sandra Moser *et al.* from Steven Donziger, dated Nov. 9, 2017, at <https://chevroninecuador.org/assets/docs/2017-11-09-adc-doj-letter.pdf>.

unfettered access to computers, cellphones, and reams of privileged and confidential information implicating the First Amendment rights and personal safety of Mr. Donziger and thousands of Ecuadorians who helped fight for justice against Chevron. When Mr. Donziger informed the court that he would follow the standard process for lawyers—inviting a civil contempt order to ensure a direct appeal of the discovery ruling — federal district judge Lewis A. Kaplan took the extremely rare step of charging him with *criminal* contempt of court. Worse, Judge Kaplan did this while the federal appeals court was reviewing his discovery order to determine if it was lawful (that review is still pending). It bears mention that Judge Kaplan has a long record of animus toward Mr. Donziger, who he once excoriated in open court for daring to pursue a multi-billion dollar environmental damage case against what he called “a company of considerable importance to our economy.” Recently, approximately 200 lawyers filed a judicial misconduct complaint against Judge Kaplan based on detailed evidence that for 10 years he has orchestrated the abusive targeting of Mr. Donziger.⁸

Chevron’s attacks on Mr. Donziger appear to be spiraling even further out of control. When Judge Kaplan asked the U.S. Attorney for the Southern District of New York to prosecute the alleged criminal contempt, that office notably declined. Instead of appreciating this response as a reasoned exercise of prosecutorial discretion, Judge Kaplan plowed ahead and invoked a rarely used federal power that allowed him to appoint a team of private lawyers from Seward & Kissel, a firm with deep ties to the oil industry and *an ongoing attorney-client relationship to Chevron*, to prosecute the case anyway in the name of the government.⁹ The firm did so at taxpayer expense, invoicing the public at least \$464,000 as of this month—in a misdemeanor case against a lawyer with a discovery dispute on appeal.¹⁰

Judge Kaplan also refused to follow established procedures for random judicial assignment of the criminal contempt case, instead appointing a hand-picked colleague whose first decision was to order a set of extraordinarily oppressive and unconstitutional release conditions for what has been confirmed as a *misdemeanor* case, including an \$800,000 bond and 24-hour house arrest. Even when the federal pre-trial services officer urged that the home detention conditions be relaxed more than a year ago, the district court judge (Loretta Preska) refused any modification. Mr. Donziger remains the only person in the federal pretrial system facing a misdemeanor charge with

⁸ See, e.g., “Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger,” International Association of Democratic Lawyers, May 18, 2020, at <https://bit.ly/3nezv9t>.

⁹ A respected ethics expert retained by Mr. Donziger, Ellen Yaroshefsky, has described how the Seward firm’s deep financial ties to Chevron and Chevron-related entities raise a conflict of interest and a fundamental lack of prosecutorial disinterestedness. See, e.g., Walter Bragman and David Sirota, The Government Gave Big Oil the Power to Prosecute Its Biggest Critic, *The American Prospect*, Jul. 14, 2020, at <https://prospect.org/power/chevron-big-oil-power-prosecute-its-biggest-critic/>.

¹⁰ Adam Klasfeld, *Quarter-Million Misdemeanors: Private Feds Cash In On Unusual Contempt Case*, *Courthouse News*, July 29, 2020, at <https://www.courthousenews.com/quarter-million-dollar-misdemeanors-private-feds-cash-in-on-unusual-contempt-case/>

no criminal record subject to such draconian custodial controls. As far as we understand, no other lawyer in U.S. history has been detained in such circumstances even for a day.

The human rights community—especially outside of the United States—is watching aghast as this situation unfolds. When taken as a whole, the combination of oppressive measures, unprecedented legal system abuse, and transparent service of the interests of an influential U.S. fossil fuel company leaves little room for doubt that the continuing proceedings amount to a new level of “SLAPP” waged against Mr. Donziger in response to the effectiveness of his human rights work in helping an international team obtain an historic environmental judgment. Attacks such as this on human rights defenders, especially by authoritarian regimes, are currently a central concern of the global human rights agenda.¹¹ Indeed, the retired federal judges who took the extraordinary step of speaking out in support of Mr. Donziger noted in particular their concern about the significant “negative international attention to our legal system” that the attacks on Mr. Donziger had generated.¹² Indeed, this misuse of the U.S. legal system to usurp a \$9B environmental judgment encourages bad actors to seek out U.S. Courts to circumvent valid international court rulings.

