ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2012

No. 11-7097

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEVRON CORPORATION,

Petitioner-Appellee,

v.

THE WEINBERG GROUP,

Respondent-Appellant.

On Appeal From The United States District Court
For The District of Columbia

BRIEF OF APPELLEE

Theodore J. Boutrous, Jr.
Peter E. Seley
Thomas H. Dupree, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Fax: (202) 467-0539

Attorneys for Appellee

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and Amici

1. District Court: Petitioner was Chevron Corporation ("Chevron"). Respondent was The Weinberg Group ("Weinberg").

2. Court of Appeals: Appellant is Weinberg. Appellee is Chevron. There are no amici or intervenors at this time.

3. Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee's undersigned counsel state:

Chevron is a publicly traded company (NYSE: CVX) that has no parent company. No publicly traded company owns 10% or more of its shares. Chevron is an integrated energy company.

II. Rulings Under Review

Weinberg appeals from the order granting Chevron's motion to compel production of documents entered by Magistrate Judge John M. Facciola in the District Court on September 8, 2011, as well as from Magistrate Judge Facciola's denial of Weinberg's motion to reconsider that same order, entered on September 13, 2011.

III. Related Cases

This case has not previously been before this Court. In addition to the proceeding that is the subject of this appeal, Chevron has a separate action against the Weinberg Group pending in the U.S. District Court for the District of Columbia. *See In re Application of Chevron Corp.*, No. 11-mc-030 (CKK) (D.D.C.).

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Thomas H. Dupree, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Fax: (202) 467-0539

Attorneys For Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

---

* Authorities upon which we have chiefly relied are marked with an asterisk.

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

OTHER AUTHORITIES

RULES

GLOSSARY

A	Appendix
UA	Appellant's Addendum of Unpublished Dispositions and Court Filings
SUA	Appellee's Special Appendix of Unpublished Dispositions and Court Filings

INTRODUCTION

Chevron subpoenaed The Weinberg Group — a Washington, D.C.-based consulting firm — to obtain discovery in connection with Chevron's lawsuit pending in a New York federal court. Chevron's claims arise from misconduct in the United States and in Ecuador that has culminated in a fraudulent $18.2 billion judgment issued by a provincial court in Ecuador. Chevron's complaint asserts claims under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq*. ("RICO"), the Declaratory Judgment Act, 28 U.S.C. § 2201, and state law. Chevron moved to compel Weinberg's compliance with its subpoena, and the district court granted Chevron's motion in full, holding that no attorney-client privilege applied to Weinberg's documents and that any potentially applicable work product protection was overridden by the crime-fraud exception.

The district court acted well within its discretion and its ruling should be affirmed. In applying the crime-fraud exception, the district court joined six other federal courts that likewise have applied the crime-fraud exception to allow discovery from the Ecuadorian plaintiffs' U.S.-based lawyers and consultants. These courts based their rulings on the now-overwhelming evidence proving that the Ecuadorian plaintiffs' lawyers and consultants have engaged in intimidation of judges, bribery, fabrication of evidence, and the secret and unlawful ghostwriting of judicial documents in pursuing a corrupt, multibillion-dollar judgment against

Chevron based on meritless claims of environmental harm. The scope of the fraud and the evidence of the plaintiffs' lawyers and consultants engaging in "inappropriate, unethical and perhaps illegal conduct" have sent "shockwaves through the nation's legal communities." *In re Chevron Corp.*, No. 1:10-mc-00021–22, Dkt. 77, at 3–4 (D.N.M. Sept. 2, 2010) (SUA 7–8).

The fraud has been documented extensively, including in the outtakes to a documentary known as *Crude* — and in documents from the plaintiffs' lawyers' own internal files — which show that the attorneys and representatives for the Ecuadorian plaintiffs corrupted a purportedly neutral court expert named Richard Stalin Cabrera Vega, the only court expert authorized to opine on causation and damages in the Ecuadorian proceeding. The plaintiffs paid Cabrera under the table, while having U.S. consultants secretly draft his entire report, which was then translated into Spanish and filed as his own work. The ghostwritten report opined that Chevron should be held liable for some $27 billion in damages. The plaintiffs' lawyers repeatedly denied that they were colluding with Cabrera, claiming he was independent and neutral. And when the details of the Cabrera fraud began to be exposed in discovery proceedings in the United States against the consultants that ghostwrote the report, the plaintiffs' attorneys admitted in internal emails that they could all "go to jail." A-1365.

Weinberg, which became involved after the Cabrera fraud was exposed, was tasked with a key aspect of damage control. Weinberg's mission was to coordinate and oversee the preparation of reports by a group of *new* experts, who would repackage the fraudulent and scientifically baseless Cabrera report. The plan was to launder the Cabrera report by having the new experts attest to the same fraudulent, unscientific, and biased data and conclusions, and file new reports under their own names with the Ecuadorian court. As admitted privately by the Ecuadorian plaintiffs' U.S.-based attorneys at Patton Boggs, the scheme was "an effort to 'cleanse' any perceived impropriety related to the Cabrera Report," and to "address Cabrera's findings in such a subtle way that someone reading the new expert report (the Court in [Ecuador] or an enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages." A-123, A-130.

Weinberg organized a group of six new "cleansing experts" who submitted new reports to the Ecuadorian court. None of these experts visited Ecuador or conducted any independent testing. Instead, they relied on the fraudulent Cabrera report or other information fed to them by Weinberg. In less than a month, the cleansing experts produced reports that added another *$86* billion to the alleged damages, for a total of $113 billion in damages. The plaintiffs' lawyers submitted the reports to the court in Ecuador, which relied on them to support an $18.2

billion judgment — a judgment that other evidence shows was itself ghostwritten at least in part by the plaintiffs' lawyers.

Weinberg challenges the district court's decision to defer to factual findings rendered by Judge Lewis Kaplan — the judge who has long presided over the underlying litigation and closely related discovery proceedings in the Southern District of New York. In a 131-page opinion containing detailed factual findings and granting a preliminary injunction enjoining enforcement of the Ecuadorian judgment — one of several rulings he has issued in this case — Judge Kaplan found "ample evidence of fraud in the Ecuadorian proceedings," including fraud with respect to the "scheme to 'cleanse' the Cabrera report." *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011), *rev'd on other grounds*, *Chevron Corp. v. Naranjo*, Nos. 11-1150-cv(L), 11-1264-cv(CON), 2012 WL 232965 (2d Cir. Jan. 26, 2012); A-1046. While the Second Circuit later vacated the preliminary injunction on procedural grounds, it did not question Judge Kaplan's factual findings or address the merits of Chevron's claims in the New York litigation. *See Naranjo*, 2012 WL 232965. Here, the district court's decision to defer to the findings of Judge Kaplan, as well as to those of another judge supervising discovery in that proceeding — Magistrate Judge James Francis — was a reasonable and proper exercise of discretion, and consistent with basic

concepts of comity among federal courts overseeing different aspects of the same case.

The district court went on to hold that even absent Judge Kaplan's and Judge Francis's findings, the court *independently* would reach the same conclusion on its own and find "more than sufficient evidence of a prima facie case that the Weinberg Group's work was part of a fraud upon the Ecuadorian court." A-20. On appeal, Weinberg fails even to mention, let alone challenge, this alternative holding — an error that is fatal to its appeal. *See Browning v. Clinton*, 292 F.3d 235, 240 (D.C. Cir. 2002) (where the district court provides two alternative grounds for its ruling and the appellant "appeals only the latter, [ ] we will affirm based on the former"). And even if Weinberg had preserved its challenge, the district court's independent determination that Chevron had established a *prima facie* case of fraud was supported by ample evidence and does not come close to an abuse of discretion.

Neither of Weinberg's remaining arguments has merit. Weinberg argues that the district court should have conducted a document-by-document review. But Weinberg never made this request until its motion for reconsideration, in which it demanded the district court personally review more than 1,000 documents in less than 24 hours — and in any event, a district court has broad discretion in determining whether *in camera* review is warranted. Weinberg also argues that the

court should have issued a protective order governing documents with purportedly "confidential" information. Here too, Weinberg failed to raise this argument until the district court had already ruled — and even then, Weinberg failed to substantiate its claims of confidentiality, merely asserting an ambiguous claim of sensitive information. The district court acted well within its discretion in denying these two untimely and meritless requests.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over the underlying actions under 28 U.S.C. §§ 1331, 1332 and 18 U.S.C. § 1964(c). Weinberg timely filed a notice of appeal on September 14, 2011, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in finding that Chevron had demonstrated a *prima facie* case of crime or fraud.

2. Whether the district court abused its discretion in declining Weinberg's untimely requests that the court conduct an *in camera* review of more than 1,000 documents in 24 hours and issue a protective order based on Weinberg's unsupported claim of confidentiality.

STATEMENT OF THE CASE

On February 1, 2011, Chevron brought an action in the Southern District of New York against the Ecuadorian plaintiffs, Steven Donziger (the plaintiffs' lead

American lawyer), the Amazon Defense Front (the designated beneficiary of the judgment in the Ecuadorian lawsuit), and their agents. Chevron's complaint alleged violations of RICO, common-law fraud and other claims, and sought a declaration that any judgment emanating from the Ecuadorian court would not be entitled to recognition or enforcement under the New York Recognition Act, N.Y. CPLR 5301 *et seq*. *See Chevron Corp. v. Donziger*, No. 11-cv-00691, Complaint, Dkt. 1 (S.D.N.Y. Feb. 1, 2011). The case was assigned to Judge Kaplan, who had presided over two related applications by Chevron for discovery pursuant to 28 U.S.C. § 1782.

