COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger)

Attorney Grievance Committee
for the First Judicial Department,
Petitioner-Respondent,

Steven R. Donziger,

Respondent-Appellant

AFFIRMATION IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

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J. RICHARD SUPPLE, JR., an attorney admitted to practice in New York, affirms under penalty of perjury that:

1. I am a partner in Clyde & Co US LLP, attorneys for appellant Steven R. Donziger ("Donziger"). This affirmation is submitted in support of Donziger's motion pursuant to 22 NYCRR § 500.22 for permission to appeal an order of the Appellate Division, First Department, dated August 13, 2020 ("Final Order") which disaffirmed a Special Referee's Report and disbarred Donziger retroactive to July 10, 2018.

2. If granted, Donziger's appeal will enable this Court to address the increasing, expanded use of collateral estoppel by New York grievance committees and Appellate Divisions to prevent attorneys from defending themselves against charges of professional misconduct. The issues in this case are novel and present themselves in a unique and extraordinary context – disbarment of an attorney who

sought to address extreme harm to indigenous Ecuadorean people resulting from the pollution of their land by a large and powerful American oil company. Beyond Donziger's own interest, the issues are of great public importance because, after being found guilty of massive damage, the oil company chose to defend itself by crushing Donziger for daring to hold it to account. If allowed to stand as is, the large corporation's successful effort to destroy an opposing public interest lawyer through "might rather than merit" (*see* ¶ 5(j)(i) *infra*) risks promotion of a chilling effect on lawyers in human rights litigation everywhere.[1]

[1] Illustrating the attention this case has drawn nationally and internationally is, among many others, a statement in support of Mr. Donziger from 29 Nobel laureates, including 10 Nobel peace laureates; a letter from 475 lawyers and legal organizations, including the International Association of Democratic Lawyers, criticizing Mr. Donziger's treatment by judicial authorities; a statement from Lawyer's Rights Watch Canada, a leading international human rights organization; a letter from several human rights and environmental justice groups, including Amnesty International, Greenpeace, Global Witness, Rainforest Action Network, Civil Liberties Defense Center, and others. *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. *See* "Over 475 lawyers, legal organizations and human rights defenders support lawyer Steven Donziger," International Association of Democratic Lawyers, May 18, 2020, at https://iadllaw.org/2020/05/over-475-lawyers-legal-organizations-and-human-rights-defenders-support-lawyer-steven-donziger/; *see also Brief of Amici Curiae International Association Of Democratic Lawyers and National Lawyers Guild*, No. 20-1940 (2d Cir. Jun. 30, 2020); LRWC Briefing: https://www.lrwc.org/usa-allegations-of-judicial-harassment-and-arbitrary-detention-of-lawyer-steven-donziger-briefing-note/. A trial monitoring committee formed to review the federal court's treatment of Mr. Donziger includes Christopher Hale, an attorney specializing in atrocity crimes and co-editor of the *International Due Process and Fair Trial Manuel* published by the American Bar Association, Nadine Strossen, former President of the American Civil Liberties Union, and Michael Tigar, former chairperson of the American Bar Association Section of Litigation. https://www.law.com/newyorklawjournal/2020/08/19/committee-formed-to-monitor-steven-donzigers-contempt-trial-for-due-process-violations/.

3. In this case, the Appellate Division, First Department applied collateral estoppel, without written reasoning, to foreclose Donziger from defending himself against federal court findings that he bribed a foreign judge to corruptly permit him to draft a substantial monetary judgment for his clients. But as the accompanying memorandum demonstrates, the Appellate Division's application of collateral estoppel was contrary to the controlling decisional law of this Court in several respects, including because of the following:

a. new compelling forensic evidence, not available to the federal court by available to the grievance committee and Appellate Division, refuted the allegations that Donziger ghostwrote the foreign judgment and bribed the foreign judge;

b. two appellate courts in the foreign jurisdiction made rulings rejecting the claims against Donziger that were completely at odds with the adverse federal court rulings relied upon by the disciplinary prosecutors and Appellate Division;

c. the underlying federal decision relied on alternate theories of relief, such that it was (and is) impossible to know which of the federal court's findings were necessary to reach its judgment; and,

d. Donziger, who acted *pro se* during crucial phases of his federal case, was the target of scorched-earth litigation tactics whereby the federal court

permitted the oil company, on an unreasonable, inflexible timetable, to bury him in motions and millions of pages of discovery documents, such that Donziger could not fairly defend himself.

