IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEVRON CORPORATION, Plaintiff, -against- MARIA AGUINDA SALAZAR, et al., Defendants. -and- STEVEN DONZIGER, et al., Intervenors.	Civil Action No. 11 Civ. 3718 (Civil Action Pending in the Southern District of New York)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CHEVRON CORPORATION'S MOTION TO COMPEL THE WEINBERG GROUP TO PRODUCE DOCUMENTS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45

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I. INTRODUCTION

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, Chevron Corporation ("Chevron") respectfully moves this Court to compel The Weinberg Group ("Weinberg") to comply with a subpoena issued on May 20, 2011. The subpoena in question was issued from this Court in connection with the ongoing matter of *Chevron Corp. v. Salazar, et al.* currently pending in the Southern District of New York (the "SDNY Action"). The SDNY Action seeks a declaratory judgment as to the enforceability of an $18 billion Ecuadorian judgment, as well as other related relief, arising from the extensive evidence that now irrefutably demonstrates that the Ecuadorian judgment was procured by fraud. The United States District Court for the Southern District of New York, after a thorough examination of the evidence that was available to Chevron as of February 2011, preliminarily enjoined any attempted enforcement of the fraudulently-obtained Ecuadorian judgment pending a trial on the merits. *Chevron Corp. v. Donziger* ("*Donziger*"), --- F. Supp. 2d ---, 2011 WL 778052 (S.D.N.Y. Mar. 7, 2011). The matter is set for trial beginning on November 14, 2011, and the discovery cut-off is September 15, 2011. Chevron seeks this Court's intervention because Weinberg has refused to produce evidence that is likely in its possession—and highly relevant to the SDNY Action—despite having been served with a valid subpoena issued from this Court nearly two months ago.

The overall scheme to obtain the fraudulent Ecuadorian judgment is described at length in Judge Kaplan's preliminary injunction order. *See id.* at *8-14. In brief, the plaintiffs in the Ecuadorian proceedings (the "Lago Agrio Plaintiffs" or "LAPs") asked the Ecuadorian court to appoint an independent court expert, Richard Stalin Cabrera Vega, to perform a "global assessment" of the environmental conditions at the various sites at issue in the Lago Agrio Litigation (the "Cabrera Report"). *Id.* When Chevron pursued discovery under 28 U.S.C.

§ 1782, it obtained evidence showing that the LAPs arranged to have Cabrera named as the expert for the Ecuadorian court, promised him future consideration in the event they prevailed, and actually planned and ghostwrote "all or much of the Cabrera report." *Id.* When this evidence came to light, the LAPs began an effort to "cleanse" the Cabrera fraud by proffering new, allegedly independent work, that "would be premised on the data and conclusions purportedly reached by Cabrera." *Id.* at *14-15.[1]

As set forth in greater detail below, Weinberg fits into this landscape in two separate and distinct ways. *First*, Weinberg was hired by the LAPs to—and indeed did—manage the process of "cleansing" the Cabrera Report. *Second*, Weinberg appears to have been involved in the LAPs' later ghostwriting of the Ecuadorian judgment itself. Forensic experts have determined that the LAPs had a covert hand in crafting the Ecuadorian judgment and that sampling data obtained from an unfiled LAP data compilation was actually copied and cut-and-pasted into the final judgment. The LAPs have not offered any explanation for the incorporation of their internal documents into the judgment, but evidence obtained by Chevron shows that Weinberg likely has versions of these internal LAP documents and possible knowledge about their use in the judgment—a central issue in the SDNY Action.

On or around May 20, 2011, Chevron served Weinberg with a subpoena pursuant to Federal Rule of Civil Procedure 45, requiring Weinberg to produce documents relevant to the SDNY Action by June 3, 2011. On the June 3 deadline, Weinberg objected to Chevron's subpoena but failed to provide any explanation as to why it could not comply with it or when, if

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[1] For additional details on the Lago Agrio litigation and the Cabrera fraud, please see the applications filed by Chevron in cases before this court: (1) *Chevron Corp. v. The Weinberg Group*, No. 1:11-mc-00030-CKK at Dkt. 11 (D.D.C.); and (2) *Chevron Corp. v. Wray*, No. 1:10-mc-00371-CKK-DAR at Dkt. 1 (D.D.C.).

ever, it would produce responsive documents. It also failed to provide any privilege log to preserve any privilege protection, as required by Rule 45. FED. R. CIV. P. 45(d)(2)(A).

