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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

***In re* Application of:** **Daniel Carlos Lusitand Yaiguaje, et. al.** **Applicants,** **For the Issuance of Subpoenas for the Taking of Depositions and the Production of Documents in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782.**	**Case No. CV10- 80324 MISC CRB** **ECUADORIAN PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS APPLICATION BY ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT (A) FIND CERTAIN CLAIMS OF ATTORNEY-CLIENT PRIVILEGE AND OTHER PROTECTIONS OR IMMUNITIES TO HAVE BEEN WAIVED BY VIRTUE OF CHEVRON CORPORATION'S SELECTIVE DISCLOSURES TO THIRD PARTIES; (B) DISSOLVE THE PROTECTIVE ORDER GOVERNING DISCLOSURE OF DIEGO BORJA'S DISCOVERY MATERIALS; AND (C) FIND CHEVRON CORPORATION IN CONTEMPT OF COURT OR OTHERWISE ENTER APPROPRIATE SANCTIONS**

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(2) *In re Application of Daniel Carlos Lusitand Yaiguaje*, 11-MC-80087 CRB ("*Yaiguaje* Mason 1782");

(3) *In re Application of Dr. Diego García Carrión, the Attorney General of the Republic of Ecuador, and the Republic of Ecuador*, 11-MC-80110 CRB ("*ROE* Mason 1782");

(4) *In re Application of Dr. Diego García Carrión, the Attorney General of the Republic of Ecuador, and the Republic of Ecuador*, 11-MC-80171-SI ("*ROE* Kelsh 1782"); and

(5) *In re Application of Dr. Diego García Carrión, the Attorney General of the Republic of Ecuador, and the Republic of Ecuador*, 11-MC-80172-SI ("*ROE* Exponent, Inc. 1782").

I. PRELIMINARY STATEMENT AND BACKGROUND

Just last month, Chevron Corporation ("Chevron") argued that the Ecuadorian Plaintiffs[1] could not use or in any way rely upon certain documents produced by Diego Borja pursuant to a Rule 502 Stipulation.[2] "[T]he documents at issue," Chevron wrote in a filing to this Court, "reflect Borja's and Chevron's counsel's communications with investigators hired in anticipation of litigation [and] are squarely protected by the work-product doctrine." (*ROE* Borja 1782, Dkt. 143, at 2.) These documents, according to Chevron, "contain[ed] the work product of Chevron Corporation or its counsel" and the "use" and "rel[iance]" on these documents, Chevron wrote, "violate[d] the . . . Rule 502 stipulations and orders and California standards of professional conduct, and is punishable by sanctions and disqualification." (*Yaiguaje* Mason 1782, Dkt. 36-5, at 1-3.)

To arrive at its ruling regarding the propriety of the Ecuadorian Plaintiffs' "rel[iance]" and "use" of certain of the Rule 502 documents, this Court conducted an exhaustive review of the eleven documents that Chevron claims to be privileged and improperly relied on by the Ecuadorian Plaintiffs, necessarily quoting from many of them. (*Yaiguaje* Mason 1782, Aug. 5, 2011 Sealed Order (explicitly quoting from PRIV-DB000166); 7 n.8 (explicitly quoting from PRIV-DB000222; PRIV-DB000210; PRIV-DB000248; PRIV-DB000242; PRIV-DB000049; PRIV-DB000196; PRIV-DB000251); 10 (explicitly quoting from PRIV-DB00049); 11 (same).)

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[1] The Ecuadorian Plaintiffs consist of a group of indigenous persons and residents of the Ecuadorian Amazon who are currently suing Chevron in a matter on appeal before the Provincial Court of Justice, Sucumbios Province, Ecuador.