4. Although disciplinary bodies frequently invoke collateral estoppel, this Court has issued only one decision regarding the collateral estoppel doctrine in an attorney discipline case.[2] In other contexts this Court's decisional law establishes that, to be eligible for estoppel, prior judicial findings not be tainted by new, contrary evidence, not be inconsistent with other judicial determinations, be necessary to the underlying judgment, and that parties resisting estoppel were accorded, in practical terms, a full and fair opportunity to defend themselves.

5. The procedural history of this matter is as follows:

a. On December 2, 2016, the Chair of the Southern District of New York Grievance Committee referred Donziger to the Attorney Grievance Committee for the First Department ("Grievance Committee") on the basis of a March 4, 2014 decision and order of United States District Judge Lewis Kaplan. Judge Kaplan's decision concerned Donziger's conduct during an environmental litigation in Ecuador. The Chair stated his "sincere hope" that the Grievance Committee would "pursue" Donziger, and opined that "collateral estoppel"

[2] *Matter of Dunn*, 24 N.Y.3d 699 (2015) (reversing collateral estoppel order for lack of a full and fair opportunity to litigate where a prior federal sanctions order was decided on papers).

treatment of Judge Kaplan's decision was "likely available." A copy of the referral letter is **Exhibit A**. Judge Kaplan's decision is **Exhibit B**.[3]

b. On February 6, 2017, Donziger answered the Grievance Committee's letter forwarding the Chair's grievance against him. **Exhibit C**.[4]

c. On October 30, 2017, the Grievance Committee moved the Appellate Division, First Department (hereafter, "Appellate Division") for an order finding Donziger guilty of professional misconduct pursuant to the New York Code of Professional Responsibility (for conduct before April 1, 2009) or the New York Rules of Professional Conduct (for conduct after April 1, 2009) by virtue of collateral estoppel. **Exhibit D.**[5]

d. According to the Grievance Committee's motion, Donziger was lead counsel for 46 plaintiffs (the "Lago Agrio Plaintiffs") who sued Chevron Corporation ("Chevron") for environmental harm and consequential personal injuries in the Oriente region of Ecuador. The injuries were allegedly caused by Texaco, Inc. ("Texaco"), which Chevron had acquired in the intervening years. The Lago Agrio Plaintiffs originally commenced their action in 1993 in the United

[3] The decision was affirmed on appeal. *Chevron Corp. v. Donziger,* 833 F.3d 74 (2d Cir. 2016). *See* Exhibit D (attachment).

[4] The exhibits to his document are omitted as they are substantially reproduced in other exhibits hereto.

[5] The Grievance Committee's motion attached Judge Kaplan's decision (separately attached hereto as Exhibit B), the Second Circuit's affirming decision, and the summary ruling of the United States Supreme Court denying a writ of certiorari (referenced in the Grievance Committee's motion as Exhibits B and C), which are reprinted and attached in this exhibit.

States District Court for the Southern District of New York, but the action was dismissed on *forum non conveniens* grounds and, following an appeal to the Second Circuit, was recommenced in 2003 in an Ecuador court. Exhibit D at 5, 7.

e. After many years of litigation, in February 2011, the Lago Agrio Plaintiffs obtained a substantial judgment against Chevron in Ecuador, which was affirmed by two Ecuadorian appellate courts, including Ecuador's highest court. Exhibit D at 5.

f. Shortly before the Ecuador judgment was issued, Chevron commenced a civil RICO action against Donziger in the United States District Court for the Southern District of New York to enjoin him from attempting to enforce the judgment. *See* Exhibit D at 5. Chevron's claims against Donziger were decided by Judge Kaplan following a bench trial.

