UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, et al., Defendants.	Case No. 11-CV-0691

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION BY ORDER TO SHOW CAUSE WHY ALL DISCOVERY IN THIS PROCEEDING SHOULD NOT BE STAYED PENDING THE COMPLETION OF MERITS BRIEFING TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (the "Ecuadorian Plaintiffs") hereby apply to this Court for an Order to Show Cause why all discovery in this proceeding should not be stayed pending the completion of merits briefing to the United States Courts of Appeals for the Second Circuit on July 5, 2011.

Chevron Corporation ("Chevron") has propounded on the Ecuadorian Plaintiffs' attorneys, experts, and others involved in the Lago Agrio Litigation literally *hundreds* of document requests (returnable *this Friday, June 3, 2011*) and issued *seven* deposition notices (noticing the first of seven depositions for June 3). The need for this Court's review of the matter is urgent and the Ecuadorian Plaintiffs further request this Court, in issuing its Order to Show Cause, grant limited emergent relief in the form of a temporary suspension of discovery in this proceeding pending a determination by this Court on the merits of the Ecuadorian Plaintiffs' instant application. To be clear, the Ecuadorian Plaintiffs do not, at this time, seek to stay *any other* aspect of the proceedings or of this Court's April 15, 2011 Scheduling Order (Dkt. 279).[1]

PRELIMINARY STATEMENT

> "***This much is clear: Chevron's declaratory judgment claim requires little or no discovery to resolve, as is typically the case in declaratory relief actions.***"

(Chevron Reply Br., Mar. 22, 2011, Dkt. 229, at 12 (emphasis added).)

> "**MR. MASTRO: . . . . Typically in a declaratory judgment action** ***there is little or no discovery. I mean there will be experts and there is potentially some expert discovery, but typically there would be little or no discovery in a dec [(sic)] relief action.***"

(Mar. 30, 2011 Conf. Tr., Dkt. 253, at 4:13-17 (emphasis added).)

[1] Although the Ecuadorian Plaintiffs initially raised the issues in this Application last week in a phone conference with the Court, the Court urged them to attempt to work these issues out with Chevron and then make this Application, if necessary, at a later time. Those efforts to date have not been fruitful. By making this Application, the Ecuadorian Plaintiffs do not intend to waive any defenses they may have to this action, including but not limited to, a lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process.

* * *

Despite these repeated representations by Chevron's counsel to induce the Court to sever Count 9 for an expedited trial, Chevron propounded, initially, **10** non-party subpoenas comprising **293** pages and **292** document requests under the issuing authority of **6** Federal judicial districts; **48** pages of Interrogatories with **32** requests; **8** Requests for Admission; and **7** Deposition Notices. (Gomez Decl., Ex. 1.) The first noticed deposition and simultaneous return date for each and every of the 293 pages of subpoenas are set for just two business days from today, **this Friday, June 3, 2011**. The subpoenas are directed to the Ecuadorian Plaintiffs' attorneys, consultants, testifying experts, and even litigation team interns – calculated to seek discovery implicating the attorney-client privilege and the work-product protection and forcing the Ecuadorian Plaintiffs to potentially litigate duplicative motions to quash or for protective orders in multiple *fora* across the country on an expedited (and perhaps even emergency) basis. (*See id.*)

The document requests suggest that, notwithstanding its multiple representations that it would need "little or no discovery." Chevron has decided to use discovery in this action to re-try the merits of the Lago Agrio proceedings that resulted in the February 14, 2011 judgment against the company. (*See, e.g.*, Subpoena Directed to D. Allen, Gomez Decl., Ex. 1, at 25 (seeking, *inter alia*, "[a]ll DOCUMENTS RELATING TO any damage or harm purportedly caused by . . . oil exploration and production activities in the FORMER CONCESSION AREA").) The requests also reflect Chevron's attempt to end-run the courts currently presiding over § 1782 actions that *Chevron initiated* that have either refused to rule on Chevron's emergent timetable or have issued decisions unfavorable to the company, by propounding subpoenas *while existing discovery requests are pending* – as in the case of attorney Joseph Kohn, his law firm Kohn,