On February 8, 2011, the New York district court granted Chevron's request for a temporary restraining order against any attempted enforcement of any judgment against Chevron in the Ecuadorian litigation. *Chevron Corp. v. Donziger*, No. 11-cv-00691(LAK), Dkt. 77 (SUA 31).

On February 14, 2011, the provincial court in Ecuador issued its judgment, imposing $18.2 billion in damages against Chevron, including approximately $8.6 billion in compensatory damages and an $8.6 billion penalty unless Chevron provided a public apology. A-745–932; A-929.

On March 7, 2011, the New York district court issued a preliminary injunction enjoining enforcement of the Ecuadorian judgment. *See Chevron Corp. v. Donziger*, 768 F. Supp. 2d at 660; A-1089.

On May 20, 2011, Chevron issued a subpoena to Weinberg from the United States District Court for the District of Columbia seeking documents and testimony in connection with the New York proceedings.

On June 1, 2011, at the Ecuadorian plaintiffs' request, the New York district court severed the declaratory judgment claim for purposes of expedited trial and appeal, creating a new proceeding styled *Chevron Corp. v. Salazar, et al.*, 11-cv-03718(LAK). *See Chevron Corp. v. Salazar*, 11-cv-03718, Dkt. 1 (S.D.N.Y. June 1, 2011) (SUA 33).

After Weinberg made an inadequate document production and refused to produce documents on the basis of attorney-client privilege and work product protection, Chevron on July 15 petitioned the D.C. district court for an order compelling production, and later filed an amended motion to compel production on August 8. *See* A-3 (Dkt. 1), A-7 (Dkt. 16).

On September 8, the district court overruled Weinberg's privilege objections on the basis of the crime-fraud exception and ordered Weinberg to produce documents responsive to Chevron's subpoena. A-8 (Dkt. 24). Weinberg moved for reconsideration, A-8 (Dkt. 27), and the district court denied that motion on September 13. A-9 (Dkt. 30).

On September 14, Weinberg filed a notice of appeal and moved this Court for an emergency stay of production pending appeal. Docs. 1329508, 1329577.

This Court denied the stay on September 15. Doc. 1329886. In denying the stay, the Court limited Chevron's use of the documents to the declaratory judgment action and the RICO proceeding. *See id.* (directing that "appellee's use of the assertedly privileged documents be restricted to the underlying litigation pending before the United States District Court for the Southern District of New York in Chevron Corp. v. Donziger, 11cv00691 [the RICO action], and Chevron Corp. v. Salazar, 11cv03718 [the declaratory judgment action]."). Weinberg then began producing documents over which it had claimed privilege.

On September 22, after the Second Circuit stayed the *Salazar* action in the Southern District of New York, the D.C. district court stayed any further production pursuant to the parties' stipulation. A-10 (Sept. 2, 2011 Minute Order).

Last week, the Second Circuit issued its opinion in *Salazar* (now styled as *Chevron v. Naranjo*). *See* 2012 WL 232965 (2d Cir. Jan. 26, 2012). The court vacated the preliminary injunction on the basis that "the district court erred in construing [New York's] Recognition Act to grant putative judgment-debtors a cause of action to challenge foreign judgments before enforcement of those judgments is sought." *Id*. at *1. The Second Circuit remanded to the district court with instructions to dismiss the declaratory-judgment claim, but recognized that Chevron's RICO claims and state-law tort claims would proceed. *Id*. at *12. Chevron is evaluating its appellate and other legal options in the New York action.

STATEMENT OF FACTS

1. The Ecuadorian Litigation

From 1964 to 1992, Texaco Petroleum Company ("TexPet"), a fourth-tier subsidiary of Texaco Inc., held an interest in an oil consortium that operated in the eastern, "Oriente" region of Ecuador. *See generally In re Application of Chevron Corp.*, 749 F. Supp. 2d 141, 148–59 (S.D.N.Y. 2010), *aff'd*, *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010). In 1976, Ecuador's state-owned oil company, Petroecuador, became the controlling, majority owner of the consortium. In 1992, TexPet ceased its participation altogether after Ecuador elected to take sole ownership of the operations. At that time, TexPet entered into negotiations with the Ecuadorian government and Petroecuador that resulted in agreements pursuant to which TexPet committed to remediate a portion of the consortium area proportionate to its minority ownership stake in exchange for a release from any further environmental liability, with Petroecuador taking responsibility for the remaining remediation. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 341–42 (S.D.N.Y. 2005). The release was granted in 1998 after all responsible agencies of the Ecuadorian government certified the satisfactory completion of the $40 million remediation program. A-108–121.

In 1993, before TexPet's remediation program commenced, U.S.-based plaintiffs' lawyers filed against Texaco a putative class-action lawsuit on behalf of residents of the Oriente region in the U.S. District Court for the Southern District of New York. The lawsuit alleged that the putative class had suffered "property damage, personal injuries, and increased risk of disease" from the oil-production activities of the consortium. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002). The Southern District dismissed the case on the ground of *forum non conveniens* after Texaco promised to consent to limited personal jurisdiction in Ecuador, accept service of process there, and waive statute-of-limitations defenses for a period after the dismissal. *See id.* at 539, 554.

The lawyers who directed the *Aguinda* action brought suit in 2003 against Chevron in the Provincial Court of Sucumbíos in Ecuador on behalf of a different, but overlapping group of plaintiffs. *In re Application of Chevron Corp.*, 749 F. Supp. 2d at 149. They named Chevron as the sole defendant, failing to name TexPet or Texaco. (In 2001, Texaco had merged with a Chevron subsidiary, through a transaction known as a reverse-triangular merger, resulting in Texaco, Inc. becoming a second-level subsidiary of Chevron.) Rather than asserting personal injury and property claims as they had in *Aguinda*, the lawyers sued under a new Ecuadorian law, for which they had heavily lobbied, called the

Environmental Management Act. *See Chevron Corp. v. Donziger*, 783 F. Supp. 2d 713, 716 (S.D.N.Y. 2011). The act created a private right of action to sue for "community" environmental harms. *Id.* Despite the 1998 release from liability for environmental harms, the government of Ecuador pledged its full support to the plaintiffs and "announced that it would receive ninety percent of any recovery." *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 286–87 (S.D.N.Y. 2010).

2. Cabrera and the Initial Revelations of Fraud

At the plaintiffs' request, the Ecuadorian court appointed a supposedly neutral expert named Richard Stalin Cabrera Vega to conduct an official "global assessment" of the harms allegedly caused by TexPet in the region. *In re Application of Chevron Corp*., 749 F. Supp. 2d at 144, *aff'd*, *Lago Agrio Plaintiffs v. Chevron Corp*., 409 F. App'x 393 (2d Cir. 2010). But as Chevron later discovered, Cabrera was not neutral — far from it. He was secretly paid by and operated at the direction of the plaintiffs' lawyers, permitted them to ghostwrite his official report, and then fraudulently presented it as his independent work while denying any relationship with the plaintiffs' lawyers. *Id*. at 144–45. That sham report recommended that Chevron pay damages of approximately $27 billion. *Id*. at 150.

The Cabrera fraud and other misconduct was brought to light by a series of actions commenced by Chevron in U.S. courts under 28 U.S.C. § 1782, which

permits a court to grant discovery for use in foreign proceedings. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–49 (2004). Because the plaintiffs' attorneys and other affiliated entities, such as consulting firms, were scattered throughout the country, Chevron brought § 1782 actions in 2009 and 2010 in a number of different judicial districts, as required by the statute. It prevailed in whole or in part in each of them, obtaining documents and other evidence demonstrating that the plaintiffs' lawyers and consultants had actually drafted the Cabrera report and had engaged in other fraudulent misconduct, including falsifying another expert report and successfully persuading the Ecuadorian government to bring trumped-up criminal charges against two of Chevron's attorneys. *In re Application of Chevron Corp.*, 749 F. Supp. 2d at 149–56.

The evidence included outtakes from a film, instigated and funded by the plaintiffs' lawyers themselves, called *Crude*. One outtake showed Cabrera — the supposedly neutral court-appointed expert — meeting with plaintiffs' counsel to plot the report shortly before he was appointed. *In re Application of Chevron Corp.*, 749 F. Supp. 2d at 150. The outtakes also "contain statements by [lead plaintiffs' attorney Steven] Donziger that the Ecuadorian court system is corrupt, that the [Ecuadorian] plaintiffs can prevail only by pressuring and intimidating the courts, and that the facts have to be twisted to support the plaintiffs' theories" —

statements that "raise substantial questions as to his possible criminal liability and amenability to professional discipline." *Id*. at 147; *see also*, *e.g*., *id*. at 147 n.15 (Donziger: "'The only language that I believe this judge is going to understand is one of pressure, intimidation and humiliation. And that's what we're doing today. We're going to let him know what time it is . . .'" (alteration in original)). When a dinner companion remarked to Donziger that any judge that ruled against the plaintiffs would be killed, Donziger responded, he "might not be [killed], but he'll think—he thinks he will be . . . which is just as good." *Id*. at 159.