It was not until three weeks after the production deadline that Weinberg began producing documents. To date, Weinberg has produced a total of 134 documents consisting almost entirely of news alerts about the Lago Agrio case.

This failure to produce any substantive materials appears to be a continuation of the LAPs' counsel's long and well documented history of obstructing discovery "to delay proceedings in the United States while moving matters ahead as quickly as possible in Ecuador." *In re Chevron Corp.*, No. 10 mc 00002 (LAK), order at 1 (S.D.N.Y. Jan. 1, 2011).[2] Moreover, Weinberg's delay here, while represented by counsel for the LAPs, is in direct defiance of the Southern District of New York's clear direction that all discovery occur as expeditiously as possible. *See Chevron Corp. v. Salazar*, No. 11 Civ. 0691, order at Dkt. 279 (April 15, 2011 S.D.N.Y.) ("The Court expects [the parties] to cooperate in scheduling depositions, agreeing to expedited periods within which to respond to document request and other written discovery").

Accordingly, Chevron respectfully requests that this Court compel Weinberg to produce all documents responsive to Chevron's subpoena forthwith.

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[2] *See also Chevron Corp. v. Salazar*, 11 Civ. 3718, order (S.D.N.Y. June 24, 2011) (describing the LAPs' "thwart or delay" strategy); *In re Chevron Corp.*, 749 F. Supp. 2d 170, 185 (S.D.N.Y. 2010) (describing strategy "to gain tactical advantage" through delay), *aff'd Lago Agrio Plaintiffs v. Chevron Corp.*, Nos. 10-4341-cv & 10-4405-cv, 2010 WL 5151325 (2d Cir. Dec. 15, 2010); *Donziger*, 2011 WL 778052, at *14 ("there is extensive evidence that counsel for the LAPs . . . made Herculean and perhaps questionable efforts in the Section 1782 proceedings to prevent or delay the disclosure of" elements of the alleged fraud); *Chevron Corp. v. Donziger*, -- F. Supp. 2d --, 2011 WL 2150450, at *6 (S.D.N.Y. May 31, 2011) (describing the "previous delaying tactics in the Section 1782 proceedings").

II. BACKGROUND

A. The Lago Agrio Litigation

From 1964 to 1992, Texaco Petroleum Company ("TexPet") held an interest in an oil consortium in the Oriente region of Ecuador. By 1976, Ecuador's state-owned oil company, Petroecuador, became the majority owner of the Consortium and has been the sole owner and operator since 1992. *Donziger*, 2011 WL 778052, at *3. In 1995, TexPet, the Ecuadorian government and Petroecuador entered into a settlement under which TexPet agreed to remediate a portion of the former Consortium proportionate to its minority ownership interest, leaving the remaining remediation to be performed by Petroecuador. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 341-42 (S.D.N.Y. 2005). After TexPet completed the remediation, Petroecuador and the Ecuadorian Government released it from any further liability for environmental damage. Ex. 1.[3] Nonetheless, in 2003, a group of American and Ecuadorian lawyers filed a lawsuit in Ecuador against Chevron (the "Lago Agrio Litigation") claiming that TexPet's operations harmed the environment. *Donziger*, 2011 WL 778052, at *6.

After several years of court-ordered site inspections, in which the parties' nominated experts jointly investigated and reported on the environmental conditions at former Consortium sites, the Ecuador court abandoned this process at the LAPs' request and on March 19, 2007, appointed Richard Stalin Cabrera Vega to serve as an "independent expert." *Donziger*, 2011 WL 778052, at *8-14. On April 1, 2008, Cabrera submitted a report to the Ecuadorian court, asserting that Chevron was liable for over $16 billion in damages and in November 2008, he amended his report raising the total amount of damages to $27 billion (collectively, the "Cabrera

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[3] Unless otherwise noted, all "Ex." citations refer to exhibits to the Declaration of Claudia M. Barrett, filed herewith.

