UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, et al., Defendant.	Docket No. 11 CV 0691 (LAK)

CHEVRON CORPORATION'S REPLY IN SUPPORT OF ITS MOTION BY ORDER TO SHOW CAUSE FOR AN ORDER FURTHER PROTECTING THE CONFIDENTIAL DECLARATION OF DOE 3 AND GRANTING LEAVE TO SUPPLEMENT THE RECORD WITH DOE 3'S DECLARATION

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Plaintiff Chevron Corporation ("Chevron") seeks two specific rulings with respect to Doe 3. First, Chevron requests leave to supplement the record with Doe 3's declaration in connection with Chevron's pending request for an order under Federal Rule of Civil Procedure 56(g) (Dkt. 745). *See* Dkt. 1095 at 6-7. Defendants do not object to this request.

Second, Chevron seeks an order of further protection for Doe 3, precluding counsel for Defendants in this action from disclosing the Doe 3 declaration, the identity of Doe 3, or any information that could identify Doe 3, to anyone other than a single individual acting as counsel of record in this action for each Defendant, without prior Court approval. *See* Dkt. 1095 at 4-6. Instead of a reasoned response to Chevron' motion, Defendants launch into an unrestrained tirade against Chevron and this Court—doing so on the same day that this Court admonished them that "Counsel should keep in mind their responsibility under Rule 3.3(f)(2) of the Rules of Professional Conduct." Dkt. 1151 at 2.

On the merits, Defendants offer five arguments, each of which lacks merit.

1. Defendants claim that "[t]he factual predicate for the motion—that the witness faces 'great personal risk'—is unsupported." Dkt. 1154 at 2. But this Court has already set forth in detail the ample good cause for believing the Doe witnesses face great personal risk if their identities are revealed. *See, e.g.,* Dkt.843 at 28 ("The Does plainly would be potential targets of intimidation, retribution, and conceivably worse if their identities become known."); *see also id.* at 29 (concluding that disclosure of the Does' identities "could lead to their identities being learned by the LAPs, their counsel and allies in Ecuador, including the Ecuadorian government, [which] is substantially likely to result in reprisals against them as well as efforts to intimidate them"). The same is true of Doe 3, and Defendants offer no contrary evidence.[1]

[1] The only "evidence" Defendants offer in support of their opposition is the taped interview of Alberto Guerra from July 13, 2012, and Guerra's May 2, 2013 deposition testimony. *See* Dkt. 1155. But Defendants do not

2. Defendants next claim that Chevron's motion "is offensive to basic principles of U.S. law" because it permits "an accuser to hide his or her name from the accused." Dkt. 1154 at 2. They equate efforts to protect the Doe witnesses with "the Spanish Inquisition or the Star Chamber." *Id.* This hyperbole is meaningless. Under the requested protective order, a single counsel of record for each Defendant—who is not himself a party—would have access to the Doe 3 declaration.[2] Defendants also would be able to apply to the Court if they believed that further disclosure was necessary.[3] Defendants offer no explanation for why such limitations would impede their ability to prepare their case. And there is nothing unusual or improper about a Court issuing a protective order limiting access to a witness's identity or testimony, out of concern for the witness's safety. *See, e.g., United States v. Celis*, 608 F.3d 818, 829 (D.C. Cir. 2010) (describing protective order governing identities of Colombian witnesses, which allowed the witnesses to testify under pseudonyms but required disclosure of their identities to defense counsel and "one member of the defense team located in the United States," but their identities

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explain how these materials could possibly undermine the Court's findings as to the risks faced by the Doe witnesses. In fact, as the Court has noted, Guerra's credibility has no bearing on whether the Does face risks if their identities are disclosed. Dkt. 843 at 15 (noting that "the question whether Guerra's account is accurate will be decided on another day").

[2] *See* Dkt. 843 at 32 (finding Defendants' "interest in properly preparing this action for trial and, in particular, in preparing to meet the testimony of the Does that is foretold by their declaration" is "served, at least to a very important extent and perhaps fully, by the fact that their counsel of record have the sealed declarations of the Does and the unredacted declarations of other witnesses and thus can prepare"). Mr. Donziger has recently entered a Notice of Appearance as counsel on his own behalf. Dkt. 1147. This is presumably in anticipation of his retained counsel at Keker & Van Nest being permitted to withdraw from the case, whose application to withdraw was served after Chevron filed the present proposed Order To Show Cause. While the Court need not reach the issue at this juncture, since Keker & Van Nest remains as counsel for the Donziger Defendants, Chevron submits that in no event should Mr. Donziger be permitted access to the Doe 3 affidavit, because, based on Mr. Donziger's conduct, the risk of disclosure of Doe 3 identifying information is too great. *See, e.g.,* Dkt. 843 at 34 ("Donziger's actions give little comfort that he would comply with confidentiality obligations imposed upon him, at least on those occasions where he is in Ecuador."); *id*. at 17 (quoting Mr. Donziger's plan to use "pressure, intimidation and humiliation" as part of a legal strategy). For these same reasons, to the extent there is any ambiguity in this Court's prior ruling with respect to the additional protection for Doe 1 and Doe 2 (Dkt. 843), the Court should clarify that Mr. Donziger is not to have access to these declarations or any identifying information about Doe 1 or Doe 2—regardless of whether he is now "counsel of record" in this action.