g. The Grievance Committee based its charges against Donziger on Judge Kaplan's decision, which Donziger contests. *See* Exhibits B & D. In sum, it alleged:

i. Donziger met, or directed others, to meet *ex parte* with judges in the Lago Agrio Plaintiffs' case;

ii. Donziger improperly influenced Richard Cabrera ("Cabrera"), an expert the Lago Agrio Plaintiffs had proposed to the Ecuador court,

and together with a consulting firm, drafted parts of Cabrera's report as well as comments and objections to the report;

iii. Pablo Fajardo, a lawyer in Ecuador for the Lago Agrio Plaintiffs, drafted a declaration for a United States court, with Donziger's participation, that omitted facts regarding the preparation of Cabrera's report, and Donziger also unsuccessfully sought to persuade another consultant, Mark Quarles, to submit an inaccurate declaration;

iv. Donziger advocated that Ecuador prosecutors indict two Texaco lawyers for preparing a fraudulent release for the Ecuador government with respect to an environmental remediation agreement that was executed before the Lago Agrio Plaintiffs' suit;

v. Donziger, on the basis of testimony from Alberto Guerra ("Guerra"), the first assigned judge to the Ecuador case, arranged a bribe to another judge, Nicolas Zambrano, to allow him and colleagues to ghostwrite the court's judgment against Chevron in his clients' favor.

h. The Grievance Committee asserted that Donziger was afforded a full and fair opportunity to be heard at his federal trial, observing only that the trial involved 31 witnesses, sworn testimony from 36 deponents, and "thousands" of documents in evidence. Exhibit D at 21.

i. In conjunction with its application for a collateral estoppel order, the Grievance Committee moved to suspend Donziger on an interim basis pursuant to 22 NYCRR § 1240.9(a), arguing that his conduct, as described in its motion, could no longer "be controverted" and, as such, demonstrated that Donziger constituted an "immediate[]" threat to "the public interest." Exhibit D at 21-24.

j. On February 16, 2018, Donziger filed his opposition to the Grievance Committee's motion. **Exhibit E**. Donziger argued, *inter alia*, the following factual and legal points in support of his position that collateral estoppel should not be applied:

i. Donziger was a solo practitioner who defended Chevron's claims with limited legal assistance for only discrete portions of the case. By contrast, to prosecute Donziger, Chevron used 60 law firms, 2,000 lawyers (including 114 lawyers from its lead law firm) and 150 investigators, at an annual cost of approximately $400 million. Chevron employed a scorched earth approach to Donziger's case, which entailed near-daily motions for partial summary judgment, for attachments, to reinstate claims, to compel discovery, for findings of privilege waivers, and for contempt and other sanctions. As a result, Donziger's first counsel, John Keker ("Keker"), withdrew, claiming the case had become a "Dickensian farce" that Chevron sought to win "through might rather

than merit." After Keker's withdrawal, Judge Kaplan denied a stay of proceedings so Donziger could obtain new counsel. Thereafter, Donziger was compelled to act *pro se* for several months before trial, during which time he attempted to review Chevron's document "dump" of more than 6 million pages, to depose many witnesses, and to answer several dispositive motions as well as an avalanche of other discovery motions and follow-on motions for contempt and other sanctions. Exhibit E at 6, 11, 14-17, 43 & Exs. 10-11 attached thereto (detailing the resource disparities between Chevron and Donziger).

ii. In contrast to the district court's permissive rulings endorsing Chevron's litigation strategy, Judge Kaplan "refused to allow" Donziger "to obtain any discovery from Chevron related to its pollution in Ecuador" or with respect to "Chevron's massive private investigative operation[.]" Judge Kaplan's ruling prevented Donziger from showing that the Lago Agrio Plaintiffs' claims were strongly grounded in evidence, and concomitantly, that he had no motive or need to bribe or ghostwrite. Exhibit E at 15-16.

iii. Judge Kaplan's decision was not only inconsistent with the judgment of the Ecuador trial court, it is also inconsistent with the rulings of two appellate courts in Ecuador, including Ecuador's highest court, which heard all the same arguments regarding the conduct of the Lago Agrio Plaintiffs' lawyers, but nonetheless affirmed Judge Zambrano's judgment (with a reduced monetary

sum) after reviewing a 220,000 page evidentiary record, including tens of thousands of chemical sampling test results. The district court claimed the Ecuador appellate courts did not consider Chevron's allegations before disparaging the same courts as corrupt and unworthy of comity. However, in a clarifying decision, the Ecuador intermediate appellate court did, in fact, report that Chevron's "allegations have been considered, but no reliable evidence of any crime has been found. The [appeals court] concluded that the evidence provided by Chevron Corporation, does not lead anywhere without a good dose or imaginative representation, therefore it has not been given any merit …" Similarly, Ecuador's highest court stated that Chevron "never demonstrated fraud, which it has been claiming without legal support." Exhibit E at 4, 17-18, 36-38, 49 & Ex. 9 attached thereto (Republic of Ecuador amicus brief); *and see* Exhibit F at 12 (district court dismisses, as irrelevant to its judgment, any contrary judicial decisions rendered by foreign courts).