Report"). *Id.* at *9. Extensive discovery conducted by Chevron pursuant to 28 U.S.C. § 1782 revealed that the Cabrera Report was actually planned and written by LAPs' counsel as part of their fraudulent scheme to extort billions of dollars from Chevron. The Southern District of New York described the scheme as "a fraud orchestrated by the Lago Agrio plaintiffs," who "colluded with Cabrera to substitute their own biased work product for the neutral and impartial assessment that Cabrera was appointed to produce." *In re Chevron Corp.*, 749 F. Supp. 2d 141, 145, 162 (S.D.N.Y. 2010). The LAPs and their counsel and consultants secretly met with Cabrera, ghostwrote and filed the report in his name, and then actively concealed their involvement in drafting the report. *Donziger*, 2011 WL 778052 at *13.

Faced with a mountain of evidence exposing the Cabrera fraud, in May 2010, LAPs' counsel concocted a plan to "cleanse" the Cabrera Report. Ex. 2. To effect this plan, they hired Weinberg in August 2010 to, in their own words, "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." Ex. 3. At LAP's counsel's direction, Weinberg hired a team of six experts ("the cleansing experts") to draft sections of a report meant to mirror the Cabrera Report. On September 16, 2010, the LAPs filed the cleansing expert reports in Ecuador, without any attribution to Weinberg, alleging damages against Chevron of up to $113 billion. Despite estimating astronomical damages figures, the cleansing experts have refused to opine on whether Chevron actually caused any of the alleged contamination in Ecuador; indeed, all of them

testified that they had no opinion at all on whether there was even any contamination damage in Ecuador at all.[4]

Weinberg's central role in the LAPs' scheme to whitewash the Cabrera fraud was exposed just months later when, in December 2010, Chevron obtained discovery from each cleansing expert pursuant to § 1782 which revealed that, over a three-week period, Weinberg: (1) managed and directed the drafting of the cleansing expert reports, (2) prepared an outline detailing what the cleansing reports should say (Ex. 10), (3) supplied the cleansing experts with the materials they should use in drafting the cleansing reports (Ex. 11), (4) provided substantive feedback to the experts on the contents of the reports (Ex. 12), and (5) even drafted substantial sections of at least two of the six cleansing reports (Exs. 13 & 14).[5]

B. The Ecuadorian Judgment Is Rife With the LAPs' Fraud.

The Ecuador court subsequently relied upon the work of Weinberg and the cleansing experts in issuing the February 14, 2011 $18 billion judgment (the "Judgment"). Ex. 15 at 179-185. For example, the Judgment's assessment of $1.4 billion for the creation of a "health system" is identical to the figure found in the healthcare cleansing report of which Weinberg drafted substantial portions. *Id.* at 183; Ex. 6 at 88:16-89:3, 152:19-153:4. And the Judgment relies on cleansing expert Allen's soil remediation damages figures as the *sole* basis for doubling the damages figure ultimately awarded from $2.698 billion to $5.396 billion. Ex. 15 at 181.

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[4] *See* Ex. 4 at 139: 7-21; Ex. 5 at 179:13-180:13, 188:16-189:1, 213: 14-19; Ex. 6 at 54: 6-12, 147:18-148:3, 159:7-160:6, 225:4-9, 264: 6-10; Ex. 7 at 47:5-18, 61:5-22, 229:3-6, 268:2-14, 269:18-22; Ex. 8 at 77:21-78:21; Ex. 9 at 207:19-209:2, 269:9-270:18.

[5] On January 21, 2011, Chevron filed an application with this Court seeking an order pursuant to 28 U.S.C. § 1782 to conduct discovery from Weinberg. That application is still pending and Weinberg has itself not produced any documents pursuant to any § 1782 proceeding.

Not only do the cleansing experts provide a basis for the Judgment, but forensic analysis has also now demonstrated that the counsel for the LAPs were secretly involved in crafting the Judgment and that at least some documents in Weinberg's possession were used to do so. Ex. 16. For example, the Judgment cites several dozen soil samples as the only scientific basis for the Ecuador court's finding that the area was contaminated. Forensic analysis, however, shows that virtually all of the samples on which the Ecuador court relies were taken directly from spreadsheets which Weinberg provided to cleansing expert Douglas Allen and which were never part of the Ecuadorian court record. *Id.* at ¶ 17.[6] Because Weinberg was the conduit through which the LAPs' counsel supplied the cleansing experts with these materials (Ex. 17), Weinberg likely possesses a copy of this data compilation as well, if not the original electronic database from which this compilation was generated—items highly relevant to showing that the Judgment is fraudulent and unenforceable.

