EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-01470-WYD

In re Application of:

The REPUBLIC OF ECUADOR and DR. GARCÍA CARRIÓN, the Attorney General of The Republic of Ecuador,

Applicants,

For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a) for the Taking of a Deposition of and the Production of Documents by BJORN BJORKMAN for Use in a Foreign Proceeding,

Respondent,

CHEVRON CORPORATION,

Intervenor.

CHEVRON CORPORATION'S AND BJORN BJORKMAN'S JOINT MOTION FOR A PROTECTIVE ORDER

Pursuant to D.C.COLO.LCivR 30.2(A) and Rule 26(c) of the Federal Rules of Civil Procedure, Respondent Bjorn Bjorkman and Intervenor Chevron Corporation (collectively, "Respondents") hereby move for the entry of a protective order prohibiting the Republic of Ecuador and Dr. García Carrión (collectively the "ROE") from publicly distributing or sharing non-public materials produced by Respondents with the Lago Agrio Plaintiffs ("LAPs") or others.

As demonstrated below, there is good cause for issuance of such a limited protective order to ensure that materials produced are used in a manner consistent with the statute

authorizing the discovery, 28 U.S.C. § 1782.[1] Moreover, the proposed order closely tracks the protective order entered in another § 1782 action, Protective Order, *In re Applic. of the Republic of Ecuador*, No. 3:10-mc-80225-CRB (N.D. Cal. Feb. 25, 2011), and remains in line with related orders entered in § 1782 actions involving Chevron and the LAPs. Order, No. 10-1918 (2d Cir. July 15, 2010). And, while the filing of a protective order motion generally stays the discovery at issue, Local Rule 30.2(A), Chevron is today producing public and other materials already accessible to the LAPs. Chevron also is serving its privilege log. Accordingly, the relief Chevron seeks is limited, and Chevron has commenced its production notwithstanding the filing of this motion and its pending objections to the Magistrate Judge's order granting the ROE's § 1782 petition and request for a stay. Chevron respectfully submits that the motion should be granted and the proposed protective order entered.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 26(c), the "court may, for good cause issue an order to protect a party or person for annoyance, embarrassment, oppression, or undue burden or expense . . . ." Fed. R. Civ. P. 26(c). Good cause "for a protective order exists when a party shows a particular need for protection." *Fransioli v. New Concepts in Mktg.*, 2011 U.S. Dist. LEXIS 90384, at *2 (D. Colo. Aug. 15, 2011). "As a general rule, the 'good cause' calculation requires that the Court balance the [moving] party's need for information against the injury which might result from unrestricted disclosure." *Masters v. Gilmore*, 2009 U.S. Dist. LEXIS 113059, at *13 (D. Colo. Nov. 17, 2009) (internal quotation marks omitted). "Courts have wide

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[1] On August 25, 2011, counsel for Respondents proposed to counsel for the ROE a stipulation regarding the relief requested herein. Ex. 1; *see* D.C.COLO.LCivR 7.1(A). By letter of August 26, 2011, counsel for the ROE declined to agree to the proposed protective order, stating that they see no "basis for the imposition of a protective order here." Ex. 2.

latitude in determining good cause, as Fed. R. Civ. P. 26(c) confers 'broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Fransioli*, 2011 U.S. Dist. LEXIS 90384, at *2-3 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

"[C]ourts must be vigilant to ensure that [their] processes are not used improperly for purposes unrelated to their role." *Drake v. Benedek Broadcasting Corp.*, 2000 U.S. Dist. LEXIS 1418, at *4 (D. Kan. Feb. 9, 2000). In exercising the "broad discretion" conferred by Federal Rule 26(c), many courts have issued protective orders prohibiting the public distribution of materials produced through discovery. *See, e.g.*, *Am. Family Mut. Ins. Co. v. Minor*, 2007 U.S. Dist. LEXIS 94096, at *2 (D. Colo. Dec. 10, 2007) (limiting "dissemination, use, [and] distribution" of material produced); *Taylor v. Solvay Pharmaceuticals, Inc.*, 223 F.R.D. 544, 547 (D. Colo. 2004) ("Public access to discovery materials may be limited upon a showing of good cause.").