The *Crude* outtakes contained many more explosive and incriminating statements from Donziger. For example, he stated with regard to Ecuadorian judges: "They're all corrupt! It's – it's their birthright to be corrupt." A-967. He also asserted that "anything is solved in Ecuador through politics. . . . You can solve anything with politics as long as the judges are intelligent enough to understand the politics. . . . [T]hey don't have to be intelligent enough to understand the law." A-1001. And when the plaintiffs' technical team cautioned Donziger that the evidence did not support his claims, he responded: "Hold on a second, you know, this is Ecuador, okay, . . . You can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want. . . . We can do it. And we can get money for it. . . . Because at the end of the day, this is all for the Court just a bunch of smoke and

mirrors and bull***t. It really is. We have enough, to get money, to win." A-992–993.

Courts presiding over these § 1782 applications have been appalled by the nature and extent of the fraud uncovered. "There is ample evidence in the record," one court concluded, "that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own." *In re Application of Chevron Corp.*, No. 10-cv-1146, 2010 WL 3584520, at *6 (S.D. Cal. Sept. 10, 2010). Another federal judge remarked, "the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court." *Chevron Corp. v. Camp*, Nos. 10-mc-27, 10-mc-28, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010); *see also In re Chevron Corp.*, No. 1:10-mc-00021–22, Dkt. 77, at 3–4 (D.N.M. Sept. 2, 2010) (SUA 7–8) (explaining that the fraud has sent "shockwaves through the nation's legal communities").

Many other courts reached the same conclusion, invoking the crime-fraud exception in overruling claims of privilege. *See, e.g.*, *In re Application of Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011) ("[W]e believe that this showing . . . is sufficient to make a prima facie showing of a fraud that satisfies the first element of the showing necessary to apply the crime-fraud exception to the attorney-client

privilege."); *In re Application of Chevron Corp*., No. 10-cv-02675, Hr'g Tr. at 43:13–44:16 (D.N.J. Jun. 11, 2010) (SUA 4) ("[T]he provision of materials and information by consultants on the litigation team of the Lago Agrio plaintiffs in what appears to be a secret and an undisclosed aid of a supposedly neutral court-appointed expert in this Court's view constitutes a prima facie demonstration of a fraud on the tribunal."); *In re Application of Chevron Corp*., 749 F. Supp. 2d at 167 ("[T]here is more than a little evidence that [plaintiffs' counsel's] activities . . . come within the crime-fraud exception to both the privilege and to work product protection."); *In re Chevron Corp*., No. 10-mc-00021 (J/LFG), Order (D.N.M. Sep. 13, 2010) (SUA 27) ("The Court concludes that these discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants."); *Chevron Corp. v. Page*, No. RWT11-1942, Oral Arg. Tr. at 11:8–18 (D. Md. Aug. 31, 2011) (SUA 51) ("[T]here is a lot of other information that the movants have provided to support the notion that there is fraudulent activity. I do accept the findings . . . of my colleagues in the federal courts of the United States on this issue where it has been made. . . . I accept them not because of the decision but because of the factual underpinning. We could spend a good deal of time here today spelling those out.").

As more and more evidence of the fraud was brought to light by Chevron's § 1782 actions and the plaintiffs' attorneys began to fear that the lawsuit against Chevron was in jeopardy, they increasingly sought to delay further disclosure through obstructive and improper means. They refused to respond to subpoenas and made misrepresentations to federal judges. They engaged in "a deliberate attempt to structure the response to [Chevron's] subpoenas in a way that would create the maximum possibility for delay." *In re Application of Chevron Corp*, 749 F. Supp. 2d 170, 185 (S.D.N.Y. 2010); *see also*, *e.g.*, *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047, Dkt. 335 at 4 (D. Colo. June 27, 2011) (SUA 39) (finding that "I was not given the truth" when counsel for Stratus Consulting falsely denied in open court that his clients had met with Cabrera).

3. The Cleansing Expert Scheme

Faced with a mountain of evidence exposing the Cabrera fraud and a trial record that was soon closing, the plaintiffs' counsel concocted a plan to "cleanse" the Ecuadorian record of the fraud lest the proceeding result in a judgment that would be unenforceable in other countries. A-123.

On May 20, 2010, plaintiffs' lawyer Eric Westenberger of Patton Boggs sent an email to his colleagues describing what he called the "effort to 'cleanse' any perceived impropriety related to the Cabrera Report." A-123. The scheme involved hiring new experts — the cleansing experts — who would file new

reports based on the data and conclusions in the Cabrera report, thereby presenting the Ecuadorian court with laundered versions of Cabrera's fraudulent work.

On June 15, 2010, the plaintiffs' attorneys exchanged emails debating the extent to which they should disclose their collaboration with Cabrera and concluded that "the best course to put the controversy [regarding Cabrera] to rest is to order supplementary reports now." A-1399.

That same day, plaintiffs' lawyer Edward Yennock of Patton Boggs circulated a draft of the pleading for the Ecuadorian court proposing the cleansing expert submissions. His cover email stated: "We no longer assert that our interaction was consistent with Ecuadorian law and Court orders; we now state merely that Cabrera's adoption of our proposed views was not a fraud . . . . We believe that this submission balances the desire for a 'cleansing' of some sort with the need to avoid creating the impression that what we describe here is an exhaustive list of the submissions to/contacts with Cabrera – an impression that has the potential to come back to haunt us in a big way." A-1404.

On August 18, 2010, plaintiffs' lawyer Adlai Small of Patton Boggs stated in an email to his colleagues:

> One overarching theme to think about throughout the process is how we want the new expert to address the Cabrera report and its conclusions. While our new expert will most likely rely on some of the same data as Cabrera (and come to the same conclusions as

> Cabrera), do we think the expert should make specific mention of such consistencies? . . . We probably wouldn't want to draw that much attention to Cabrera, but we should think about whether our expert might address Cabrera's findings in such a subtle way that someone reading the new expert report (the Court in Lago or an enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages.

A-130. Small recommended that the cleansing experts should, "with Cabrera as a starting point, identify the data/evidence he used to support his numbers – Have our expert review this analysis and hopefully agree with some of his conclusions." A-132.

Patton Boggs hired the Weinberg Group to coordinate the "cleansing" scheme. At the direction of the plaintiffs' counsel, Weinberg in turn hired a team of six cleansing experts to draft sections of a report meant to mirror the Cabrera report.

Almost all of the new experts completed their reports in less than a month without even visiting Ecuador. *Chevron*, 768 F. Supp. 2d at 611; A-16; A-998. They were provided with the Cabrera report but not told the truth regarding the source of its data and conclusions. Nor were they told that the purpose of their work was to repackage that flawed data and conclusions so as to disguise the plaintiffs' and the Ecuadorian court's reliance on it. The cleansing experts did not

conduct any new site inspections, take new samples, conduct any form of environmental testing, or take any independent steps to verify the data in the Cabrera report or the other findings upon which they relied. *Chevron*, 768 F. Supp. 2d at 611; A-16; A-998.

Weinberg's involvement in this process was integral and extensive, as discovery Chevron has obtained directly from these cleansing experts shows. Specifically, Weinberg: (1) managed and directed the drafting of the cleansing expert reports; (2) outlined what the cleansing expert reports should say (A-181, A-1427 at 140:5–21); (3) provided the cleansing experts with the facts, data, and assumptions on which they relied (A-148 at 126:9–129:11, A-181, A-185, A-1421–22 at 237:6–238:15); (4) provided substantive feedback to the experts on the contents of the cleansing expert reports (A-188); and (5) drafted substantial sections of at least two of the six cleansing expert reports (A-192–223).

On September 16, 2010, the plaintiffs filed the cleansing expert reports in Ecuador, without any attribution to Weinberg, somehow managing to increase the damages estimate from the fraudulent $27 billion in Cabrera's supplemental report to $113 billion. In other words, once their Cabrera fraud was exposed, the plaintiffs' lawyers grew more brazen, concocting a way to quadruple the amount they sought to recover through the fraudulent scheme.

Specifically, the cleansing experts recommended between $487 and $949 million for soil remediation (A-1452, A-237), between $396 million and $911 million for groundwater remediation (A-237), $1.4 billion for healthcare infrastructure costs (A-239), between $32.8 billion and $74.4 billion for excess cancer deaths, $541.5 million for potable water systems (A-1235, A-230), $1.697 billion for natural resource damages (UA-202), between $874 million and $1.7 billion to compensate the loss of flora and fauna (UA-201–202, A-238, A-5738), and between $4.57 billion and $37.86 billion in unjust enrichment damages (UA-223, A-584). Although the cleansing experts relied on Cabrera and did no independent sampling or testing and never visited Ecuador, their damages proposals often far exceed his already baseless and inflated assessments. *See Chevron Corp. v. Weinberg*, No. 1:11-mc-00409, Dkt. 24, at 3–4 (D.D.C. Sept. 8, 2011). For example, while Cabrera estimated $8.42 billion for unjust enrichment, the cleansing expert recommended as much as four times that amount. Other cleansing experts recommended three times Cabrera's $480 million estimate for healthcare costs and more than seven times the damages for excess cancer.