C. The Declaratory Relief Action in the Southern District of New York

Chevron filed the underlying action on February 1, 2011, in the Southern District of New York against various individuals and entities seeking, *inter alia*, an injunction against any activities related to the enforcement of the $18 billion judgment issued in Ecuador. *See Donziger,* 2011 WL 778052, at *25.

In light of Weinberg's extensive involvement with the cleansing experts, the plan to whitewash the Cabrera Report, on or around May 20, 2011, Chevron served a subpoena on

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[6] 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. Ex. 16 at ¶ 16.b [Younger]. These and other observations have 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." *Id.* ¶ 17.

Weinberg pursuant to Rule 45, requiring Weinberg to produce by June 3, 2011 certain relevant documents. Ex.18 (Weinberg subpoena). On the June 3 return date, Weinberg served objections but failed to produce any documents or a privilege log. Instead, Weinberg unilaterally decided—without Chevron's consent or the approval of this Court—that it would not begin to produce documents until three weeks later and that it would do so only on a "rolling basis" for an indefinite period of time until its production is "complete." Ex. 19. Weinberg further decided—again, without the approval of Chevron or this Court—that it did not have to comply with Rule 45 and provide a privilege log until after its production was complete. *Id.*

Weinberg's late productions are inexcusably deficient. Despite evidence showing substantial contact with the LAPs' counsel and the cleansing experts, Weinberg's productions to date consist of a grand total of 134 documents, almost all of which are publicly-available press releases and news alerts.[7] To date, Weinberg has made no effort to produce any substantive documents, including communications between Weinberg and the cleansing experts or the LAPs' counsel, and has failed to provide any privilege log whatsoever. What is more, Weinberg has continued its "rolling production"—despite Chevron's protestations—and has provided no indication as to (1) why it has taken over a month to produce 134 publicly-available documents; (2) when the remaining documents will be produced; or (3) the total volume of documents remaining to be produced.

Chevron met and conferred with Weinberg's counsel on June 26, 2011 regarding Weinberg's failure to comply with the subpoena and Chevron's intention to seek judicial relief as

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[7] Indeed, all of the documents produced appear to be publicly available. Of the 134 documents, 116 are articles and news alerts, and the rest seem to be copies of publicly-available filings in the Lago Agrio litigation and one publicly-available report on population projections in Ecuador, published by Ecuador's National Institute of Statistics and Census.

a result. Chevron has also repeatedly objected to Weinberg's manner of production and has notified Weinberg's counsel of the many production deficiencies in the Weinberg production. Exs. 20 & 21. All of Chevron's attempts to obtain compliance by Weinberg have been ignored. As a result, Chevron has no alternative but to respectfully seek the Court's assistance in ending the gamesmanship surrounding Weinberg's responses, by overruling its meritless objections, and compelling Weinberg to produce all documents responsive to Chevron's subpoena.

III. ARGUMENT

Weinberg has not offered any plausible excuse for its failure to comply with Chevron's subpoena. There is no undue burden, nor is there any applicable privilege that would protect the documents sought by Chevron. Weinberg served the role of a testifying expert, directing the writing of, and in some cases actually drafting, expert reports submitted to the Ecuadorian court. Moreover, its participation in that endeavor—clearly designed to perpetrate a fraud on the Ecuadorian court—triggers the crime-fraud exception and requires production of all documents. Finally, by failing to submit a timely privilege log, Weinberg has waived any privilege that might have protected any of Weinberg's documents. For these reasons, this motion to compel should be granted.

A. There Is No Undue Burden On Weinberg.

Weinberg's objection that Chevron's subpoena creates an "undue burden and expense" is without merit. *See* Ex. 22 at ¶¶ 9, 13, 19 (Weinberg objections). As the party seeking to avoid discovery, Weinberg bears the burden of demonstrating undue burden. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) (interpreting "undue burden" as a request that is "unreasonable[] or oppressi[ve]" in the context of all circumstances in the case). Yet Weinberg's only justification is that the discovery sought here is somehow duplicative of the

discovery that Chevron is also seeking from Weinberg in a proceeding before this Court under 28 U.S.C. § 1782. But Weinberg's excuse is nonsensical, because Weinberg has not produced *any documents at all* in the § 1782 proceeding. Moreover, even if Weinberg had produced documents in the § 1782 proceeding, compliance with this subpoena would still be required, given that the subpoena in this action is different in scope from the subpoena served in the § 1782 proceedings.[8]