[2] The Ecuadorian Plaintiffs had relied on eleven documents produced by Diego Borja subject to a Rule 502 Stipulation in support of their 28 U.S.C. § 1782 Application seeking discovery from the Mason Investigative Group. (*See Yaiguaje* Mason 1782, Apr. 27, 2011 Declaration of M. Jasinski, Exs. 8 (PRIV-DB000049); 10 (PRIV-DB000242-000243); 11 (PRIV-DB000218-000219); 16 (PRIV-DB000001-000003); 17 (PRIV-DB001195-001196); 19 (PRIV-DB000166); 20 (PRIV-DB000210); 21 (PRIV-DB000196 - 000199); 22 (PRIV-DB000221-228); 23 (PRIV-DB000250-251); 24 (PRIV-DB000248-249).) A number of these documents were also filed as exhibits to the Declaration of Eric Bloom, dated May 16, 2011. (*See ROE* Mason 1782, Dkt. 2.) For ease of reference, and to avoid confusion, the Ecuadorian Plaintiffs will refer to documents by their privileged bates numbers where possible.

Presumably, because the Court was extensively quoting these privileged documents, the Court placed its Order under seal – a practice that has been followed by courts in other § 1782 jurisdictions in which Chevron has been a party. *See, e.g.*, *In re Chevron Corp.*, No. 10-mc-21JH/LFG, Dkt. 180, at 1 (Order) (D.N.M. Sept. 21, 2010) ("The Court filed a Notice indicating that its Memorandum Opinion and Order was filed under seal because the Court extensively quoted from portions of documents claimed to be attorney-client privileged.") (attached hereto as Ex. 1).)[3]

Notwithstanding the fact that as many as nine of its own purportedly privileged materials are quoted *ad seriatim* throughout the August 5, 2011 Sealed Order, Chevron's company spokesperson Kent Robertson voluntarily disclosed the entire sealed order (including references and quotations to the purportedly privileged documents) to at least one third-party journalist. This disclosure was improper, in clear defiance of this Court's intention to seal the August 5, 2011 Sealed Order, and violative of the Protective Order governing this matter. This disclosure, moreover, was not inadvertent: when the reporter contacted Mr. Robertson to confirm whether the document was sealed, Chevron did not retract, but instead attempted to *defend* the disclosure. (Declaration of Karen Hinton ("Hinton Decl."), dated Aug. 11, 2011, at ¶ 7 (relaying that Chevron spokesperson Kent Robertson informed the reporter "that he knew the August 5th, 2011, Sealed Order, was under seal").) Based on the disclosure, the third-party journalist published a news story appearing in the widely distributed *Courthouse News* legal periodical yesterday afternoon that discusses in depth the August 5, 2011 Sealed Order. (Ex. 2, at 1 (noting "[t]he contents of a sealed court order pose new complications for Chevron").)

It is improper and unfair for Chevron's public relations apparatus to publicly disseminate protected information which it claims is privileged while threatening the Ecuadorian Plaintiffs with sanctions and disqualifications for quoting those same documents in their filings to the

[3] Unless otherwise noted, all "Ex." citations refer to exhibits to the Declaration of James E. Tyrrell, Jr., filed herewith.

Yiaguaje Mason 1782 court. By disclosing such information to a third-party journalist, Chevron waived any privilege over those documents.

This most recent episode only highlights the extreme prejudice presented by the existing Protective Order in this case. Chevron and Borja have continued to benefit from the lopsided and selective disclosure of materials directly to the media, while the Ecuadorian Plaintiffs must file large categories of Borja's discovery materials *under seal* (even materials over which there is no claim of privilege, *e.g.*, Borja's résumé) and must make "reasonable diligen[t]" efforts in Ecuador (where there is no sealing requirement) to seek "permission to file such documents under seal" in order to file any non-privileged documents with the Provincial Court. (Dkt. 64, at 2.) Thus while Chevron's public relations apparatus selectively spews into the public realm whatever documents it desires (including information previously claimed privileged), the Ecuadorian Plaintiffs are left with a cumbersome process that prohibits them from even offering any public response to Chevron's selective disclosures for fear of a finding of contempt. (*See, e.g.*, Ex. 2, at 2 (declining to respond to Chevron's public allegations and noting "[a] spokeswoman for the Ecuadoreans suing Chevron declined to reply, explaining the order was under protective seal").)