Testimony obtained from the cleansing experts further shows that they drew their assumptions and data from Cabrera; that they relied on information from Weinberg; and that the cleansing experts believed that Cabrera was an independent, court-appointed expert. *See, e.g.*, A-713 at 81:5–84:6 ("Q: You said

that you were conducting an independent evaluation and part of that independent evaluation relied on the data in the Cabrera report, because that – A: Right Q: -- was the only place that that data existed. A: Right."); A-731 at 59:20–60:2 ("Q: Now, the conclusion that you express of unjust enrichment of between 4.57 billion and 9.46 billion based upon tax treatment, now, is that a conclusion that you arrived at yourself alone? A: Well, it follows from some data and cost estimates in the Cabrera report, but otherwise it's my own work."); A-1421–22 at 237:6–237:15 ("Q: What was the basis for the statement that those areas were primarily in the concession area? A: That originated from draft text supplied by the Weinberg Group. . . . Q: What's your basis for stating that there's an urban population in those [Ecuadorian] counties? A: Again, that was text, draft text, that originated via The Weinberg Group. Q: So that was their language, not yours? A: It was draft text."); A-145 at 55:19–56:2 ("Q: What did you understand [Cabrera's] role to be with regard to the Lago Agrio court? . . . A: I think he is an independent expert appointed by the court to generate these reports."); A-135 at 140:21–141:25 (" It was made clear to us – or made clear to me . . ." that "to the extent possible there was a desire to have an independent valuation done using Cabrera as a starting point but then I was free to use any source of information that I felt was appropriate to develop my valuation"); A-141 at 210:1–212:2 ("Q: When you did your work, what baseline period did you did you use? A: Well, I adopted this – I

had simply – the Cabrera Report basically implicitly assumed the baseline was virgin rainforest.").

Despite estimating astronomical damages figures, the cleansing experts admitted to having no opinion on whether Chevron or TexPet actually caused any of the alleged contamination in Ecuador and that they had no first-hand knowledge of any of the alleged contamination in Ecuador. *See* A-135 at 139:7–12; A-139 at 179:131–80:13; A-140 at 188:16–189:1; A-141 at 213:14–19; A-152 at 159:7–160:6; A-153 at 225:4–9; A-158 at 264:6–10; A-164 at 47:5–18; A-165 at 61:5–22; A-166 at 229:3–6; A-167 at 268:2–269:22; A-176 at 207:19–209:2; A-177–178 at 269:9–270:18; A-150 at 147:18–148:3; A-171 at 77:1–78:21.

4. The Fraudulent Ecuadorian Judgment

On February 14, 2011, the Ecuadorian court issued an $18.2 billion judgment. The judgment relied in part on the cleansing expert reports. A-922–929. For example, the judgment's assessment of $1.4 billion for the creation of a "health system" was identical to the figure found in the healthcare cleansing report, substantial portions of which Weinberg drafted. A-239; *see also* A-140 at 188:16-89:1, A-147 at 88:22–89:3, A-148 at 126:9–21, A-151 at 150:1–18, 152:19–153:4, A-579, A-1212. And the judgment relied on a cleansing expert's soil remediation damages figures as the *sole* basis for doubling the soil remediation damages

ultimately awarded from $2.698 billion to $5.396 billion — the largest single component of the compensatory portion of the judgment. A-236–237.

In addition, forensic analysis now demonstrates that plaintiffs' lawyers ghostwrote all or at least part of the Ecuadorian judgment itself.[1] The judgment contains substantial verbatim passages from the plaintiffs' lawyers' internal, unfiled memos and data taken from plaintiffs' lawyers' internal spreadsheets and databases, including idiosyncratic notations and errors, that did not appear anywhere in the record. A-39–49; A-480–508. Included among these documents surreptitiously copied in the judgment was a document known as the "Selva Viva Data Compilation," which Weinberg provided to one of the cleansing experts. A-41; A-43–46; A-506–8. As a result of that copying, the judgment erroneously stated that some substances were found in concentrations one thousand times greater than the actual sampling data showed. A-47–48 at ¶ 16.b. These and other

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[1] Recent State Department reports on Ecuador have recognized "the susceptibility of the judiciary to bribes for favorable judicial decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature." U.S. Dep't of State, *2006 Country Report on Human Rights Practices, Ecuador*, *available at* http://www.state.gov/j/drl/rls/hrrpt/2006/78890.htm; *see also Ecuador's Bully*, WASH. POST, Jan. 12, 2012, at A16 (reporting that even Ecuador's president has been implicated in a judicial ghostwriting scheme, in which his attorney appeared to be the true author of a judgment awarding him $40 million personally and ordering the three-year imprisonment of a reporter who "harshly criticized Mr. Correa's provocative behavior during a police uprising").

observations led to the expert conclusion that "the Selva Viva Data Compilation was likely the source of numerous data points cited in the [judgment]" and that the data points cited in the judgment "were copied, cut-and-pasted, or otherwise taken directly from the Selva Viva Data Compilation." A-48–49 at ¶ 17. The Ecuadorian plaintiffs' lawyers have not provided any explanation for the appearance of their own internal data and other documents in the judgment. *Chevron Corp. v. Page*, No. RWT-11-1942, Oral Arg. Tr. at 10:16–21, 11:13–23 (D. Md. Aug. 31, 2011) (SUA 50–51) ("I do think that probable cause has been established if for no other reason than for the production of the admittedly co-authored, or documents co-authored by [interns for the plaintiffs], which has found its way into the decision in Ecuadorian court"; "And with those submissions made to the court [of Ecuador], for them not to be addressed or responded to with some record evidence or some reference to the record of the Ecuadorian court, that is a sure fire ["]pass the smell test" presentation of more probable than not. I have no reservations in that instance alone, and there is a lot of other information that [Chevron has] provided to support the notion that there is fraudulent activity.")

On January 3, 2012, an Ecuadorian appellate court affirmed the judgment in its entirety as to the amount of damages. SUA 63. The appellate court expressly refused to consider the evidence that the plaintiffs — and their counsel, consultants, and representatives — had committed fraud, explaining that those

allegations and the relevant evidence were before the Southern District of New York in Chevron's RICO suit. SUA 72 ("this Division has no competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice"). The court was not even "aware of the existence of the database to which the defendant refers." SUA 73. Immediately after the appellate decision issued, the plaintiffs filed a motion for "clarification and amplification," asking the court to say that it had reviewed and rejected Chevron's allegations of fraud. SUA 96. Mere hours after briefing on the motion to clarify was completed, the appellate court obligingly declared that, contrary to its prior opinion, it had reviewed some of the voluminous fraud record and found "no reliable evidence" of "any crime" by the plaintiffs or their agents. SUA 96. Even then, however, the court of appeal reiterated that "it stays out of these accusations, preserving the parties' rights . . . to continue the course of the actions that have been filed in the United States of America." SUA 99.

5. The Southern District of New York Proceedings

On February 1, 2011, Chevron filed a complaint in the Southern District of New York alleging claims under RICO and state law, and seeking a declaratory judgment and preliminary injunction enjoining enforcement of the Ecuadorian judgment. *See Chevron Corp. v. Donziger, et al.*, 11-cv-00691(LAK), Complaint, Dkt. 1-2 at 144–145 (S.D.N.Y. Feb. 1, 2011). The case was assigned to Judge

Kaplan, who had previously issued several decisions in connection with this case, including rulings compelling production of the *Crude* outtakes and granting Chevron discovery from Donziger — both of which were affirmed by the Second Circuit. *See In re Application of Chevron Corp.*, 749 F. Supp. 2d 141 (S.D.N.Y. Nov. 10, 2010), *aff'd Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283 (S.D.N.Y. 2010), *aff'd Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

Judge Kaplan severed the declaratory judgment claims and on March 7, 2011, issued a preliminary injunction restraining enforcement of the judgment. *See Chevron Corp. v. Donziger*, 768 F. Supp. 2d at 660; A-1089. The court's 131-page ruling included detailed factual findings, frequently quoting the Ecuadorian plaintiffs' own incriminating documents and the *Crude* outtakes. *Id.* The court concluded that Chevron was likely to prevail on its claim that Ecuador "does not provide impartial tribunals or procedures compatible with the requirements of due process of law," and that Chevron had "raised substantial questions that present a fair ground for litigation as to whether the Ecuadorian judgment is a result of fraud practiced on the Ecuadorian tribunal." *Id.* at 636–37 (quotation marks omitted). Judge Kaplan also specifically found that the Ecuadorian plaintiffs endeavored "to 'cleanse' the Cabrera report" and "hired the Weinberg Group, another scientific

consulting firm, and subcontracted with several new experts" to run the cleansing operation. *Id.* at 610–611 & n.116; A-997.

Subsequent to Judge Kaplan's ruling, another judge in the Southern District of New York held that the crime-fraud exception applied to all documents related to the cleansing experts. Magistrate Judge Francis explained: "Especially given that the crime-fraud exception requires only a showing of probable cause that a crime or fraud was intended," it was sufficient that Judge Kaplan had found "a reasonable basis to suspect" that the Ecuadorian Judgment had been procured by fraud. *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 454 (S.D.N.Y. 2011). Judge Francis applied the crime-fraud exception to documents related to the "undert[aking] [of] a scheme to 'cleanse' the Cabrera report." *Id.*

6. The Weinberg Subpoena

Given Weinberg's role in selecting and managing the cleansing experts, Chevron served it with a subpoena on May 20, 2011. The subpoena commanded Weinberg to produce relevant documents by June 3. A-254. Weinberg responded by serving objections, but failed to produce any documents or a privilege log.