B. The Consulting Expert Privilege Does Not Prevent Production.

Weinberg has no basis to withhold its documents based on Weinberg's purported status as a consulting expert for the LAPs. Because Weinberg proffered its work product to the Ecuadorian court either directly or indirectly (Ex. 23), Chevron is clearly entitled to review the bases for those opinions. *See, e.g.*, *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty."); *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 31 (W.D.N.Y. 2002) (allowing deposition of non-testifying expert where "the evidence clearly demonstrate[d] that the expert report . . . was the result of substantial collaborative work by [the expert] and [the non-testifying expert]").[9] Indeed, in several of the

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[8] The subpoena issued to Weinberg in the SDNY Action seeks several categories of documents that are not sought by the § 1782 subpoena, including, for example, documents relating to the LAPs' laboratories (Request No. 6), documents related to Selva Viva's databases (Request No. 8), documents relating to the Ecuadorian judiciary or the quality of justice in Ecuador (Request No. 19), and documents related to the "proposing, writing, drafting, creation, editing, ghostwriting, advance knowledge, or revision" of any document issued by the Ecuador court including the Judgment (Request No. 21). *See* Ex. 18.

[9] Even courts applying the "exceptional circumstances" provision of FED. R. CIV. P. 26(b)(4)(D) have found that, "exceptional circumstances under Rule 26(b)(4)[(D)] may exist . . . ***when there is evidence of substantial collaborative work between a testifying expert and***

related § 1782 proceedings, courts have allowed discovery of the LAPs' experts precisely because their work product essentially served as the opinion ultimately filed under another testifying expert's name. *See, e.g.*, *In re Chevron Corp.*, No. 4:10-mc-134, 2010 U.S. Dist. LEXIS 120479 (S.D. Tex. Apr. 5, 2010) (order granting Chevron's application to take discovery from LAPs' consulting expert 3TM); *Chevron Corp. v. Champ*, Nos. 1:10-mc-27 and 1:10-mc-28, 2010 U.S. Dist. LEXIS 97440, at **14-15 (W.D.N.C. Aug. 30, 2010) (holding that the LAPs' consulting expert Charles Champ "clearly waived" any consulting expert privilege when he "conveyed, shared, or otherwise provided his own expertise" to testifying expert Cabrera).

Here, the fact that the cleansing expert reports are based almost entirely on Weinberg's work is beyond question. Weinberg closely controlled the entire cleansing report process. Weinberg not only dictated the contents of the reports (Ex. 10) but also supplied the cleansing experts with substantive feedback (Exs. 12 & 24), drafted substantial sections of several reports (Ex. 8 at 237:6-14), and suggested ways in which the experts could increase their damages estimates (Ex. 25 at 1690:12-1691:15, 1697:12-19).

Weinberg's overarching control over the cleansing expert reports is made clearer in light of the fact that the LAPs' original plan was to compile the cleansing expert reports into one omnibus submission credited to Weinberg. *See* Ex. 26 (advising cleansing experts that their references will be "combin[ed]" into one "final report."); *see also* Ex. 27 (LAPs' counsel discussion about one report written by Weinberg). Indeed, the LAPs' counsel, Weinberg and the cleansing experts worked under that assumption until at least September 8, 2010. Ex. 26. But at some point between September 8, 2010 and September 16, 2010, the day the cleansing expert reports were filed in Ecuador, a decision was made to file separate reports. Thus, the cleansing

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a non-testifying expert." *Long Term Capital Holdings v. United States*, No. 01-CV-1290(JBA), 2003 WL 21269586, at *2 (D. Conn. May 6, 2003) (emphasis added).

expert reports were filed under each of the cleansing experts' names and without any attribution to Weinberg at all (Ex. 23), despite its considerable planning, control and execution of the process from start to finish.

It is therefore clear that Weinberg was not simply a consultant here, but instead the architect—and in some instances the drafter—of the cleansing expert reports. That Weinberg's substantial contribution was not attributed in the actual filings does not negate the fact that Weinberg was, for all intents and purposes, a testifying expert. As a result, no consulting expert's privilege applies and Weinberg's documents must be produced.

C. The LAPs' Waiver of Privilege Over the Cleansing Experts' Materials Extends to Weinberg.

Even assuming, *arguendo*, that any privilege did protect Weinberg's work product, which it does not, any privilege associated with its work with the cleansing experts was waived when LAPs' counsel produced the purportedly privileged documents of those cleansing experts. *See* Ex. 28 (agreeing to produce privileged documents for cleansing experts Allen, Picone, Rourke and Scardina); *see also* Ex. 29.