Swift & Graf, consulting experts The Weinberg Group and Christopher Arthur, and expert Douglas Allen. (*See* Gomez Decl., Ex. 1.) And despite the Second Circuit's clear directive that United States counsel for the Ecuadorian Plaintiffs be permitted to seek funding and provide legal advice to their clients regarding future enforcement actions, Chevron's subpoenas improperly seek to intrude on the attorney-client privilege by requesting production or privilege-log disclosure of activity now expressly permissible under the modified Injunction and wholly unrelated to Chevron's declaratory relief claim. (*See, e.g.*, Gomez Decl., Ex. 1, Woods subpoena, at 22, 26 (seeking "All DOCUMENTS RELATED TO COMMUNICIATIONS . . . with . . . any person . . . asked to finance . . . the LAGO AGRIO LITIGATION" and "All DOCUMENTS RELATED TO the enforcement of the LAGO AGRIO JUDGMENT").)

This Court's rulings make plain that it is unclear at this stage whether any discovery is needed or even would be admitted during a bench trial, as the Court has not yet resolved the specific contours of Chevron's Count 9 claim. (*See, e.g.*, Apr. 15, 2011 Order, Dkt. 278, at 15 ("*[I]t is not yet clear that evidence of the manner in which the Lago Agrio case actually was handled – as distinguished from the characteristics of the Ecuadorian legal system in general or, perhaps, in categories of cases such as the Lago Agrio case – would be received in evidence on the issue of whether the Ecuadorian system is impartial and consistent with due process.*" (emphasis added)).) It is equally clear that if any of the parties need discovery in aid of the trial of Count 9, it is not Chevron, which has already received hundreds of thousands of pages of documents and taken at least 59 days of deposition testimony in various other proceedings leading up to and during this action. Chevron's relentless pursuit of discovery, now in the guise of discovery regarding Count 9, is more than vexatious, especially in light of its repeated representations that it would need little if any discovery at all.

Courts have recognized that "[r]esponding to discovery may well take valuable time." *See Gonzales v. Nat'l Broadcasting Co., Inc.*, 155 F.3d 618, 625 (2d Cir. 1998) (citation and internal quotation marks omitted). At this early juncture in the proceedings, there is simply no good cause to force needless motion practice in six different Federal judicial districts on 300 pages of subpoenas or depositions when this Court has not even decided whether it will allow the use of such discovery as evidence or whether such discovery is even relevant to the claims before this Court. That argument is even more compelling where, as here, an appellate court is currently reviewing (on an extraordinarily expedited appeal schedule) threshold issues related to these proceedings and this Court's exercise of jurisdiction. For these and other reasons expressed in this application, the Ecuadorian Plaintiffs respectfully request that this Court enter an Order to Show Cause why all discovery in this proceeding should not be stayed at least until the completion of merits briefing in the Second Circuit on July 5, 2011.

I. THIS COURT HAS NOT YET RULED WHETHER IT WOULD RECEIVE EVIDENCE ON "THE MANNER IN WHICH THE LAGO AGRIO CASE ACTUALLY WAS HANDLED" VIS-À-VIS CONSIDERATION OF CHEVRON'S CLAIMS OF LACK OF DUE PROCESS

On April 15, 2011, in granting Chevron Corporation's motion to bifurcate Count 9, this Court noted that "it is not yet clear that evidence of the manner in which the Lago Agrio case actually was handled – as distinguished from the characteristics of the Ecuadorian legal system in general or, perhaps, in categories of cases such as the Lago Agrio case – would be received in evidence on the issue of whether the Ecuadorian system is impartial and consistent with due process." (Apr. 15, 2011 Order, Dkt. 278, at 15.) To require the Ecuadorian Plaintiffs and their counsel, consultants, experts, and interns to sit for deposition and/or produce documents, to needlessly litigate motions to quash and other motions, to prepare privilege logs, etc., on an expedited basis and in Courts throughout the United States when this Court has not even begun

to define what evidence would even be considered relevant to Chevron's Count 9 claims is wholly inconsistent with this Court's expressed views.