The purpose of § 1782 is to assist in gathering evidence "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). In granting the ROE's petition, the Magistrate Judge found that the ROE could obtain discovery for use in the ongoing Bilateral Investment Treaty Arbitration between Chevron and the ROE. Dkt. 20. But there are numerous indications that, in fact, the ROE is seeking this discovery to aid the LAPs in ongoing litigation here in the United States: Chevron's lawsuit against the LAPs and others in the Southern District of New York, where Chevron has already submitted powerful evidence that the judgment is the product of fraud and corruption and has obtained a preliminary injunction barring enforcement of the $18 billion judgment obtained by the LAPs against Chevron, and where a trial on the permanent injunction is set for November. *See Chevron Corp. v. Donziger et al.*, 768 F. Supp.

2d 581 (S.D.N.Y. 2011) (finding that "[t]here is ample evidence of fraud in the Ecuadorian proceedings.").

As Judge Kaplan, who is presiding in that action, has observed, there is reason to believe that the ROE and the LAPs have cooperated in connection with this matter, noting that "the ROE stands to benefit greatly from the billions of dollars that would flow into Ecuador for remediation and other programs were the judgment enforced." *Id.* at 634. Judge Kaplan also noted that the LAPs and the ROE entered into an agreement whereby the LAPs would not pursue claims against Ecuador and its state oil company (*id.* at 598-99), and even pressured the ROE to bring criminal charges against Chevron lawyers in Ecuador. *Id.* at 614. Indeed, Judge Kaplan noted that "[t]he criminal charges at least in part are a result of an alliance between the Lago Agrio plaintiffs and the Ecuadorian government, which has both financial and political interests in the success of the lawsuit." *In re Application of Chevron Corp.*, 749 F. Supp. 2d. 141, 143-44 (S.D.N.Y. 2010).

Furthermore, the ROE has used discovery it obtained from Chevron to serve the LAPs' interests in the past. Documents obtained from the LAPs' counsel Steven Donziger indicate that, as early as 2006, the LAPs sent the ROE a five-page "Wish List" of discovery they wanted the ROE to get from Chevron. Ex. 3. When Chevron noticed depositions as part of a case then pending against the ROE in the Southern District of New York, Donziger circulated an email entitled "Winston [& Strawn] depositions—it's time," describing the depositions that the LAPs wanted the ROE's counsel to take and the lines of questioning they wanted the ROE to ask:

> It is our moment; I am licking my chops, at least vicariously. We need to come up with a list of everybody we think Winston [& Strawn LLP] should hit up . . . and figure out a theory to justify each and then we need to convince Winston to be aggressive in who they notice and in the depositions themselves. Then, we need to figure out a strategy for the lines of questioning of each person based on the materials we collected in the trial and whatever else we can think of.

Ex. 4.

Moreover, although the ROE claims that it seeks this discovery for use in the Treaty Arbitration, there are no existing deadlines in that arbitration and the ROE even admitted that discovery in that action is "clearly premature" and that the information requested was irrelevant to Mr. Bjorkman's role as an "expert [] in the arbitral proceedings." Dkts. 25-1; 31-1. The ROE's request for discovery under § 1782 thus cannot be prompted by a need to respond to any event in the Treaty Arbitration. Indeed, although the Treaty Arbitration has been ongoing for nearly two years, the ROE waited to initiate its flurry of § 1782 actions until just months prior to the November 14, 2011 trial requesting declaratory relief and an injunction against enforcement of the fraudulent Ecuadorian judgment, where fact discovery is scheduled to close on September 15, 2011.

If the ROE were to share the materials produced in this action with the LAPs, not only would it contravene the language and purpose of § 1782, which is to assist in gathering evidence "for use in a proceeding in a foreign or international tribunal," 28 U.S.C. § 1782(a), it would also cause substantial harm to Chevron by improperly enlarging the scope and timing of discovery in the action going to trial in the Southern District of New York. And the ROE can claim no legitimate prejudice from the proposed protective order, as it has no legitimate interest in sharing these materials with the LAPs in any event. In its letter rejecting Respondents' proposed protective order, the ROE did not even purport to deny that they were going to share produced information with the LAPs, their counsel, and representatives.

The Court should, therefore, restrict the use and distribution of discovery to the Treaty Arbitration and expressly prohibit its circulation to, or use by, the LAPs, their representatives, any of their co-conspirators, and others. Such restrictions would help minimize improper

collusion between the ROE and the LAPs, protecting Chevron's and Mr. Bjorkman's rights under Rule 26 and § 1782.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court enter the attached Protective Order.

Dated: August 26, 2011

Respectfully submitted,

/s/ Robert C. Blume
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF system on this, the 26th day of August, 2011.

s/ *Robert C. Blume*
ROBERT C. BLUME