By selectively producing a subset of the materials relating to Weinberg and the cleansing experts, presumably in an effort to exculpate them, the LAPs have waived any privilege over the broader set of documents relating to them and their work. *See, e.g.*, *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("[V]oluntary breach of confidence or selective disclosure for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor."); *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) (holding that courts may "broaden the waiver as necessary to eliminate the advantage" that arises "[w]hen one party takes advantage of another by selectively disclosing otherwise privileged communications");

Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991) (holding that "[i]f partial waiver [of the privilege] . . . disadvantage[s] the disclosing party's adversary . . . the privilege will be waived as to all communications on the same subject"); *In re Pioneer Hi-Bred Int'l, Inc*., 238 F.3d 1370, 1374-75 (Fed. Cir. 2001) (holding that disclosure will waive the privilege for the entire subject matter area, including "all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice). Thus, the LAPs' partial disclosure of allegedly privileged materials relating to Weinberg and the cleansing experts has effected a broad subject-matter waiver as to all documents relating to them. Accordingly, no cognizable claim of privilege as to Weinberg's materials remains.

D. Weinberg Has Waived Any Privilege By Its Failure To Produce A Privilege Log.

Moreover, because Weinberg has failed to produce a privilege log, it has waived any privilege that might have attached to any documents in Weinberg's possession. Rule 45 requires that "[a] person withholding the subpoenaed information under a claim that it is privileged . . . must (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that . . . will enable the parties to assess the claim." FED. R. CIV. P. 45(d)(2)(A). Individuals in possession, custody, or control of allegedly privileged documents called for by subpoenas and document requests are therefore obliged to assert their privilege claims in the manner prescribed by the federal and local rules. *Id.* Here, Weinberg has not produced a privilege log; instead, its counsel decided that it would not produce a log until some undetermined time in the future. Ex. 19.

Weinberg's position is directly analogous to the position taken by LAP counsel, Steven Donziger, in a related § 1782 proceeding. There, as here, Donziger refused to produce a

privilege log. As a result, the Court there found that he had waived the privileges that he might have asserted. *In re Chevron Corp.*, 749 F. Supp. 2d 135, 140 (S.D.N.Y. 2010) ("Insofar as [Donziger] claims privilege with respect to the requested documents, the failure to file a privilege log as required by . . . Fed. R. Civ. P. 26(b)(5) waived the objections."). Donziger attempted to cure his deficiency after-the-fact, but the court found that his late-produced privilege log did not excuse his initial deficiency and that a waiver was still effected. *In re Chevron Corp.*, 749 F. Supp. 2d 170, 185 (S.D.N.Y. 2010).

Weinberg's conduct here is no different. On June 3rd, the return date of the subpoena, Weinberg's counsel served objections on Chevron but failed to produce a privilege log. Three weeks later (Ex. 19), Weinberg's counsel stated its intention to withhold production of a privilege log until its production is complete. Chevron did not consent to allowing such a late-production of Weinberg's privilege log, because Chevron needs a log to evaluate the sufficiency of any privilege asserted while discovery is ongoing. Furthermore, there is no provision of the Federal Rules or the local rules that allows the target of a subpoena to delay production of its privilege log without first seeking permission from the issuing Court. To the contrary, the Federal Rules of Civil Procedure *require* production of a log at the time that objections to a subpoena under Rule 45 are served. FED. R. CIV. P. 45(d)(2)(A).

As a result, under the black-letter law of this District, Weinberg has ignored its obligations under Rule 45 and waived any and all privilege objections. *See, e.g.*, *Walker v. Center for Food Safety*, 667 F. Supp. 2d 133, 138 (D.D.C. 2009) (holding that individuals subject to third party subpoenas under Rule 45 "waived their claims to privilege" by failing to "produce an adequate privilege log before the Court entered its order compelling production"); *Bregman v. District of Columbia*, 182 F.R.D. 352, 363 (D.D.C. 1998) ("[P]laintiff's failure to comply with

Fed. R. Civ. P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis.").

Chevron therefore respectfully requests that this Court overrule Weinberg's objections based on "attorney-client privilege, the work product doctrine and/or any other privilege" (Ex. 22 at 7), and order it to produce all responsive documents immediately.