Chevron has violated the Protective Order that governs this case. A violation punishable – by the Protective Order's terms – with contempt. (Dkt. 46, at 3.) And a contempt finding is particularly warranted here: Chevron disclosed a document sealed by a United States District Judge that the company knew to be under seal. (Hinton Decl. ¶ 7.) It did so without first seeking leave of Court, without requesting the Court unseal the Order, without requesting the Court file a redacted version of its Order on the CM/ECF docket system, and without even bothering to issue a retraction when presented with the opportunity.

Proceeding by order to show cause is necessary, as the disposition of this Application is urgent.[4] As this Court has observed, "Chevron's allegations of judicial bribery in Ecuador are

[4] The Ecuadorian Plaintiffs have not met and conferred with counsel for Chevron, but such a meet and confer would be pointless. Chevron has voluntarily disclosed Protected Material in violation of this Court's Protective Order. A journalist has written publicly regarding the

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monumental," "Hansen is at the very center of those allegations," and Chevron has sought to invalidate the entirety of the Ecuadorian judgment against the company based in part on a judicial entrapment scheme the evidence now shows the company helped orchestrate. (*See Yaiguaje* Mason 1782, Aug. 5, 2011 Sealed Order, at 19.) Chevron should not be able to prohibit the Ecuadorian Plaintiffs from quoting freely in their appellate filings to the Ecuador court the same materials that Chevron voluntarily disclosed to a newspaper reporter. A ruling that Chevron has waived the privilege with respect to these documents (or, at the very least, waived the right to benefit from the onerous restrictions in the Protective Order) will begin to lessen the inequities in this matter by enabling the Ecuadorian Plaintiffs to file those same documents at the first available opportunity with the Ecuadorian appellate court and in any other judicial proceeding in the United States. This will allow the Ecuadorian Plaintiffs to respond to Chevron's and Borja's lopsided, misleading, and false presentation of facts to the press and public in both Ecuador and the United States.

II. ARGUMENT

A. Chevron Corporation Has Waived Privilege Over the Documents Quoted in This Court's August 5, 2011 Sealed Order.

It is hornbook law that "'any voluntary disclosure inconsistent with the confidential nature of the attorney-client relationship waives the privilege.'" 81 Am. Jur. 2d Witnesses § 336 (2010) (quoting *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985)). If the attorney-client communications are disclosed to unnecessary third parties, including the press, "the client manifests an intent to waive confidentiality."[5] *Id.*; *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) (noting disclosure of communications to a third party "manifests an intent to waive confidentiality" and "unquestionably waives the privilege").

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information in a sealed order of this Court. No meet and confer could possibly unscramble this egg.

[5] The Ecuadorian Plaintiffs here seek a finding of waiver as to the documents at issue that were voluntarily disclosed by Borja. The Ecuadorian Plaintiffs reserve the right to argue that Borja's selective disclosures have caused a broader subject-matter waiver.

Chevron cannot credibly argue that its voluntarily disclosure of the protected information contained in the August 5, 2011 Sealed Order did not waive privilege with respect to the documents quoted therein. Indeed, the company has repeatedly taken the position in other litigation that communications with third parties "cannot be privileged." (*See, e.g.*, Ex. 3, at 3 (Chevron filing in which company takes position communication with producers of Australian and Spanish language network television waived privilege or cannot be privileged).) And the disclosure here was far from inadvertent – the Court's quotation and extensive discussion of privileged documents was evident from a facial reading of the order and the company readily acknowledged to the journalist that it was aware of the seal. (*See* Ex. 1 (*Courthouse News* article noting Chevron spokesman Kent Robertson acknowledged "the order was publicly filed before it was sealed"); *see also* Hinton Decl. ¶ 7.)