iv. Ecuadorian legal practice is different in fundamental respects from American practice. Among other things, lawyers in Ecuador are permitted to, and customarily do engage in *ex parte* communications with judges, as Chevron's lawyers did. It is also commonplace and customary for parties in Ecuador to pay experts directly (when Ecuador courts fail to do so timely) rather than wait for the court to make the payments out of funds already provided by the

responsible party to the court for such purpose, which Chevron also did. Exhibit E at 37-38.

v. Before testifying in Donziger's case, Chevron paid Guerra significant sums of money (including in cash), provided him and his large family with immigration assistance to come to the United States, and also gave him a house, a car, an annual salary and health insurance. Guerra's testimony that a bribe was agreed with Judge Zambrano "was the only direct evidence claiming that there was a corrupt arrangement with the Ecuadorian court." However, digital forensic evidence later demonstrated, contrary to Chevron's allegations, that the Lago Agrio Plaintiffs' attorneys did not write the judgment. An electronically-stored draft of the judgment was opened and closed 484 times on the court's own computers, and crucially, substantial parts of the judgment were prepared long before the alleged bribe to ghostwrite was offered. Revelation of the forensic evidence caused Guerra to later admit, in a related international arbitration proceeding, that his testimony at Donziger's trial was false in numerous respects. Exhibit E at 4-5, 9, 15, 20, 22, 33-34, 45-46 & Exs 4, 5 attached.

vi. The district court's trial judgment relied on alternative theories – "non-statutory grounds and [] RICO" – that are "entirely independent of each other." As a result, Judge Kaplan ruled in several important respects that Chevron was entitled to relief regardless of whether one or another factual

allegation should be sustained. For example, the key witness on the bribery/ghostwriting charge was Guerra, whose clear credibility issues and bias was disregarded by Judge Kaplan, who held that Chevron should be awarded relief "even absent bribery." Exhibit E at 28-30. (Emphasis added.) That the bribery/ghostwriting findings were not necessary to the judgment was then re-confirmed by Judge Kaplan in an order subsequent to the judgment, wherein he specifically notes that Guerra's "critical" testimony regarding alleged bribery – by far the most serious charge against Donziger – was "far from indispensable to the judgment rendered in this case." **Exhibit F**; see p. 12. (Emphasis added.)

k. In addition to arguing against collateral estoppel, Donziger objected to the Grievance Committee's application to suspend him on an interim basis by observing that, although the Grievance Committee was required to show that Donziger presented an immediate threat to the public (*see* 22 NYCRR § 1240.9(a)), it waited nearly eleven months after the federal court referral (and more than three and one-half years after Judge Kaplan's decision) to move for a suspension on purported emergency grounds. Exhibit E at 6, 19.[6]

[6] Donziger disagreed strongly with the facts found by Judge Kaplan on appeal to the Second Circuit, as his appellate brief plainly shows. But given the extraordinarily high burden of proving on appeal that Judge Kaplan's findings of fact at a bench trial were "clearly erroneous," and after the Second Circuit denied motions by Donziger urging consideration of the new evidence disproving Chevron's ghostwriting and bribery allegations, Donziger's appellate counsel made a strategic decision to attack legal deficiencies in Judge Kaplan's decision rather than use limited briefing space for a "plain error" analysis. Exhibit E at 9 n. 9, 17 & Exs. 7, 12 attached thereto. *See* Fed.R.Civ.P. 52(a)(6); *Ceraso v. Motiva Enterprises, LLC*, 326 F.3d 303,

l. On March 9, 2018, the Grievance Committee replied to Donziger's opposition. **Exhibit G**. The Grievance Committee did not deny that Guerra had a lengthy history of bribery and lying. Exhibit G at 9.

m. On March 30, 2018, Donziger submitted a surreply to clarify three points in the Grievance Committee's reply; namely, that the new evidence disproving Guerra's claims of ghostwriting and bribery was not considered by the district court; the Ecuador appellate courts did, in fact, review Chevron's allegations; and with respect to the "crushing inequality of resources between" Donziger and Chevron. **Exhibit H**.