[3] In the Court's February 21, 2013 order regarding Does 1 and 2, the Court allowed Defendants to "apply to the Court to unseal portions of the declarations that they believe could be made public without material risk of harm to higher values." Dkt. 843 at 32. Defendants have not taken advantage of this opportunity.

"could not be shared with anyone located in Colombia without the district court's prior permission"); *Carhart v. Ashcroft*, 300 F. Supp. 2d 921, 922-23 (D. Neb. 2004) ("The court may take all reasonable steps necessary to protect the witness during discovery, at trial, and thereafter.").

3. Defendants take issue with this Court's previous findings about their "persistent obstruction of discovery in this case" and the "need to safeguard" the Doe witnesses from reprisals. Dkt. 1154 at 2-3. Defendants offer nothing more than their own ipse dixit—in contrast to the extensive factual and legal record supporting this Court's previous order of protection for the Doe witnesses, which relates in substantial detail Defendants' discovery misconduct and the reasonable bases for believing that the Doe witnesses' face risk of reprisals. Dkt. 843.

4. Defendants hurl a number of baseless accusations about Chevron's supposed misconduct in this litigation. Dkt. 1154 at 3, 4. But even if Defendants' allegations were true (and they are not), Chevron's behavior is not at issue, and these claims have no bearing on whether Doe 3 faces economic or physical harm if the witness's identity is revealed.

5. According to Defendants, Chevron "provides no justification" for limiting access to Doe 3's declaration. *Id*. Again, Defendants ignore this Court's detailed recitation of all the reasons, evidence, and authorities supporting its decision to limit access to Doe 1 and 2's declarations and identities—all of which apply greater force with respect to Doe 3. *See* Dkt. 843.[4] And the further protection sought for Doe 3 (limiting access to a single counsel of record for each Defendant) is warranted for the reasons expressed in Chevron's motion, to which Defendants offer no response. *See, e.g.*, Dkt. 1095 at 3 (explaining that Doe 3 is from a small group of

[4] Defendants ask: "How does limiting access to one lawyer protect the 'integrity of the court's process''? Dkt. 1154 at 4. This Court answered that question more than thirty years ago when it explained that "[t]he insult that such retaliation against litigants or witnesses would produce goes beyond the injuries suffered by the individuals themselves: the integrity of the court's process and proceedings suffers the inevitable and intolerable destruction that accompanies any retaliation against the witnesses." *EEOC v. Locals 14 and 15, Int'l Union of Operating Eng'rs*, 438 F. Supp. 876, 879 (S.D.N.Y. 1977); *see also id.* at 879-80 ("Witnesses who lose work opportunities, suffer harassment, and are otherwise retaliated against because of their testimony, are going to be much less likely to testify in a subsequent proceeding . . . .").

individuals who could possibly have access to the reported information, so revealing anything about the declaration itself could lead to identification of this witness by process of elimination). Further, given the recent attempts by Defendants to shuffle their roster of attorneys (Dkts. 1109, 1112), granting all of their U.S. lawyers full access to Doe 3's identity increases the risk of leaks and amplifies the inability to determine their source. This concern is especially significant where departing counsel objects to this Court's continuing jurisdiction over them. *See* Dkt. 1153 at 2. Thus, by limiting the universe of individuals to whom the Doe 3 declaration and identity may be disclosed, the Court can better police its orders and ensure that Doe 3 has the needed protection.

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In sum, Chevron respectfully requests that the Court grant Chevron leave to supplement the record with Doe 3's sealed declaration. This Court should also issue a protective order barring Defendants from disclosing the Doe 3 declaration or identifying information about Doe 3 to anyone other than an individual counsel of record for each Defendant in this action, except without prior leave granted on notice to Chevron.

Dated: May 17, 2013
New York, New York

Respectfully submitted,
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