E. Weinberg's Role in the Cabrera Fraud Triggers the Crime-Fraud Exception, Vitiating Any Privilege in Any Event.

Weinberg's objections based on privilege are also unavailing given Weinberg's central role in drafting and overseeing the creation of reports whose stated purpose was to "cleanse" the Cabrera fraud.

Under the crime-fraud exception, communications "cannot be privileged if the work was performed in furtherance of a crime, fraud or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case*, 676 F.2d 793, 812 n.74 (D.C. Cir. 1982) (exception applies to work product protection); *see also In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (same for attorney-client privilege); *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981) (exception may also be based on attorney misconduct). In this Circuit, the crime/fraud exception applies upon:

> [A] *prima facie* showing of a violation sufficiently serious to defeat the work product privilege. . . [and] . . . some valid relationship between the work product under subpoena and the *prima facie* violation. . . . The first condition may be met by a showing that the client was engaged in planning a criminal or fraudulent scheme when it sought the advice of counsel, or that the client actually committed or attempted a crime or fraud subsequent to receiving the benefit of counsel's work product. . . . The *prima facie* violation may also be the attorney's, since attorney misconduct negates the premise that the adversary system furthers the cause of justice. . . . A finding that the work product reasonably relates to the subject matter of the possible violation should suffice [to demonstrate the relationship between the work product and the fraud].

In re Sealed Case, 676 F.2d at 814-15.

The evidence currently in Chevron's possession clearly makes a *prima facie* showing that LAPs' counsel were "engaged in planning a criminal or fraudulent scheme" to whitewash the fraudulent Cabrera report. 676 F.2d at 815. LAPs' counsel concocted their scheme to cleanse the Cabrera report, and then specifically hired Weinberg to carry out that scheme by drafting the "curative additional reports as [their] 'cleanser.'" Exs. 2, 30 & Ex. 31at 8-9. As a result, Weinberg's documents cannot possibly be privileged since the only purpose for Weinberg's involvement in the Lago Agrio Litigation was to perpetrate a fraud on the Ecuadorian court. Indeed, in related proceedings, the Southern District of New York recognized that the cleansing of the Cabrera report was part of the fraud: "There is ample evidence of fraud in the Ecuadorian proceedings," *including* the LAPs' "scheme to 'cleanse' the Cabrera report." *Donziger*, 2011 WL 778052, at **33-34 (emphasis added).

What is more, several district courts in related § 1782 proceedings have applied the crime-fraud privilege exception on similar facts. *See, e.g.*, *Chevron Corp. v. E-Tech Int'l.*, No. 10-cv-1146, 2010 U.S. Dist. LEXIS 94396 (S.D. Cal. Sept. 10, 2010); *In re Chevron Corp.*, Nos. 10-mc-21 and 10-mc-22 (D.N.M. Sept. 1, 2010); *Chevron Corp. v. Champ*, Nos. 1:10-mc-27 and 1:10-mc-28, 2010 U.S. Dist. LEXIS 97440 (W.D.N.C. Aug. 30, 2010). In each of these instances, the district court found that the crime-fraud exception was triggered when the LAPs' consultants helped to ghostwrite the Cabrera Report.[10] The same rationale should apply here. Weinberg planned and orchestrated the creation of the cleansing expert reports, and was the

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[10] Indeed, Weinberg's extensive involvement in these fraudulent activities is similar to conduct that the U.S. Supreme Court has condemned as fraud. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), attorneys for a patent applicant ghostwrote an article "signed by an ostensibly disinterested expert," and then relied on the article in defending the patent. *Id.* at 240. The Court called what the ghostwriting party had done "a deliberately planned and carefully executed scheme to defraud," and "tampering with the administration of justice." *Id.* at 245, 246.

"ghostwriter" of at least two of the reports. Having furthered the LAPs' fraud with regard to the Cabrera Report and the cleansing efforts surrounding it, Weinberg's actions clearly trigger the crime-fraud exception. Accordingly, this Court should hold that any privilege Weinberg might otherwise have claimed over any privileged documents, does not apply.

IV. CONCLUSION

For the foregoing reasons, Chevron respectfully requests that this Court order Weinberg to produce immediately all responsive documents. Chevron further requests that this Court find that all privileges have been waived, not only by Weinberg's failure to provide a privilege log, but also due to application of the crime-fraud exception to privilege.

Respectfully submitted,

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