n. On July 10, 2018, the Appellate Division granted the Grievance Committee's motion for collateral estoppel without analysis, and in doing so, found Donziger guilty of all alleged DR and RPC violations. The Appellate Division thereupon suspended Donziger on an interim basis on the ground that the district court's findings "constitute[ed] uncontroverted evidence of serious professional

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316-17 (2d Cir. 2003) ("Even if the appellate court might have weighed the evidence differently, it may not overturn findings that are not clearly erroneous. The weight of the evidence is not a ground for reversal on appeal, and the fact that there may have been evidence to support an inference contrary to that drawn by the trial court does not mean the findings are clearly erroneous. The decisions as to whose testimony to credit and which of permissible inferences to draw are solely within the province of the trial of fact, and where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (internal citations and quotations omitted). Exhibit E at 9, 17 & Exs. 7, 12 attached thereto. Appellate counsel's decision to focus on legal questions should not be used against Donziger in this state court proceeding. Failure to appeal findings for strategic reasons does not add probity to the findings if they are otherwise shown to be faulty. If anything, that the Second Circuit would not hear Donziger's new evidence refuting Guerra's bribery/ghostwriting testimony and never reviewed Judge Kaplan's fact findings directly diminishes the probity of those findings since they were never reviewed on their merits.

misconduct which immediately threatens the public interest," and referred the matter to a Referee for a "hearing on sanction for disciplinary rule violations." **Exhibit I**.

o. On August 16, 2018, the Appellate Division ordered that, in addition to a hearing on sanction, Donziger was entitled to a post-suspension hearing before the assigned Referee pursuant to 22 NYCRR § 1240.9(c) to determine whether his continued suspension was warranted. **Exhibit J**.

p. On November 8, 2018, the Referee ruled that Donziger could challenge the District Court's findings at his post-suspension hearing. **Exhibit K.**

q. On January 17, 2019, the Appellate Division ordered that the Referee "may not reexamine" its collateral estoppel order and was limited for purposes of the post-suspension hearing to determining "whether the professional misconduct [Donziger] committed warranted his interim suspension …" **Exhibit L**.

r. The post-suspension hearing and hearing on sanction commenced in September 2019. Donziger called 15 character witnesses. The Grievance Committee called no witnesses. Both sides submitted documentary evidence. Donziger also submitted an offer of proof describing his factual defenses that he was not allowed to present at the hearing. **Exhibit M**.

r. On February 24, 2020, the Referee issued his recommendation that the Appellate Division terminate Donziger's suspension and reinstate him to the practice of law. **Exhibit N.**

s. On August 13, 2020, the Appellate Division disaffirmed the Referee's report and disbarred Donziger in the Final Order. **Exhibit O**. The Final Order did not discuss the Appellate Division's application of the collateral estoppel doctrine (except in passing) or any of Donziger's points in opposition, including his new evidence that Guerra's evidence with respect to ghostwriting and bribery was false. Instead, the Appellate Division faulted the Referee for permitting Donziger latitude to explain his conduct and state his case, finding that the Referee had been "too dismissive of the severity of the misconduct at issue" and should not have heard Donziger's "protestations of innocence."

6. The Grievance Committee served the Final Order with Notice of Entry on Donziger by regular mail on August 14, 2020. *See* Exhibit O. As a result, Donziger could make this motion by September 18, 2020. CPLR 2103(2), 5513(b).

7. This Court has jurisdiction of this motion and Donziger's proposed appeal. The Final Order finally determined Donziger's disciplinary case by disposing of all issues and imposing an order of disbarment. CPLR 5602(1)(i), 5611.

8. A concise statement of the questions presented for review and the reasons the questions presented merit review by this Court are set forth in the attached memorandum, to which the Court is respectfully referred.

9. Because appellant is a natural person, no disclosure statement pursuant to 22 NYCRR § 500.1 is necessary.

10. The Final Order sought to be appealed from with Notice of Entry is Exhibit O hereto. The Appellate Division's order granting collateral estoppel and imposing an interim suspension is Exhibit I hereto. Other relevant orders are attached as Exhibit J (permitting Donziger a post-suspension hearing) and Exhibit L (forbidding the Referee from considering Donziger's evidence with respect to the district court's decision). Donziger will submit the Record of Proceedings in accordance with 22 NYCRR § 500.22(c).

WHEREFORE, Donziger's motion for permission to appeal to this Court should be granted.

Dated: New York, New York
September 17, 2020

J. Richard Supple Jr.