II. THE CURRENT DISCOVERY REQUESTS ARE A CLEAR EFFORT TO DEPLETE THE RESOURCES OF THE ECUADORIAN PLAINTIFFS AND DEPRIVE THEM OF THE ABILITY TO PROSECUTE THEIR EXPEDITED APPEAL

It is now clear that Chevron's requests for discovery are not aimed at discovering relevant evidence for use at trial but rather are propounded in an effort to deplete the Ecuadorian Plaintiffs' resources and their ability to prosecute the critical and expedited appeal now pending in the Second Circuit. Chevron's scheduling of discovery requests with simultaneous return dates of two weeks (inclusive of two weekends and the Memorial Day holidays), along with simultaneous litigation in other jurisdictions, is as vexatious as it is premature. Chevron is attempting to fully and completely divert and deplete the resources of the Ecuadorian Plaintiffs.

It is surely no coincidence that Chevron selected June 3, 2011 as its simultaneous, nationwide return date for all of its subpoenas and its first deposition – *one day* after the Ecuadorian Plaintiffs' merits brief to the Second Circuit is due in the present appeal of this Court's Preliminary Injunction order. (*See* Gomez Decl., Ex. 5.) Just before it served its discovery requests in this matter, Chevron applied for an Order to Show Cause in a § 1782 action pending before the District of New Jersey seeking documents it learned about one month earlier. (Gomez Decl., Ex. 6.) The company requested the court grant the Ecuadorian Plaintiffs only four days to oppose and schedule "a hearing date of *June 1, 2, or 3, 2011*." (*Id.* (emphasis added).) The District of New Jersey flatly rejected Chevron's application, finding that the company "fail[ed] to show that emergency relief is warranted" and that Chevron failed to confer in good faith prior to making the application to the Court. (Gomez Decl., Ex. 7.) But even that has not deterred Chevron: after waiting a week since the District of New Jersey's order denying

Chevron's application, Chevron sent a letter *just last week* demanding a supplemental production by, coincidentally, *June 2, 2011*. (Gomez Decl., Ex. 8.) Chevron also sent another demand letter in a Maryland § 1782 action *just last week* requesting the production of documents the company claims to have learned of on April 21, 2011 – the company has demanded that the documents "be produced as soon as possible." (Gomez Decl., Ex. 9.)

In the Northern District of California the company timed its re-assertion of what appear to be frivolous privilege claims over documents evidencing clear misconduct on the part of Chevron, and its law firm Jones Day, in California to coincide with this same period. (*See* Gomez Decl., Ex. 10.) And the Ecuadorian Plaintiffs were forced to respond in a District of Colorado § 1782 action to a motion to reallocate certain document production costs that Chevron is apparently spending $60,000 to litigate to avoid paying the $60,000 it had promised to pay for the actual costs of the discovery it received and used in the underlying proceedings. (Gomez Decl., Ex. 11.)

For months, Chevron has alleged in filings to this Court that the Ecuadorian Plaintiffs are engaged in a "multipronged strategy" by way of "multiplicitous and burdensome proceedings" with a "harassing purpose" calculated with intent to cause "expense, burden, disruption, and harm" on Chevron. (Dkt. 251, at 6, 9) Indeed, this Court granted Chevron a Preliminary Injunction based, in large part, on a perceived threat of "a multiplicity of suits . . . . forcing [Chevron] to attempt to ward off proceedings 'in a myriad of jurisdictions.'" (Dkt. 181, at 66-67 (citation omitted).) Chevron's own discovery strategy, however, follows just that course, and appears aimed at diverting resources from the immediate task at hand in these proceedings: prosecuting the appeal that may, if decided in favor of the Ecuadorian Plaintiffs, undermine Chevron's entire case. This far-flung discovery also serves to prevent the Ecuadorian Plaintiffs

from adequately defending the integrity of the Ecuadorian judgment and the Ecuadorian judicial system that rendered it. Chevron seeks this massive amount of discovery even though it has claimed that this expedited trial "requires little or no discovery," even though its discovery requests are far broader than its Count 9 claims, and even though the company has repeatedly decried a multiplicity of litigation. Multiplicity and needless litigation will result if this Court does not stay discovery in these proceedings.