Chevron is well aware that the public disclosure of privileged information quoted in a judicial opinion can lead to waiver of privilege over the documents quoted therein. In a related § 1782 proceeding initiated by Chevron in the United States District Court for the District of New Mexico, the District Court "quoted extensively from some of the documents submitted for [*in camera*] review" and claimed to be privileged by the Ecuadorian Plaintiffs. (Tyrrell Decl., Ex. 2, at 1.) Chevron nevertheless improperly filed the sealed order in multiple jurisdictions; and then argued to the New Mexico court that it "is a pointless and waste of judicial resources" to "[u]nscramble [a]n [e]gg" once the privileges had been disclosed. (Ex. 4, at 10-11.) When the district court reaffirmed its sealing order, however, Chevron requested the court "authorize a redacted version of the Memorandum Opinion and Order . . . .for whatever purposes [Chevron] deems appropriate." (Ex. 2, at 2.)

Chevron could have requested a redacted order at any time from this Court or could have abstained from disseminating the sealed order to the press. Instead, the company rushed to a reporter with this supposedly protected information, in the process removing even the last vestige of privilege that might have once attached to any of the documents at issue.

B. The Protective Order Governing the Disclosure of Diego Borja's Discovery Materials Should Be Immediately Dissolved.

Chevron has violated the express terms of the Protective Order by selectively disclosing material within the Order's purview in a misguided and futile effort to rescue the company's image in the face of the mounting evidence that Chevron engineered a judicial entrapment scheme in Ecuador. Chevron abuse of the Protective Order are reason alone for the Court to re-evaluate that Order's efficacy. The Protective Order should not be a one-way street: if the Ecuadorian Plaintiffs are required to file materials under seal or are restricted as to the persons who can receive such materials, Chevron should not at the same time be permitted to transmit protected materials to journalists and media outlets or post protected materials on Chevron's corporate website.

Chevron's recent communication with *Courthouse News'* journalist (and any others it may have contacted) clearly violate the terms of the Protective Order. (*See* Dkt. 46.) The Protective Order prohibits the public dissemination of "documents, materials, [or] *information*" ("Protected Materials") produced by Borja in this proceeding. (*Id.* at 1.) All of the documents at issue, by Chevron's and Borja's own admission, are subject to the Protective Order – they are clearly stamped "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER." (*See, e.g.*, PRIV-DB000049.) The *Yaiguaje* Mason 1782 August 5, 2011 Sealed Order quotes from Protected Materials within the meaning of the Protective Order and, as a result, the order contains "information" that is subject to the Protective Order's reach. Protected Materials may only be disclosed "to those persons or entities responsible for preparing for and conducting the Lago Agrio Litigation"; and disclosure of any protected information "shall be accompanied by notice of this Order." (Dkt. 46, at 1-2.) The Protective Order does not authorize, in any form, disclosure of protected information to the media – in fact, because the Protective Order is so broad so as to cover *every single* document produced by Diego Borja, regardless of content – it would seem that Borja's and Chevrons' aim was to prevent the disclosure of these very materials to the media. Nevertheless, Chevron did not hesitate to disclose what it knew were Protected Materials to *Courthouse News*. Moreover, Chevron's public website continues to maintain a veritable

cornucopia of materials prominently featuring Borja and discussing Chevron's lopsided account of Borja's role in the judicial entrapment scheme. All told, at least nine web addresses on the Chevron Corporation webpage are devoted to Borja, including a final declaration prepared by Borja himself (the draft declarations produced by Borja are each marked "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER").[6] (*See generally* Ex. 5.)