Three weeks later, Weinberg began to produce documents on a rolling basis and informed Chevron that it would provide a privilege log when its production was complete, although it refused to specify when that would be. *See* A-7 (Dkt.

18-22). When Weinberg produced only a few documents (most of which were publicly available), Chevron moved to compel. A-3–4 (Dkt. 1).

The district court granted Chevron's motion in full. A-8 (Dkt. 24);A-13–22. The court rejected Weinberg's claim that its communications and documents were protected by the attorney-client privilege finding that no consulting expert privilege applied. A-22.

The court held that any work product protection was overcome by the crime-fraud exception. The court explained: "It is undisputed that in this jurisdiction, a *prima facie* case that a crime or fraud has been committed suffices to invoke the crime fraud exception to the attorney-client and work product privileges. The Weinberg Group's role in the preparation and submission of the cleansing reports was clearly a part of such an alleged fraud and its claim of privilege cannot survive." A-17.

In reaching this conclusion, the court noted that based on "[t]he most fundamental principles of comity and the efficient administration of justice," it accepted the factual findings of Judge Kaplan in ruling on Chevron's motion for a preliminary injunction, and Judge Francis in ruling on the motions to compel. A-19. Nonetheless, the district court emphasized that even "if the question were an open one, I would find that the evidence marshaled by Judge Kaplan and then applied by Judge Francis to the privilege question convinces me that there is more

than sufficient evidence of a prima facie case that the Weinberg Group's work was part of a fraud upon the Ecuadorian court." A-20.

Weinberg moved for reconsideration, seeking to require the District Court to conduct *in camera* review of all of the documents it was producing, or in the alternative, for issuance of a protective order permitting it to produce in redacted form documents that Weinberg claimed contained confidential information. A-9 (Dkt. 27). The court denied the motion, criticized Weinberg for presenting "frivolous" arguments, and explained that "a *prima facie* finding of fraud has been made on numerous occasions by this Court and in related cases and as such, it is within my discretion to order production of these documents without reviewing each document individually." A-25. The court also rejected Weinberg's arguments on reconsideration as untimely, noting that Weinberg had failed to make many of them in opposing Chevron's motion to compel, instead choosing to "'roll the dice'" by claiming privilege over *all* its documents rather than asking the court to individually inspect each document. A-26. The court also held that Weinberg's conclusory assertions regarding "confidential" information did not satisfy its burden to establish that a protective order was warranted. A-29.

Weinberg moved for an emergency order to stay the order pending appeal. A-9 (Dkt. 31). The district court denied the motion and found that Weinberg had made "no showing whatsoever" of "a likelihood of success on the merits of any

appeal." A-31. Weinberg also sought a stay pending appeal from this Court. Doc. 1329577. The Court denied the stay the next day, but limited Chevron's use of the documents to the New York injunction and RICO proceedings. Doc. 1329886.

7. The Stay of the *Salazar* Proceedings and the Second Circuit's Opinion

The defendants in the Southern District of New York proceeding appealed the preliminary injunction. The Second Circuit heard oral argument on September 16, 2011. At the Second Circuit's urging, the defendants stipulated that they would not seek to enforce the judgment anywhere in the world during the pendency of the intermediate appeal in Ecuador (although they had refused to so stipulate before the district court). *Chevron Corp. v. Naranjo*, No. 11-1150-cv(L), Dkt. 593 (2d Cir. Sept. 16, 2011) (SUA 55). The Second Circuit then vacated the injunction in an unpublished order, with an opinion to "follow in due course." *Naranjo*, No. 11-1150-cv(L), 2011 WL 4375022, at *1 (2d Cir. Sept. 19, 2011).

On September 22, 2011, the D.C. district court in this proceeding entered a stay stipulated to by the parties, pending further order of the court. A-10 (Minute Order, Sept. 22, 2011).

On January 26, 2012, the Second Circuit issued its opinion. The court remanded to the district court with instructions to dismiss the declaratory-judgment claim, while recognizing that Chevron would proceed with its RICO claim (and other state-law claims), which had been severed for purposes of an expedited trial

on the declaratory-judgment action. The ruling was based purely on a procedural question — the availability of relief under the Declaratory Judgment Act. Nothing in the Second Circuit's opinion suggests that Judge Kaplan erred in his factual findings and the court expressly stated it was not ruling on the merits of Chevron's RICO, fraud, and other claims. *See Chevron Corp. v. Naranjo*, 2012 WL 232965 at *12 n.17.

SUMMARY OF ARGUMENT

I. In arguing that the district court erred by deeming itself "bound" by Judge Kaplan's findings, Weinberg ignores — and does not challenge — the district court's alternative ground for its ruling: that *even absent* Judge Kaplan's and Judge Francis's findings, it would have reached the same conclusion independently based on the abundant evidentiary record before the court. Weinberg's failure to challenge this ground is fatal to its appeal.

The district court's determination that Chevron demonstrated a *prima facie* case of fraud is supported by ample evidence in any event. There is overwhelming evidence that Weinberg coordinated the "cleansing" process, in which it helped leverage, launder and expand the massive fraud perpetrated by the plaintiffs' lawyers and Cabrera. At the direction of the plaintiffs' lawyers, Weinberg recruited new experts who did not conduct their own independent research, but instead adopted the corrupt data and conclusions of Cabrera and the material fed to

them by Weinberg to render a fraudulent damage claim more than four times larger than the ghostwritten Cabrera report's baseless $27 billion assessment. The district court's ruling is consistent with the decisions of six other federal courts that have applied the crime-fraud exception to this case — decisions that Weinberg ignores.

The district court also acted well within its discretion in deferring to Judge Kaplan's and Judge Francis's findings. Weinberg failed to challenge such reliance until after the district court granted Chevron's motion to compel and thus it has waived this issue. Moreover, as the district court found, in these circumstances, basic principles of comity and judicial economy counsel in favor of adhering to factual findings rendered by another district court in the same case where, as here, that other court has been presiding over the case for more than a year and has issued a series of decisions that contain detailed analyses of the extensive evidentiary record.

II. The district court did not abuse its discretion in denying Weinberg's request — presented for the first time in its motion for reconsideration — to conduct an *in camera* document-by-document review. First, the argument is waived because it was not timely raised. Second, the district court acted well within its considerable discretion in declining Weinberg's request that it personally review more than 1,000 documents within 24 hours. The court correctly described this as improper "gamesmanship" by Weinberg — a transparent, eleventh-hour

attempt to stall production and run out the clock on Chevron. "Once [the *prima facie* crime-fraud] showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court," *United States v. Zolin*, 491 U.S. 554, 572 (1989), and the district court's ruling here was a perfectly reasonable exercise of that discretion.

Nor did the district court err in denying Weinberg's belated request for a protective order. Not only did Weinberg fail to request a protective order until *after* the district court ruled, it had "previously represented that if so ordered, it would turn over all documents previously withheld within 24 hours, without any mention of a protective order." A-26. In any event, Weinberg failed to establish good cause for a protective order, relying entirely on unsubstantiated and generalized assertions of "confidentiality" rather than providing specific facts justifying the need for secrecy.

STANDARD OF REVIEW

This Court reviews for abuse of discretion the district court's determination that a party has demonstrated a *prima facie* case of a crime or fraud for the purposes of the crime-fraud exception to the attorney-client privilege and work product protections. *In re Sealed Case*, 754 F.2d 395, 399–400 (D.C. Cir. 1985). The district court's decision whether to review documents *in camera* for purposes of applying the crime-fraud exception is also reviewed for abuse of discretion,

Zolin, 491 U.S. at 572, as is its decision denying a protective order. *See Doe v. Dist. of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Finding a *Prima Facie* Showing of Fraud.

"In this jurisdiction, a *prima facie* case that a crime or fraud has been committed suffices to invoke the crime fraud exception to the attorney-client and work product privileges." A-17; *In re Sealed Case*, 754 F.2d at 399. Chevron satisfied that standard here. And whereas Chevron did not need to establish Weinberg's knowledge of the fraud to override the privileges, *id*., the evidence left no doubt that Weinberg was an integral player and fully aware of its role in the corrupt scheme to launder the Cabrera report.

A. The District Court's Unchallenged, Independent Finding of *Prima Facie* Evidence of Fraud Is Dispositive.

Weinberg ignores the district court's holding that *even absent* Judge Kaplan's findings, it would reach the same conclusion based on its own evaluation of the overwhelming evidence demonstrating fraud. *See* A-20 ("I hasten to add, however, that if the question were an open one, I would find that the evidence marshaled by Judge Kaplan and then applied by Judge Francis to the privilege question convinces me that there is more than sufficient evidence of a prima facie case that the Weinberg Group's work was part of a fraud upon the Ecuadorian court."). Weinberg's assertion that the district court "relied entirely" on Judge

Kaplan's findings is false and ignores the district court's independent evaluation of the evidence. Weinberg's failure even to acknowledge, let alone challenge, the alternative basis for the district court's opinion provides a sufficient ground for affirmance. *See Browning v. Clinton*, 292 F.3d at 246 (where the district court provides two alternative grounds for its ruling and the appellant "appeals only the latter, [ ] we will affirm based on the former").