III. CHEVRON'S DISCOVERY REQUESTS SEEK TO SELECTIVELY END-RUN THE AUTHORITY OF THOSE § 1782 COURTS THAT HAVE DECLINED TO EMBRACE CHEVRON'S DISTORTED NARRATIVE

As this Court is familiar, Chevron has employed a carpet-bombing strategy of pursuing 28 U.S.C. § 1782 discovery against 30 individuals and 10 entities in sixteen Federal judicial districts. Not every reviewing court, however, has agreed to adopt Chevron's inflammatory approach with respect to the limited issues before said courts:

- In the District of Vermont, in a § 1782 action filed last year against Ecuadorian Plaintiffs' expert Douglas Allen, Judge William Sessions found the crime-fraud exception not applicable, even after an *in camera* review of documents. *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38, Order at 13 (D. Vt. Dec. 2, 2010) ("Having reviewed the materials [submitted by respondent for in camera review], the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears . . . ."). Even after receiving a full production of documents from Mr. Allen, Chevron has sought additional documents and a deposition. Notwithstanding Chevron's purported claims of urgency, the Court has not acted on Chevron's motion (which was fully briefed as of February 11, 2011).

- In the District of Columbia, District Judge Colleen Kollar-Kotelly expressly refused to rule on the application of the crime-fraud exception in a related § 1782 proceeding. *In re Application of Chevron Corp.*, No. 1:10-mc-00371-CKK-DAR, Dkt. 78, Order at 30 (D.D.C. Nov. 3, 2010) ("Nor will the Court opine on the merits of Applicants' proffered 'crime-fraud exception' argument based on the record created by the parties." (citing *Stratus Consulting*, 10-cv-00047-MSK, 2010 WL 3923092, at *11 (D. Colo. Oct. 2, 2010) (deferring to Ecuadorian courts to adjudicate allegations concerning crime-fraud).) In a § 1782 action filed in January 2011 against the Weinberg Group, Judge Kollar-Kotelly implicitly rejected Chevron's purported claims of urgency, having not yet issued a decision on Chevron's § 1782 Application (which was fully briefed as of February 23, 2011).

- Just last week, the United States Court of Appeals for the Third Circuit, in a precedential opinion, reversed a District Court's finding of privilege waiver over documents in the possession of attorney Joseph Kohn. (*See generally* Gomez Decl., Ex. 12.) The Third Circuit – presented with virtually the same documentary evidence as this Court – flatly rejected Chevron's theory that the allegation of fraud regarding the Cabrera Report, allegations that the Ecuadorian Plaintiffs were "involved surreptitiously in having criminal charges brought against [two Chevron lawyers] in an effort to pressure Chevron into settling the case," and allegations that the Ecuadorian Plaintiffs meetings and other contact with Republic of Ecuador officials were improper constituted, by themselves, even *prima facie* evidence of a crime or fraud. (*Id.* at 37-44.)

It is no surprise then that Chevron has propounded subpoenas against Mr. Allen, the Weinberg Group, and Mr. Kohn – to evade the § 1782 jurisdiction of the courts that have not proved to be simpatico to Chevron's claims. It cannot be credibly argued that multiple subpoenas issued against the same individuals for virtually the same discovery "will promote the prompt, efficient, convenient, and fair resolution of the declaratory judgment claim," as the company promised in its briefing to the Court on the issue of bifurcation. (Dkt. 229, at 3.)