The Ecuadorian Plaintiffs are undeniably prejudiced by the one-sided disclosure of the sealed Court order to the media and the continued lopsidedness imposed by the extremely broad strictures of the Protective Order – in which every single document, regardless of content, has been designated by Borja/Chevron as "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER." *See* Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 J. COMM. L. & POL'Y 7-8 (2004) ("High-profile civil litigation is not just decided in the courts; it also is decided in the court of public opinion. Courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation, has a very real impact on the resolution of individual lawsuits."). While the Ecuadorian Plaintiffs are unable to quote from the Rule 502 documents in their filings to the Provincial Court in Ecuador and in related and contemplated § 1782 proceedings, Chevron apparently believes itself to not be so constrained, running to the press with a Sealed Order containing extensive quotation of Rule 502 documents (including quotations relied on by the Ecuadorian Plaintiffs in their Mason § 1782 application; the reliance on these documents, Borja and Chevron both earlier claimed, was sanctionable). Chevron's spokesperson is able to use carefully parsed quotations from the Sealed Order (and the Rule 502 documents quoted therein) while the Ecuadorian

[6] Borja indisputably has benefited from Chevron's extensive press operations regarding the judicial entrapment scheme. By using selective documents in the press and in court filings, Chevron has attempted to legitimize Borja's act of attempting to solicit a bribe from a sitting judge which would be criminal in the United States, as it is in Ecuador. While Borja is certainly capable of objecting to Chevron's use of his documents on their website and distribution of his discovery materials to the media – Borja has not sought any intervention from this Court or made any objections known to the parties.

Plaintiffs are forced to stand on the sidelines – unable to adequately respond for fear of violating this Court's Protective Order.

The facts surrounding Chevron's back-room orchestration of a judicial entrapment scheme are monumentally important. But under this Court's Protective Order, while Chevron picks and chooses at will the sealed documents it shares with the media, highly relevant discovery materials cannot be shared with anyone other than co-counsel and experts, while other documents (such as Borja's résumé) are completely shrouded under a Protective Order cloak and must be filed under seal. Given the extreme gravity of the charges of judicial misconduct raised by Chevron and Borja, the public (in the United States and Ecuador) should have the right to access Court files related to Chevron's self-described "witness payments" – payments that began after Diego Borja intimated in a recorded conversation that he possessed evidence of Chevron's litigation misconduct.[7] The public and other courts should have the right to examine Borja's résumé to determine if he was a Chevron employee at the time of the judicial entrapment scheme (Chevron has claimed in press releases and in filings to the Provincial Court that he was not).[8] There is no

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[7] The existing Protective Order requires that all "tax return information as defined in I.R.C. § 1603" – no matter its origin and even if it reflects a payment to Borja by Chevron *during* and after the judicial entrapment scheme – to be filed under seal. (Dkt. 64.) Of course, any private interest Borja has in his "tax return information" (separate and distinct from actual tax returns) would be satisfied by redacting the documents pursuant to Rule 5.2 of the Federal Rules of Civil Procedure to remove: (1) Borja's Social Security or taxpayer identification numbers; (2) the Borjas' addresses and phone numbers; (3) any other listed contact information for Borja; and (4) any income or transactions not originating from Chevron. *See, e.g.*, *In re Hydroxycut*, No. 09-md-2087 BTM (AJB), 2011 WL 864897, at *3 (S.D. Cal. Mar. 11, 2011) (noting "[i]t is not enough that the parties would *prefer* to keep certain business information confidential" and requiring Plaintiff to unseal and re-file banking documents, in redacted form, "*on the public docket*" (emphasis added)). The Ecuadorian Plaintiffs have pledged to redact such information and should be permitted to file redacted "tax return information" and references to them in pleadings, particularly given their relevance to the underlying litigation.

[8] The existing Protective Order requires that Borja's résumé and Chevron job application (filled out by Borja in the immediate aftermath of the judicial entrapment scheme) be sealed from public view. Of course, Borja's employment status is highly relevant to the Ecuador litigation as Chevron has claimed in court filings and nationally distributed press releases that he was an "ex-contractor" at the time of the judicial entrapment operation. (Dkt. 3, Ex. D; *Yaiguaje* Mason 1782, Dkt. 4, Ex. 51.) The Protective Order should not shield Chevron from its claims. *Cf. Yountville Investors LLC v. Bank of Am.*, No. C08-425RSM, 2009 WL 411089, at *4 (W.D.