We ask that your office act urgently to investigate this situation in the interests of justice for Mr. Donziger and his family, and also to protect human rights advocates from the chilling effect of Chevron’s attacks in this case. The personal attacks Mr. Donziger has been forced to bear over the last decade on account of his critically important human rights work is outrageous enough, but the current state of affairs is absolutely unacceptable. Even putting aside the obvious defects in the case (such as a Chevron-linked private prosecutor and the lack of a randomly-assigned judge, as noted) and the misuse of judicial resources given the fact that the civil contempt is still pending an appellate ruling (which Mr. Donziger has repeatedly stated would resolve the discovery dispute affirmatively), it is not disputed that the longest sentence ever imposed for a similarly situated conviction was 90 days of home confinement. Mr. Donziger has already “served” over 500 days without a trial, much less a conviction. He faces immense pressure to continue to help enforce the Ecuadorian judgment on behalf of the victims who continue to suffer from the unmitigated harms of pollution, as well as his personal pressures—financial, family life, and even his mental health are impacted as a result.

Significantly, the international human rights community faces a parallel threat: with each greater blow to Mr. Donziger, the “chilling effect” on human rights advocacy increases, sending a terrifying signal to defenders across the country and around the world of what might happen to them if they try to confront powerful companies like Chevron—and at the same time, sending a clear message to rich corporations like Chevron that some U.S. Courts are ‘open for business.’ Chevron sought exactly this effect when it began its ferocious litigation campaign against Mr. Donziger over a decade ago. In the interests of justice, human rights advocacy, and the reputation of the United States — a country normally seen as an international leader when it comes to respecting the rule of international law — the out-of-control situation of SLAPP attacks by

¹¹ See, e.g., Secretary-General’s remarks to the UN Human Rights Council, Feb. 24, 2020, at <https://bit.ly/3qKBFQm>.

¹² *Supra* note 5.

Honorable Merrick Garland

February 16, 2021

Page 6 of 7

Chevron and its law firms targeting Mr. Donziger and the vulnerable Amazon communities in Ecuador must be addressed by your office as a matter of utmost urgency. We request a meeting with your office in order for us to provide further information about the case and welcome the opportunity to communicate with you about this troubling case and the pressing need for an investigation. The legal team for Mr. Donziger is willing to join us and answer any questions you may have about the case.

We realize you face many challenges as you take the helm of the United States Department of Justice at this critical time. We believe that this case embodies everything that was wrong about the environmental justice, human rights, and civil rights agenda of the previous administration, and we look forward to you helping us shed light on this troubling trend in America.

/s/
Paul Paz y Miño
Associate Director
Amazon Watch

/s/
Bob Goodfellow
Interim Executive Director
Amnesty International USA

/s/
Lauren Regan
Executive Director
Civil Liberties Defense Center

/s/
Alice Cherry
Co-Founder and Staff Attorney
Climate Defense Project

/s/
Simon Taylor
Director and Co-Founder
Global Witness

/s/
Kurtis Dengler
Organizer
Mosquito Fleet

/s/
Elena L. Cohen
President
National Lawyers Guild

/s/
Bill Twist
Executive Director
Pachamama Alliance

/s/
Dima Khalidi
Director
Palestine Legal

/s/
Graham Clumpner
Task force Coordinator
Protect the Protest

/s/
Kathleen Brophy
Director
Publish What You Pay-US

/s/
Ginger Cassady
Campaign Director
Rainforest Action Network

/s/
Kathy Mulvey
Accountability Campaign Director
Climate & Energy Program
Union of Concerned Scientists

Honorable Merrick Garland
February 16, 2021
Page 7 of 7

Cc:

Kristen Clarke, Nominee for Assistant Attorney General for Civil Rights

Steven Cohen, Chair, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, US Congress

John Kerry, US Special Presidential Envoy for Climate

Vanita Gupta, Nominee for Associate Attorney General at the U.S. Department of Justice

Brenda Mallory, Nominee for White House Council on Environmental Quality

James McGovern, Co-Chair, Tom Lantos Human Rights Commission, US Congress

Gina McCarthy, White House National Climate Advisor

Lisa Monaco, Nominee for Deputy Attorney General

Jerry Nadler, Chair, Judiciary Committee, US Congress

Chris Smith, Chair, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, US Congress

Audrey Strauss, US Attorney, Southern District of NY