Even if Weinberg had preserved the issue for appeal — which it did not — the district court's determination that Chevron demonstrated a *prima facie* case of fraud is supported by ample evidence and does not amount to an abuse of discretion. The plaintiffs' lawyers and consultants ghostwrote what was supposed to be a neutral report from an independent court expert, caused the report to be submitted to the court exactly as they had drafted it, lied about it repeatedly, then were forced to reveal a false and misleadingly partial account of their interactions with the court expert in order to attempt to head off the complete collapse of their case. A-1319 at 2290:7–2292:2. As the district court explained, Weinberg played a central role in the "strategy . . . to cleanse the Cabrera report by submitting an apparently 'new' report that 'would appear to be independent but that would be premised on the data and conclusions purportedly reached by Cabrera.'" A-15. Weinberg's experts' reports in turn were used to expand the fraud by seeking $89 billion more than the plaintiffs were seeking before their fraudulent Cabrera

scheme was exposed. This is far more than necessary to establish a *prima facie* case of fraudulent conduct.

The Supreme Court has condemned fraud on the court as "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238, 246 (1944). Federal and state courts around the country have sanctioned lawyers for committing fraud in circumstances similar to — but much less egregious than — those presented here. For example, in *Hazel-Atlas*, the Supreme Court held that attorneys for a patent applicant committed a fraud on the court when they ghostwrote an article "signed by an ostensibly disinterested expert," and then relied on the article in defending the patent. *Id*. at 240. Similarly, in *Aoude v. Mobil Oil Corp*., 892 F.2d 1115 (1st Cir. 1989), the plaintiff attached a forged contract to his complaint. When his fraud was exposed, he withdrew the document and submitted the genuine contract. The court held that this was not sufficient to cleanse the fraud, explaining that: "A malefactor, caught red-handed, cannot simply walk away . . . and begin afresh. . . . Once a litigant chooses to practice fraud, that misconduct infects his cause of action, in whatever guises it may subsequently appear." *Id*. at 1121; *see also Young v. Office of the United States Senate Sergeant at Arms*, 217 F.R.D. 61, 71 (D.D.C. 2003) (dismissing complaint based on

plaintiff's misconduct, including an attempt to bribe a witness, noting that "[c]oercing or seeking to obtain or manufacture false testimony strikes at the heart of the judicial system" (quotation marks omitted)).

What the plaintiffs' lawyers and Weinberg did here is far worse than what occurred in cases like *Hazel-Atlas* and *Aoude*. They purposefully exploited a "corrupt" and politicized foreign legal system in order to exact a massive fraudulent judgment and now they are poised to engage in further fraud by trying to enforce the judgment. Unlike *Hazel-Atlas*, where the ghostwritten report was publicized in a trade journal but not filed in court, the Cabrera report was ghostwritten by the plaintiffs' representatives for the very purpose of submitting it to the court. It was in fact filed in the Ecuadorian court, and its bogus data — laundered by Weinberg and others — underlie the court's judgment, which was itself ghostwritten at least in part by the plaintiffs' lawyers. And unlike the plaintiff in *Aoude*, the plaintiffs here did not disclaim the fraudulent document when their scheme was exposed; to the contrary, they doubled down on the fraud by attempting to (in their lawyer's own words) "cleanse" the fraudulent report by securing new experts to use the report to seek an even larger fraudulent recovery. As in *Hazel-Atlas*, "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant." 322

U.S. at 246. Even if the plaintiffs' lawyers had walked away from their fraud — which they did not — they could not undo the damage.

In applying the crime-fraud exception, the district court joined the six other federal courts that have similarly applied the crime-fraud exception in connection with the plaintiffs' scheme. *See, e.g.*, *Chevron*, 2010 WL 3418394 at *6 ("what has blatantly occurred in this matter would in fact be considered fraud by any court"); *see generally supra* pp. 15–17 (citing cases). These rulings detail the fraud surrounding the Cabrera report and pervading the Ecuadorian litigation, yet Weinberg ignores them and does not even bring them to this Court's attention.

Weinberg asserts, in a footnote, that "[i]t is important to note that the Cabrera report 'controversy' is limited to the authorship of the report" and that there can be no suggestion that the substance is "somehow fraudulent." Weinberg Br. at 25 n.39. This is untrue. The plaintiffs manipulated the Ecuadorian trial court into appointing "global expert" Cabrera precisely because they recognized that the site inspection process that the court had ordered pursuant to the agreement of the parties was confirming the lack of significant environmental damage or risk to human health. *See, e.g.*, *Chevron Corp. v. Salazar*, Annotated Amended Complaint, 11-cv-03718(LAK), Dkt. 45-1 at ¶¶ 96-100, 122–138 & accompanying exhibits (S.D.N.Y. Jul. 16, 2011). Moreover, Chevron has not just asserted, but conclusively demonstrated, that the Cabrera report lacks scientific grounding and

factual support and the plaintiffs' own consultants have testified under oath that the Cabrera report is predicated on fabricated evidence, forged expert reports, and fake sampling results. Evidence on file in the Ecuadorian proceeding shows that the Cabrera report was not just fraudulently procured but is utterly worthless as a scientific opinion. Indeed, Donziger has described the "science" underlying his case as "just a bunch of smoke and mirrors and bull***t." A-993.

Weinberg also makes claims in its brief regarding Chevron's purported discharge of "billions of gallons of toxic production water," and "poisoning" of the Ecuadorian Amazon. Weinberg Br. at 9–10. Weinberg's only support for these claims is the Ecuadorian judgment itself, which relies on the fraudulent Cabrera and cleansing expert reports. *Id*. Chevron's submissions to the New York court as well as the Ecuadorian court and other courts demonstrate the falsity of these claims — showing, for example, that samples taken from every drinking water source in proximity to every inspected site revealed no evidence of contamination from TexPet operations, causing plaintiffs' own experts to acknowledge that the drinking water was not contaminated with petroleum compounds. *See Chevron Corp. v. Salazar*, Annotated Amended Complaint, 11-cv-03718(LAK), Dkt. 45-1 at ¶ 134 & accompanying exhibits; *see also, e.g.*, *Chevron Corp. v. Donziger*, 11-cv-00691-LAK, Dkt. 355 (Hendricks Declaration Exhibits 1030, 1031, 1037, 1040, 1046, 1052, 1053, 1151, 1152) (S.D.N.Y. Nov. 29, 2011).

Weinberg argues that there was no fraud because some of the cleansing experts disclosed their reliance on Cabrera. Weinberg Br. at 41–43. But this cannot erase the fraud under decisions like *Hazel-Atlas* and *Aoude*. Moreover, the cleansing experts *were not told* by Weinberg (or anyone else) that the Cabrera report was itself secretly ghostwritten by the plaintiffs' lawyers and consultants. Indeed, the very same attorneys who were instructing the cleansing experts to rely on the Cabrera report concealed from those experts the fact that the plaintiffs' consultants were the report's true author. *See, e.g.*, A-145 at 55:8–14 ("Q: Were you told that Richard Cabrera actually prepared the report? . . . A: I was told – yes, Richard Cabrera. I believe he had a team. It probably wasn't just himself considering the volume of the report, but yes."); A-692 at 230:21–231:4 ("Q: Did they tell you anything about the Cabrera report when they gave it to you, the Weinberg Group? . . . A: Only that it was a report prepared at the request of the judge.").

The evidence also implicated Weinberg in a related fraud: the plaintiffs' lawyers' and consultants' involvement in drafting the Ecuadorian trial court's judgment itself. *See supra* pp. 24–25. This forensic evidence is additional proof, if any were needed, that Weinberg is a player in the plaintiffs' lawyers' ongoing fraudulent scheme.

In sum, the evidence demonstrating the fraud surrounding the "cleansing expert" scheme — and Weinberg's central role in that scheme — is far more than necessary to establish a *prima facie* case.

B. The District Court Reasonably Deferred to Judge Kaplan's and Judge Francis's Findings

Weinberg's argument that the district court erred by deferring to the findings of Judge Kaplan and Judge Francis fails for many reasons. First, it is waived. Chevron's opening brief in the district court urged the court to defer to Judge Kaplan's findings given his extensive involvement in this case, and Weinberg did not object. As the district court stated, "[t]he Weinberg Group makes no attempt to challenge Judge Kaplan's opinion . . . ." A-24. Having effectively conceded the validity of Judge Kaplan's findings, it is too late in the day for Weinberg to argue that the district court erred in relying on them.

Even on appeal, Weinberg makes little effort to challenge the merits of Judge Kaplan's determinations. While Weinberg asserts that Judge Kaplan's findings were based on a "lopsided record," Weinberg Br. at 36–37, the truth is that the Ecuadorian plaintiffs were afforded ample opportunity to respond to Chevron's motion for a preliminary injunction — and they took advantage of the opportunity, submitting a 67-page opposition brief and more than 1,200 pages of exhibits. *See Chevron Corp. v. Donziger*, 11-cv-00691-LAK, Dkt. 61; Dkts. 62–67 (S.D.N.Y.). Counsel for Donziger and the plaintiffs attended the hearing and

submitted additional papers after the hearing and before the motion was decided. *Id.* at Dkt. 81. Moreover, as discussed below, the Second Circuit did not question Judge Kaplan's findings, which are by no means isolated — six other federal courts have applied the crime-fraud exception in related proceedings.