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good reason to allow Chevron and Borja to hide behind the shield of a Protective Order, including its sealing requirements, while Chevron continues to use some select Borja discovery materials as a sword against the Ecuadorian Plaintiffs, and Borja remains mute in the face of these inequities.

C. Chevron Corporation Is in Contempt of Court.

The transmission of Protected Materials to a member of the media is a clear violation of the Protective Order. (*See generally* Dkt. 46;) *see also Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 290 (5th Cir. 2002) (upholding contempt finding where party "violated the protective orders by revealing the contents of sealed documents to the press").[9] Even if this Court were not to find Chevron in violation of the Protective Order, this Court should affirmatively sanction Chevron for the company's submission of a sealed court record to the media without first obtaining leave of court. *See, e.g., In re Holley*, 285 App. Div. 2d 216, 221, 729 N.Y.S.2d 128 (2001) (disciplinary case; public censure for disclosing sealed document to journalist).

III. CONCLUSION

If the Ecuadorian Plaintiffs publicly filed this Court's Sealed Order in the Provincial Court in Ecuador or in a related § 1782 proceeding, or shared the Sealed Order with a reporter, Chevron and Borja undoubtedly would have objected, would have threatened sanctions or disqualification,

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Wash. Feb. 17, 2009) (finding "compelling interest in maintaining the secrecy of [résumé does not] outweigh[] the public interest in access").

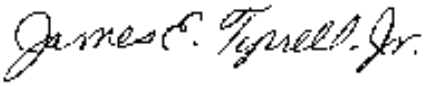
[9] Chevron spokesperson Kent Robertson, in the published *Courthouse News* article, defended his submission of the sealed court document to a journalist: "[T]he order was publicly filed before it was sealed," Mr. Robertson said. (Ex. 1, at 3.) Even if this fact were true, the temporary and inadvertent placement of the order on the public docket does not give license to Chevron to trample on a Protective Order. The issue of the Protective Order, the Rule 502 Stipulation, and the rights and responsibilities of parties in this proceeding have been the subject of substantial litigation before this Court. Even a cursory reading of the document would put Chevron on notice that the material Mr. Robertson was giving the journalist included substantial quotations to materials and information that just three months ago formed the basis for Chevron's threats to have undersigned counsel disqualified or sanctioned for relying on and quoting the material in the Ecuadorian Plaintiffs' § 1782 Application against Mason Investigative Group. Moreover, it appears, on information and belief, that at the time when Chevron disclosed the Sealed Order it was, in fact, already sealed by the Court and not publicly accessible.

and would have sought relief from this Court in the form of a request for immediate compliance with the Protective Order and the Rule 502 Order governing this case. (*See, e.g.*, *Yaiguaje* Mason 1782, Dkt. 36-5, at 1-3.)

Chevron and Borja, nevertheless, sought to advance their respective legal positions by selectively disclosing or using those sealed or privileged documents that suit their arguments or greater litigation media strategies. (*See, e.g.*, *Yaiguaje* Mason 1782, Sealed Order, at 14 (finding "Chevron made affirmative use" of certain privileged documents, and holding privilege to have waived over same documents).) Chevron's latest gambit – giving a journalist a Sealed Order of this Court (without first seeking leave of Court to release the Sealed Order, and without requesting this Court file a publicly available redacted version of its Sealed Order) – while threatening the Ecuadorian Plaintiffs with sanctions for using similar quotations to the Rule 502 documents, smacks of duplicity and unfairness. While Chevron widely distributes (to the media, no less) sealed Court Orders extensively quoting Rule 502 documents, the Ecuadorian Plaintiffs are flatly prohibited from quoting these same documents in their filings to the Provincial Court in Ecuador and in related § 1782 filings. The playing field should, respectfully, be leveled for all parties.

Dated: August 12, 2011

Respectfully submitted,



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