IV. CHEVRON WOULD NOT BE PREJUDICED BY A TOLLING OF ALL DISCOVERY REQUESTS PENDING THE FINALIZATION OF ALL MERITS BRIEFING BEFORE THE SECOND CIRCUIT

By Chevron's own admission, the company needs "little or no discovery." (Chevron Reply Br., Mar. 22, 2011, Dkt. 229, at 12). Therefore, it cannot credibly claim to be harmed by a stay of discovery in this matter pending the finalization of briefing before the Second Circuit. The Ecuadorian Plaintiffs, after all, seek by this Application only to stay discovery and, at this time, do not seek to stay any other aspect of the proceedings or of this Court's April 15, 2011 Scheduling Order (Dkt. 279). Chevron already has amassed hundreds of thousands of documents through § 1782 discovery, scores of depositions, and hundreds of hours of raw video footage. The company cannot be said to be prejudiced by temporarily staying additional discovery while the parties obtain clarity from this Court on the contours of the Count 9

bifurcated action and devote time to their Second Circuit submissions which, we presume, may be critical to the future direction of this case..

Needless discovery requests timed to divert the resources of the Ecuadorian Plaintiffs is an issue that the Second Circuit contemplated when it invited the Ecuadorian Plaintiffs to renew its stay application of the entirety of the proceedings to the Merits Panel. When the Ecuadorian Plaintiffs earlier asked the Second Circuit to stay *all* proceedings before this Court pending appeal (*not* narrowly limited to discovery matters as requested herein), Judge Hall expressed a particular concern about the discovery demands that would be placed on the Ecuadorian Plaintiffs, denying the stay without prejudice subject to its immediate renewal "*should the results of the Rule 26 Conference now scheduled for April 29, 2011 require the parties to engage in pre-trial discovery, including but not limited to document production, propounding and responding to interrogatories and participating in depositions, or any discovery-related motion practice prior to the time that this matter is heard by a three-member panel of this Court.*" (Gomez Decl., Ex. 3, at 1 (emphasis added).) Chevron thereafter cancelled the Rule 26 Conference. (*See* Gomez Decl., Ex. 4, at 1.) Chevron's counsel elected not to share with the Second Circuit stay panel its then-contemplated strategy of demanding extensive discovery from the Ecuadorian Plaintiffs' attorneys, consultants, experts, and interns on a two-week schedule: in fact Chevron was representing to this Court, at the time, that it would need "little or no discovery." The Second Circuit ultimately denied the Ecuadorian Plaintiffs' request for a stay "without prejudice to renew before the merits panel." (Dkt. 314, at 1.) While the Ecuadorian Plaintiffs expressly reserve their rights to renew their request for a stay from the Second Circuit, this Court's prior rulings and the past representations by Chevron's counsel suggest that this Court did not intend

for such a broad discovery fishing expedition spread over six judicial districts on matters palpably beyond the scope of Chevron's Count 9 claims.

CONCLUSION

In granting Chevron's motion to bifurcate Count 9, this Court noted that "[p]rudence suggests moving toward [ ] a determination with appropriate speed." (Apr. 15, 2011 Order, Dkt. 278, at 4.) This litigation is still in its preliminary stages, with the full scope of the issues to be tried not yet having been determined by the Court, (*see, e.g.*, Dkt. 278, at 15), with the United States Court of Appeals for the Second Circuit not yet having ruled on the Ecuadorian Plaintiffs' appeal of the Court's March 7, 2011 Preliminary Injunction Order, (Dkt. 181), and with the appellate courts of Ecuador not yet having ruled on Chevron's and the Ecuadorian Plaintiffs' *de novo* appeals of the February 14, 2011 judgment against the company. The Ecuadorian Plaintiffs respectfully submit that, at this early juncture of the Count 9 proceeding, it is both premature and imprudent to require the Ecuadorian Plaintiffs to either move to quash or otherwise respond to literally hundreds of pages of discovery requests and/or oppose subpoenas in six Federal judicial districts when this Court has not yet decided what classes of evidence it will accept at trial. A stay of discovery is particularly warranted where, as here, a party seeks to wield discovery requests not for the purpose of obtaining relevant evidence but for the purpose of depleting an adversary's resources and ability to respond to critical appellate issues, and seeks to end-run the jurisdiction and authority of other Federal courts. The Ecuadorian Plaintiffs therefore request that this Court stay discovery pending the conclusion of appellate briefing on July 5, 2011.

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