Second, Weinberg claims that the district court erred because it deemed itself "bound" by Judge Kaplan's opinion. But it was entirely reasonable for the court to defer to the findings of the judge presiding over the underlying case, as well as those of Judge Francis, the magistrate supervising discovery. Whether viewed as an application of the law of the case doctrine, or as stemming from basic principles of comity among federal courts, there can be no question that deferring to prior factual findings — and thereby avoiding the untenable situation of two federal judges rendering conflicting factual findings in the same case — the district court's decision was a reasonable exercise of discretion. *See* A-19 (explaining that "[t]he most fundamental principles of comity and the efficient administration of justice compel the conclusion that when the court that will ultimately try a matter has reached conclusions that speak directly to a claim of privilege, another court should accept those conclusions except in the most extraordinary situations"). Indeed, it would be bizarre and anomalous to say that one federal judge *lacked* the discretion to follow the findings of another federal judge in the same case.

Weinberg relies on cases with little relevance. In *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), the Court simply held that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." But the district court here was not conducting a trial on the merits. Quite the contrary, the district court was determining whether the evidence was sufficient to establish a *prima facie* case of fraud for purposes of enforcing a subpoena during pretrial discovery. The other cases cited by Weinberg are similarly inapposite; like *Camenisch*, they all involve situations where the eventual trial court is not bound by prior rulings. *See* Weinberg Br. at 37 (citing *Grudzinski v. Staren*, No. 02-cv-3479, 2004 WL 103014, at *3 (6th Cir. Jan. 21, 2004); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997); *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 122 n.3 (5th Cir. 1993); *Nat'l Org. for Women v. Soc. Sec. Admin.*, 736 F.2d 727, 744 n.154 (D.C. Cir. 1984); *United States v. Birney*, 686 F.2d 102 (2d Cir. 1982)).

Weinberg argues that instead of relying on findings made by the court presiding over the proceeding for which the Weinberg subpoena issued, the district court should have adopted purported findings from courts presiding over *other* proceedings that considered *different* issues and applied *different* legal standards. Weinberg even asserts that these *other* rulings were "perhaps binding" on the district court. Weinberg Br. at 39–40. The district court rejected this argument,

noting that Weinberg was misrepresenting the conclusions of some of those courts. A-18–19.

For example, the district court observed that, contrary to Weinberg's characterization, the Third Circuit *affirmed* the district court's finding that Chevron had established a *prima facie* case of crime or fraud in its Section 1782 proceeding against a consultant who provided work adopted in the Cabrera report. A-18; *In re Chevron Corp.*, 633 F.3d 153, 167 (3d Cir. 2011). In fact, on remand, the respondent withdrew all claims of privilege and agreed to produce all the documents sought. *In re Application of Chevron Corp*., 10-cv-02675-ES-CLW, Dkt. 44 (D.N.J. Feb. 17, 2011) (SUA 107–109). The district court also rejected Weinberg's reliance on an opinion from the discovery proceeding involving Douglas Allen, one of the cleansing experts. The district court noted that the fact that none of the specific communications at issue in that proceeding reflected evidence of fraud was not inconsistent with the conclusion that "there was evidence supporting a finding that the enterprise of replacing the discredited Cabrera report with a new one while disguising the experts' reliance on the Cabrera report was fraudulent." A-19.

Weinberg claims that six district courts presiding over discovery proceedings involving the cleansing experts refused to apply the crime-fraud exception. Weinberg Br. 38–40. This is misleading. Three of those courts had no

need to *reach* the crime-fraud issue because they found waiver on other grounds. In *Picone* and *Rourke*, for example, the court granted Chevron's applications for discovery from the cleansing experts and both experts *withdrew* their privilege claims and produced all responsive documents. *See Chevron Corp. v. Picone,* No. 10-cv-02990, Dkt. 28 (D. Md. Nov. 24, 2010) (UA-1); *Chevron Corp. v. Rourke*, No. 10-cv-02989, Dkt. 34 (D. Md. Nov. 24, 2010) (UA-1). Likewise, in *Scardina*, the court granted Chevron's application and found that because Scardina had provided testimony directly to the Ecuadorian court, he was the equivalent of a testifying expert under Rule 26, thus waiving any privilege as to documents related to his report and opinions. *See Chevron Corp. v. Scardina*, No. 10-cv-00549, Dkt. 33 at 7 (W.D. Va. Nov. 24, 2010) (UA-16).

In *Shefftz*, the Massachusetts court required proof of Shefftz's own personal knowledge of and intent to engage in fraudulent activity in order to apply the crime-fraud exception. *Chevron Corp. v. Shefftz*, No. 10-mc-10352-JTL, Dkt. 45, Memorandum Order at 20 (D. Mass. Dec. 7, 2010) (UA-59). However, after Chevron moved to compel, Shefftz withdrew his objections and produced the remaining disputed documents. *See id.*, Dkt. 49 at 3. And in *Barnthouse*, the court similarly required a showing of Barnthouse's own knowledge of the fraud. *Chevron Corp. v. Barnthouse*, No. 10-mc-00053-SSB-KLL, Dkt. 36 at 21 (S.D. Ohio Nov. 26, 2010). Unlike the Massachusetts court in *Shefftz* and the Ohio court

in *Barnthouse*, the district court in this case applied District of Columbia law, which does not require Chevron to show that Weinberg was a knowing participant in the fraud. *See In re Sealed Case*, 754 F.2d at 402.

Weinberg argues that the Ecuadorian appellate court "rejected any alleged wrongdoing on behalf of the Ecuadorian Plaintiffs" — a finding that Weinberg says "may be entitled to preclusive effect in U.S. courts." Weinberg Br. at 38–39. The district court correctly noted, however, that the evidence indicated that the Ecuadorian judgment itself was procured by fraud — and Weinberg "ha[d] not proffered any new evidence or advanced any new legal theory as to why this Court should ignore Judge Kaplan's ruling and instead rely on the opinion of the Ecuadorian court." A-25. And contrary to Weinberg's suggestion, the Ecuadorian court did not "reject" the evidence of wrongdoing, but rather sidestepped the issue by stating that "this Division has no competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice . . . ." SUA 72. The court, furthermore, had refused to perform any investigation of the fraudulent conduct, and the *ipse dixit* statement in its clarification order fails to acknowledge or attempt to explain the voluminous evidence of wrongdoing. SUA 99.

Moreover, to establish preclusive effect, the plaintiffs would need to show that the Ecuadorian judgment is entitled to recognition and enforcement, and no court that respects the rule of law will permit recognition and enforcement of a

judgment that was procured by fraud, or issued by a judicial system that lacks due process and impartial tribunals. *Hilton v. Guyot*, 159 U.S. 113, 206 (1895) (noting that U.S. courts will recognize foreign judgments where that judgment was obtained where there was a "full and fair trial" "under a system of jurisprudence likely to secure an impartial administration of justice" and where there is no evidence of "prejudice in the court or in the system of laws" nor evidence of "fraud in procuring the judgment"); *see Alfadda v. Fenn*, 966 F. Supp. 1317, 1325–26 (S.D.N.Y. 1997) (before applying principles of issue preclusion "the Court must determine . . . whether the [foreign-country] judgment is entitled to recognition" and, among other things, whether the judgment was "tainted by fraud"); Uniform Foreign Money Judgments Recognition Act (2002) (codifying *Hilton* and progeny); Uniform Foreign-Country Money Judgments Recognition Act (2005) (same) (over two thirds of states have adopted some version of the Uniform Act).

As the Supreme Court made clear more than a century ago, fraud in the procurement of a judgment overrides any argument for res judicata or issue estoppel: "[t]here are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy," res judicata and issue estoppel, but these maxims nevertheless must give way where a judgment was procured by fraud. *United States v.*

Throckmorton, 98 U.S. 61, 65–66 (1878); *Browning v. Navarro*, 826 F.2d 335, 345–46 (5th Cir. 1987) (finding that allegations that defendants and the state court judge "colluded" were "clearly sufficient to deny Holloway a fair and impartial trial"). Overwhelming evidence shows that the Ecuadorian judgment — issued by a biased tribunal that was complicit in the fraud — is not enforceable for all of these reasons. *See Osorio v. Dole*, 665 F. Supp. 2d 1305, 1326–27 (S.D. Fla. 2010), *aff'd* 635 F.3d 1277 (11th Cir. 2011).

C. The Second Circuit's Opinion Does Not Address or Question Judge Kaplan's Findings.

The Second Circuit's *Naranjo* opinion did not in any way cast doubt on Judge Kaplan's detailed findings about the fraud. In fact, the court of appeals discussed the evidence and findings at length without questioning them. *See, e.g.*, *Naranjo*, 2012 WL 232965 at *5 (explaining that "the district court held that there was 'ample evidence of fraud in the Ecuadorian proceedings'") (quoting 768 F. Supp. 2d at 636)). The opinion reversed on narrow procedural grounds, and specifically noted that the Second Circuit expressed no opinion on the merits or the conduct of the litigation. *See* 2012 WL 232965 at *12 n.17.

Moreover, the factual findings that Judge Kaplan issued in ruling on the preliminary injunction are consistent with his prior findings set forth in rulings that have been affirmed by the Second Circuit. For example, in the Donziger 1782 proceeding, Judge Kaplan held that all claimed privileges had been waived by not

complying with a local rule requiring a privilege log, but also found strong evidence that Donziger and others had written some or all of the Cabrera report. Although the court did not need to reach the crime-fraud exception, given the holding of waiver, the court stated that "there is more than a little evidence that Donziger's activities . . . come within the crime-fraud exception to both the privilege and to work product protection," and that "[t]he crime-fraud exception may vitiate any otherwise applicable protection." *In re Application of Chevron Corp.*, 749 F. Supp. 2d at 167. And Judge Kaplan's findings are also consistent with the rulings of the many district courts across the country, discussed *supra*, that have applied the crime-fraud exception and expressed shock and dismay at the conduct of the Ecuadorian plaintiffs and their U.S.-based lawyers and consultants.

The fact that the Second Circuit dismissed the declaratory judgment claim has no bearing on this appeal. As the Second Circuit recognized, Chevron may now proceed on its RICO claim, and this Court has already indicated that Chevron may use the documents it obtained from Weinberg in connection with the RICO claim. *See* Sept. 15 Order. Moreover, Chevron's subpoena to Weinberg was issued prior to the severance order and thus encompasses both the RICO and declaratory judgment claims, *see* A-254 (subpoena issued in Case No. 11-CV-0691), and even the plaintiffs have acknowledged in court filings that the evidence relevant to the two claims substantially overlaps. *See Donziger*, No. 11-cv-0691

(Sept. 23, 2011 letter to Judge Kaplan) (SUA 57) (admitting that the RICO and declaratory judgment claims "rely on the same set of facts").

II. The District Court Did Not Abuse Its Discretion by Declining to Conduct an *In Camera* Review or by Denying Weinberg's Request for a Protective Order.

A. Weinberg's Belated Request That the District Court Personally Review More Than 1,000 Documents Within 24 Hours Was Properly Denied.

Weinberg argues that the district court erred by not conducting an *in camera* review of the more than 1,000 documents it claimed were privileged. According to Weinberg, an *in camera*, document-by-document review would have enabled the district court to determine whether each document was related to the fraud.

The district court did not abuse its discretion in declining to conduct an *in camera* review. Weinberg never made this request until *after* the court had overruled its privilege claims and ordered that all documents be produced. At that point — with the close of discovery in the New York proceeding fast approaching — Weinberg moved for "reconsideration" and demanded an *in camera*, document-by-document review at the eleventh hour. The district court correctly recognized this as an improper stalling tactic aimed at running out the clock, and criticized Weinberg for making this request at a time when it was a physical impossibility for the district court to perform the requested analysis:

> [T]he Weinberg Group never asked me until now to review each document individually. Instead, it "rolled the dice" by

> claiming the privilege absolutely barred the production of the documents. It is the wors[t] kind of gamesmanship to accuse me of "error" for not doing what they never asked me to do. Moreover, it takes remarkable kidney to demand that I review over 1,000 documents in the next 24 hours.

A-26. Because the district court did not excuse Weinberg's lack of timeliness, the issue is not preserved for this Court's review. In this Circuit, "[i]t is well settled that an issue presented for the first time in a motion pursuant to Federal Rule of Civil Procedure 59(e) generally is not timely raised; accordingly, such an issue is not preserved for appellate review unless the district court exercises its discretion to excuse the party's lack of timeliness and consider the issue." *Dist. of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010) (quotation marks omitted). Here, the district court did not excuse Weinberg's lack of timeliness. The fact that the court considered the merits of the arguments *in the alternative* does not resurrect these issues and preserve them for appellate review.

Even if Weinberg had timely made the request, the district court acted well within its broad discretion in denying it. As the district court explained: "In this case, a *prima facie* finding of fraud has been made on numerous occasions by this Court and in the related cases and as such, it is within my discretion to order production of these documents without reviewing each document individually." A-25. Indeed, the Supreme Court has specifically held that once a *prima facie*

showing of crime or fraud has been made, "the decision whether to engage in *in camera* review rests in the sound discretion of the district court." *Zolin*, 491 U.S. at 572. Here, the district court had sound reasons for declining to conduct a document-by-document review. The court explained that "the Weinberg Group was hired to coordinate the work of the cleansing experts" and its "role in the preparation and submission of the cleansing reports was clearly a part of [the] alleged fraud." A-17. Weinberg's role was integral to and co-extensive with the fraudulent scheme, and there would be no point to conducting a document-by-document review when *all* the requested documents concerned Weinberg's involvement with the cleansing experts.

B. Weinberg's Untimely and Unsupported Request for a Protective Order Was Properly Denied.

Weinberg presses on appeal another argument that it failed to raise until the reconsideration stage: the claim that it should have been allowed to produce 214 documents in redacted form or been granted a protective order concerning those documents, which supposedly contain "confidential" information. Weinberg Br. at 47–49. Weinberg's argument is meritless.

This is yet another instance where Weinberg failed to timely raise its request. Weinberg has known from day one what these documents contain, and if Weinberg had concerns that they contained confidential information, it was obligated to present its objection, or seek a protective order, *before* the district

court ruled. It chose not to do so, and then made a belated attempt to stall production and run out the clock by asserting that the absence of a protective order could lead to the disclosure of confidential information. This was too little, too late, and the district court did not abuse its discretion in denying the untimely request. As the district court noted, Weinberg had disclaimed any need for confidentiality, and in fact had "previously represented that if so ordered, it would turn over all documents previously withheld within 24 hours, without any mention of a protective order." A-26.

Nor did Weinberg demonstrate its entitlement to redactions or a protective order. To warrant issuance of a protective order, "the movant must establish 'good cause' under Rule 26(c) by demonstrating the specific evidence of the harm that would result. To do so, the movant must articulate specific facts to support its request and cannot rely on speculative or conclusory statements." *Doe v. Dist. of Columbia*, 230 F.R.D. 47, 50 (D.D.C. 2005) (internal citations omitted); *see also In re Veiga*, 746 F. Supp. 2d 27, 40-41 (D.D.C. 2010) (ordering respondent to produce documents from privilege log where respondent failed to carry burden to establish that privilege applied). Here, Weinberg failed to articulate specific facts supporting its request, instead choosing to rely on conclusory assertions. For example, while it asserted that redactions or a protective order were necessary to "shield confidential, non-responsive information, including personal information

and privileged information related to work . . . on behalf of other clients," Weinberg Br. at 47, Weinberg failed to substantiate this claim. It did not cite "specific facts," *Doe*, 230 F.R.D. at 50, and instead referred the district court to generic and conclusory statements in its "redaction log" such as "Confidential Information" (*see* A-1505–1577) — statements that failed to identify the nature of the information, why it was confidential, or the harm that would result from disclosure. As the district court noted, the purpose of a privilege or redaction log is to "enable the parties to assess the claim" that provides the basis for withholding certain documents or information. *See Loftin v. Bande*, 258 F.R.D. 31, 33 (D.D.C. 2009); A-26–27. The generic descriptions on Weinberg's redaction log provided no basis for assessing the claims of confidentiality, and the district court did not err by declining to credit Weinberg's unsupported assertions that harm would result from disclosure. Moreover, to the extent that the documents do contain sensitive information such as account information, Chevron is required to redact any such documents before publicly filing them, *see* Fed. R. Civ. P. 5.2, so there is no risk of harm in any event.

Many of Weinberg's claims of "confidential" information appeared to be nothing more than an improper second attempt to maintain the privilege and work product claims that the district court had already rejected. For example, entries WG00007173 and WG00010865 on Weinberg's redaction log contain conclusory

statements that confidential information was redacted, but those entries describe communications between Weinberg and the plaintiffs' counsel Steven Donziger concerning legal strategy that should be produced. A-1506, A-1518. Another example is entry WG00010865. That entry claims the document contains "non-responsive" information, but this email communication between Weinberg and counsel is in fact responsive to the subpoena.

Weinberg cites *Graham v. Mukasey*, 247 F.R.D. 205, 207 (D.D.C. 2008), for the proposition that it was not obliged to produce a redaction log at all. But in *Graham*, the party identified the specific grounds for the redactions on each document. *See id*. at 206–07. Weinberg also cites *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 919, 934 (D.D.C. 2003), and *Democratic National Committee v. Republican National Committee*, No. 86-mc-385, 1987 WL 9034 (D.D.C. Mar. 19, 1987), for the unremarkable proposition that "credit card and bank account numbers" and other irrelevant material may properly be redacted. But Weinberg never identified any such information, and in both of those cases (unlike here) the party had timely requested and been granted a protective order. *See McConnell,* 251 F. Supp. 2d at 922; *Democratic Nat'l Comm.*, 1987 WL 9034 at *1.

CONCLUSION

For the foregoing reasons, the decisions of the district court should be affirmed.

Dated: February 2, 2012

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Peter E. Seley
Thomas H. Dupree, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Fax: (202) 467-0539

Attorneys for Appellee Chevron Corporation

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 32 of the Federal Rules of Appellate Procedure and Circuit Rule 32. This brief was printed in Times New Roman 14-point typeface and contains 13,379 words, as calculated under Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

/s/ Anne Champion
Anne Champion

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2012, I electronically filed the foregoing Brief of Appellee with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

Service of the foregoing Brief of Appellee was accomplished on February 2, 2012, by using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Richard Dennis Carter
rcarter@colemanragland.com
CARTER COLEMAN & RAGLAND
602 Cameron Street
Alexandria, VA 22314
(703) 739-4200

James E. Tyrrell, Jr.
jtyrrell@pattonboggs.com
Eric S. Westenberger
ewestenberger@pattonboggs.com
PATTON BOGGS LLP
One Riverfront Plaza, 6th Floor
Newark, NJ 07102
(973) 848-5600

February 2, 2012

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539